MONTANA LAWYER

State Bar of Montana

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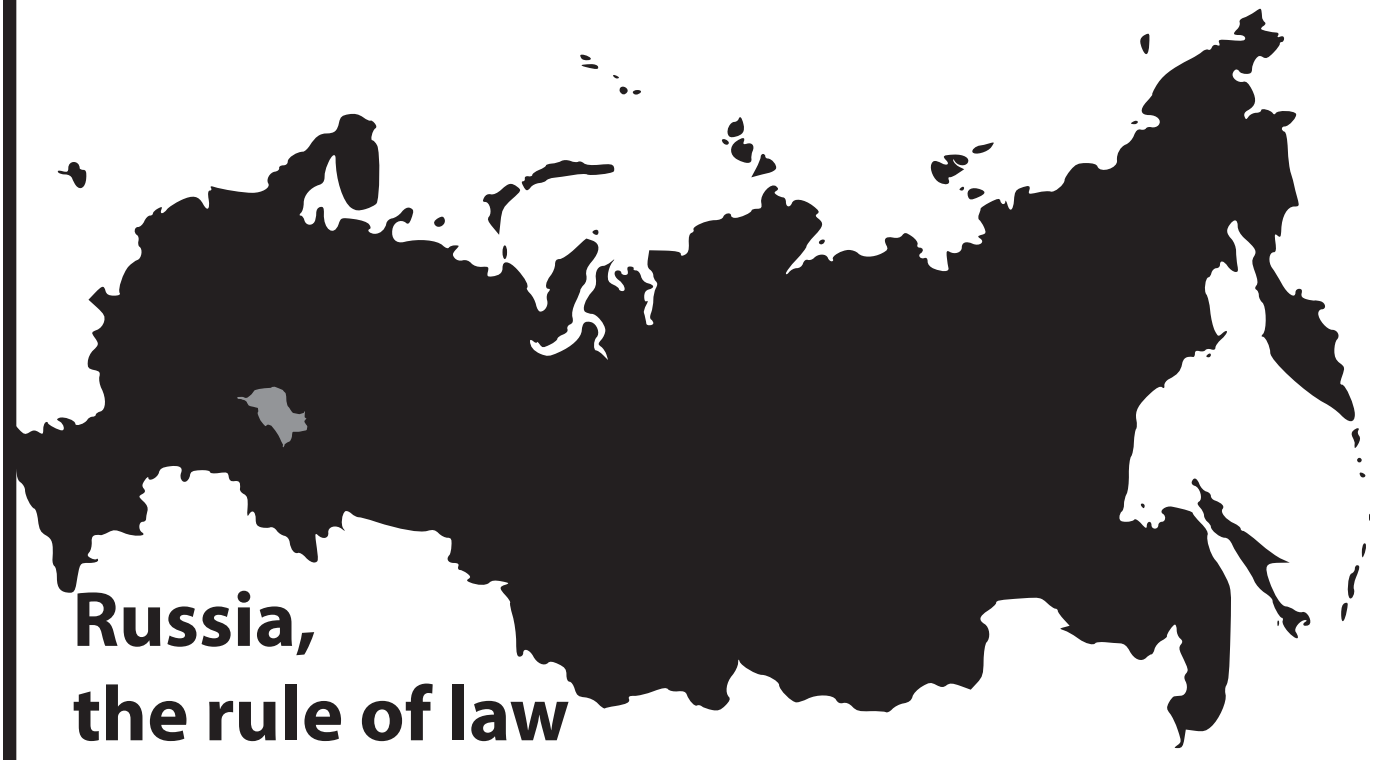

Russia, the rule of law and "comfort zones"

Montana attorney's Tatarstan travelogue inside

Also in this edition:

MONTANA LAWYER

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INDEX
June/July 2013

Feature Stories

Commentary

Regular Features

Gideon, schmideon – what about my needs?

By Mark D. Parker

I was a "pump jockey" in high school. I was smart enough to pump gas, clean windshields and spot matters mechanical which would be referred to the mechanic. The mechanic, Ken Largis, was a master welder, an absolute artist, but none of us would have ever had the guts to call him an "artist." Mostly he made trailer hitches, but he could take a pile of scrap and make about anything. When done, he would pull the welding mask back up over his head, light a hand-rolled cigarette, smoke it down halfway and then all hell broke loose. He would pick up a hammer and start pounding on his weld. "Deafening" was not hyperbole as Ken was deaf – or close to it. If his weld was faulty, he wanted to know it right then and there, not later. He loved his, and everyone else's, horses. He would have never forgiven himself had one of his hitches failed and harmed a horse.

It's a stretch I know, but public defenders remind me of Ken Largis' hammer – loud, by all appearances, a menace, and critical to the system.

I drive by Montana State Prison. Many others, mostly young men, are stuck inside. In a small way, I put them there. I am part of the society that has decided a good cage is the best place for these people. But, I do want to know I got it right. I need to have some level of comfort that innocent men aren't locked behind those walls on my behalf. What gives ME, yes, this is about ME, a level of comfort? It's people like Moira D'Alton, Tony Gallagher, and Roberta Drew, public defenders that get in there and fight, fight, fight.

Public defenders are lawyers at their absolute best. It is pure lawyering. It is certainly not a "get rich quick" scheme. For many years, I have attended a Public Defenders Retreat in Las Vegas. Three hundred attorneys, largely public defenders, pack the place. It's like walking into the Mos Eisley Cantina in Star Wars.

They don't preach diversity, they are diversity. Each morning, a banquet of juices, rolls, and other goodies line the back wall. They are gone in seconds. By the first coffee break, a sparrow couldn't find a crumb. It would be an even bet as to whether Louis Pasteur could grow a culture. A free meal means one less meal beat out of their paycheck.

Maslow described the hierarchy of needs. Physiological needs. Then safety. Then love and belonging, followed by esteem. Finally, the pinnacle is self-actualization. The "self-actualized" are a content lot. Public defenders, in large part, have already gotten there. They have to. For many of us lawyers, the practice of law supplies all, or most all, of these needs. For public defenders, it ain't going to work out that way. It may deliver a paycheck for food (level one) and a house (level two) but they are an unloved lot in many ways – unfair ways, but in many ways. For example, recently in Montana a legislator proposed that we draw Supreme Court justices from district court judges. When he realized that this would provide too small of a pool, he proposed we expand the pool to include prosecutors. I saw no indignation over this snub to public defenders.

The Legislature is going to commission a study, a study of the public defender system that will yield recommendations which will then guide policy. It will follow the great tradition of other great studies that have yielded great legislation such as..... Well, I can't name one, either. Not one. Regrettably, these studies become wish lists hammered out by true believers which are blended into a smoothie and poured off the back porch of the Capitol. But, we can hope that this one will be different. We can always hope.

I am supporting a better financed public defender system. I will let others champion the cause of the downtrodden, the Constitution and the religious/moral obligation to the less fortunate. I am in this one for myself. If I am putting someone in a cage, I want to make sure I get it right. I don't need another study to tell me that the system is short-sheeted. I can see it in the faces of the prisoners at YCDF and the public defenders with caseloads that not a single attorney I know in the private practice world could take on.

As Ronald Reagan said, "trust, but verify." We verify by a hammer, the hammer of the public defender system. Yes, I trust prosecutors and judges. I even play poker with both from time to time – but we always cut the cards.

Mark Parker is an attorney in Billings. He currently serves as the secretary-treasurer for the State Bar of Montana. Mark also ran unopposed for president-elect in the recent Bar elections.

President's Message | Pam Bailey

Local-Bar leaders visit State Bar

Next year the State Bar will be 40 years old. In 1974, the Supreme Court issued an Order unifying the members of the State Bar. In other words, you did not have a choice. You had to become a member of the State Bar in order to practice law in Montana. I am told there was much grumbling back then by many members, particularly when it came to paying mandatory dues. No one likes to be told that they have to do something. Then to add insult to injury, you need to also cough up some money.

Those who were opposed to the Supreme Court's Order unifying the bar are dwindling in numbers – mainly due to the fact that most have retired. So the new argument becomes – "Is the State Bar relevant?"

In the December 2012 issue of the Montana Lawyer, I asked you to test your knowledge about the State Bar. The State Bar is governed by the Montana Supreme Court, which controls the practice of law. The State Bar does not have control over rules regarding admission to the bar; rules regarding Continuing Legal Education; the administration of IOLTA funds; Disciplinary Counsel; etc. Additionally, only $200 of the $385 each attorney is assessed each year goes to the State Bar.

Rather, the State Bar is responsible for providing support for the numerous commissions that carry out the directives of the Supreme Court. The Board of Trustees, Executive Committee and State Bar staff need to have ongoing dialogue with our members so that they are aware what is going on and how the State Bar can be of help to our membership.

... ask yourself if we do not regulate our profession, who will? The Montana Legislature? Pretty scary thought.

To facilitate this dialogue, I have reached out to local bar leaders across the State. Instead of having the Executive Committee monthly meetings in Helena, I have held these meetings in different parts of the state. To date, we have met in Billings, Helena, Great Falls, Kalispell, Missoula, and Bozeman.

To widen the net, I reinstituted the Local-Bar Leadership Meeting, which had fallen by the way side approximately ten years ago. I invited all local bar presidents to meet in Helena in April. Out of the fifteen local bars across the State, thirteen attended. We started the day with a tour of the State Bar office and introduction of the staff. Each local bar president gave a report on what was happening in their area. It was incredibly impressive to learn what each local bar is doing, particularly in the areas of pro bono, continuing legal education, and community service. They are also promoting civility amongst its members and the judiciary with membership meetings and social functions.

Shaun Thompson, Disciplinary Counsel, reported to the local bar presidents on common disciplinary issues and the new Closing Practice Rule which became final by Order of the Supreme Court in April 2013. Members of the Montana Supreme Court joined us for lunch, and Chief Justice McGrath gave an update from the Court and spoke about the alarming issue surrounding unrepresented litigants. Members of the State Bar staff presented on how they can help the local bar when a lawyer gets into trouble, and how they can assist with local pro bono efforts.

Every local bar president left with a better understanding about the role and functioning of the State Bar that they can take back to their communities. Everyone left with new ideas that they can adopt to better serve their members. The meeting was a success.

The State Bar of Montana has the additional challenge of reaching out to 3,600 active members across the fourth largest State in our Nation. Staff, bar leaders, and members of the Professionalism Committee travel across the State to stage Road Shows to keep members updated on ethical issues affecting the practice of law.

Do you read the Montana Lawyer? Kudos to Peter Nowakowski, the editor, and Chris Manos, the publisher, who do an outstanding job of keeping our members informed on a monthly basis of the new developments in our profession.

If you continue to question whether the State Bar is relevant, than ask yourself if we do not regulate our profession, who will? The Montana Legislature? Pretty scary thought.

If you have concerns or suggestions on how to improve services or programs, contact your local Trustee, member of the Executive Committee or member of the Staff. Consider serving as a Trustee for your area or becoming a member of a committee or section. Believe me, you will no longer question the relevance of our State Bar.

Matt appointed to MLSA Board of Trustees

Montana Legal Services Association (MLSA) is pleased to announce attorney Terryl Matt has accepted an appointment to the MLSA Board of Trustees.

Ms. Matt is from the Fort Belknap Indian Reservation. She attended Montana State University, obtaining a political science degree, and minor in public administration in 1990. She attended law school at the University of Montana, graduating in 1993. After graduating from law school she worked for one year in Big Horn County.

Since 1994, Ms. Matt has been in private practice in Cut Bank. For many years her practice consisted of criminal defense as a public defender for the State of Montana and representing Indian tribal governments. Today, while still doing individual criminal defense work and representing tribal governments, her practice now handles more civil matters, from personal injury, contract issues, to custody disputes.

Ms. Matt has practiced in tribal courts for years and sees the great need for attorneys. She has seen that many tribal members may need representation in custody, landlord-tenant matters, or commercial matters. The value may be low and the case difficult, so most attorneys do not want to take these cases. This is an area of the law where MLSA has helped fill the gap. Due to lack of resources, however, for these areas many individuals who are in need of legal help have none.

Ms. Matt has gladly accepted the invitation to sit on the MLSA Board, seeing this as an opportunity to help find ways to make legal aid available to those who cannot afford to hire an attorney.

MEMBER NEWS, next page

STATE BAR OF MONTANA

HEALTH CARE LAW SECTION

Are you assisting health care providers in business transactions?

Does compelling production of health information in litigation present problems?

Are your business clients ready for 2014 Health Care Reform changes?

Do you receive patient health information to perform legal services for your health care clients?

Will your clients be subject to the new penalties under Health Care Reform?

Are your provider clients asking for advice regarding establishing new service lines?

Do you draft or review agreements for hospitals or health care providers?

Join the Health Care Law Section at the State Bar Annual Meeting in Helena, Sept. 18-20 for a presentation and discussion that will assist you in advising your clients about issues that are relevant to the highly regulated health care industry.

If you're interested in joining the section, please contact Erin MacLean at emaclean@fandmpc.com

Cossitt featured at ABI Spring Meeting

Jim Cossitt was a featured speaker at the 31st Annual Spring Meeting of the American Bankruptcy Institute (ABI), held April 18 – 21 in National Harbor, Maryland, where he participated as member of the Consumer Bankruptcy/Ethics & Professional Compensation Committee joint presentation. The subject of this education session was "Nothing Is Impossible: The Complex Requirements and Ethical Duties of Representing Chapter 11 and/or Chapter 13 Consumer Debtors."

More information about these events can be found on at http://www.cossittlaw.com.

Botsford to retire; files available for pickup

After 43 years of practice, T. K. Botsford, Attorney at Law, of Missoula, Montana, has announced his retirement from the active practice of law effective July 1, 2013. Mr. Botsford's client files will be available for pickup at his office until June 28th, 2013 when they will be scheduled for destruction. All open files will be transferred for safe keeping to the Missoula law firm of Milodragovich Dale and Steinbrenner. Milodragovich will hold these files upon the exclusive option and opportunity granted to Mr. Botsford's clients to either retain the Milodragovich firm for representation or to remove their files at any time without restrictions, conditions or costs. Mr. Botsford extends his appreciation to all fellow attorneys, judges, court officials and other servants who have worked with him. Old lawyers never die, they just lose their appeal.

Loveland joins St. Peter Law Offices

St. Peter Law Offices, P.C., in Missoula, Montana, is pleased to announce that Rochelle L. Loveland has joined the firm. Rochelle graduated from the University of Montana School of Law in 2005. Following graduation, Rochelle practiced for six years in Billings, Montana, primarily in the area of civil defense litigation. She has now returned to her hometown of Missoula to practice law and raise her family. Her areas of practice will include wills, probates and trusts, business law and civil litigation. Rochelle is admitted to practice in the state and federal courts of Montana. Rochelle can be contacted at: St. Peter Law Offices, P.C., 2620 Radio Way, Missoula, Montana 59808. Phone: (406) 728-8282; Fax: (406) 728-8141.
Email: rochelle@stplawoffices.com.

Attorneys Dudik, Williams, Lowy certified as Child Welfare Law Specialists

The National Association of Counsel for Children (NACC) is pleased to announce the inaugural class of Montana lawyers certified as Child Welfare Law Specialists:

- Kimberly P. Dudik, Missoula
- Judy A. Williams, Billings
- Matthew B. Lowy, Missoula

These lawyers passed the NACC Child Welfare Law Examination and satisfied additional practice criteria for Child Welfare Law Attorney Certification, awarded by the National Association of Counsel for Children and accredited by the American Bar Association.

Kimberly Dudik currently represents House District 99 in the Montana House of Representative. She was previously an Assistant Attorney General with the Child Protection Unit, a Gallatin Deputy County Attorney representing Child and Family Services (CFS), and has represented children and parents in both divorce of abuse/neglect proceedings.

Judy A. Williams is also a former AAG in the Child Protection Unit. She is now an attorney guardian ad litem in her private practice with the Goodrich Law Firm in Billings and also works part-time for MSU Billings Student Legal Services.

Matthew B. Lowy is a Deputy Missoula County Attorney. His prosecutorial duties include representing CFS in child abuse proceedings.

Congratulations to the inaugural class on certification as Child Welfare Law Specialists. The NACC looks forward to conferring certification upon future classes of Montana attorneys who successfully complete the certification process. For more information visit http://www.naccchildlaw.org.

Vicevich Law welcomes Pohlman, Everett-Martin

Vicevich Law is proud to announce the association of Dolphy Pohlman, Esq. and Rose Everett-Martin with Vicevich Law Firm.

Dolphy Pohlman is an experienced litigator who graduated from University of Montana Law School in 1966. After 2 years in the US Army he returned to Montana to practice law. He moved to Butte in 1971, after 3 years in the Attorney General's Office, and began private practice with Corette Smith & Dean, which ultimately became Corette Smith Pohlman & Kebe. He primarily handled civil lawsuits and business transactions. Dolphy became "Of Counsel" to that firm but recently transitioned to active practice with the Vicevich Law Firm.

In the mid 1990s Dolphy began working in mediation, arbitration and litigation in business matters and has continued to mediate and arbitrate cases since that time.

Rose Everett-Martin also began working in mediation and arbitration in the 90s, while away from Montana, managing a law office in SLC, Utah. She is a current Board Director of the Montana Mediation Association.

Rose has a very high success rate in Federal Workplace Mediation, as well as in State Victim/Offender Dialogue (VOD) which focuses on Restorative Justice. In addition, Rose is a mediator serving businesses and families. She has 3 decades of background, experience and knowledge dealing with landlord-tenant issues. Further, Rose is also a guardian ad litem serving families in the surrounding counties and has a Bachelor's Degree in Paralegal Arts and Sciences.

Attorneys form Swandal Law & Mediation Center

Rebecca R. Swandal, Kendra K. Anderson & Wm. Nels Swandal are excited to announce the formation of Swandal Law PLLC, in Livingston, MT.

MEMBER NEWS, next page

President to serve on search committee for dean of UM School of Law

State Bar President, Pamela J. Bailey, has been nominated by Perry J. Brown, Provost of the University of Montana, to serve on the Search Committee for the new Dean of the University of Montana School of Law. The Committee plans to select a new dean to start on January 1, 2014. Dean Irma Russell will remain in her current position until a successor is selected.

The Health Care Law Section is looking for interested Members

Are you assisting health care providers in business transactions? Does compelling production of health information in litigation present problems? Are your business clients ready for 2014 Health Care Reform changes? Do you receive patient health information to perform legal services for your health care clients? Will your clients will be subject to the new penalties under Health Care Reform? Are your provider clients asking for advice regarding establishing new service lines? Do you draft or review agreements for hospitals or health care providers?

For more information contact Erin MacLean at (406) 502-1594 or emaclean@fandmpc.com.

First UBE set for July

Beginning with the July 2013 administration, Montana will accept the transfer of a score of 270 or greater from a qualified Unified Bar Exam (UBE) exam within three years. All UBE applicants are required to complete the application process outlined above through the NCBE and meet the requirements set forth in the Rules for Admission to the State Bar of Montana. For more information about the Uniform Bar Exam, visit the admissions area at www.montanabar.org.

It is the applicant's responsibility to have UBE scores from another jurisdiction certified to the State Bar of Montana. Beginning with the July 2013 Bar exam, transferred MBE scores will no longer be accepted and all applicants will either be required to sit for the Uniform Bar Exam (the MEE, MPT and MBE) or meet the requirements to transfer a UBE score. To have your UBE score certified to Montana, contact either the testing authority where you took the exam, or the National Conference of Bar Examiners at http://www.ncbex.org/multistate-tests/ube/ube-transcript-services/

Save the date -- State Bar Annual Meeting

State Bar's Annual Meeting is Sept. 19-20 at the Red Lion in Helena. Approximately 10 CLE credits. Keynote speaker is Bill Neukom, former ABA president, chief legal officer for Microsoft, and the founder of the World Justice Project. CLE Topics include modern discovery, health care law, Indian law jurisdiction issues, tax update, Supreme Court arguments, a special segment for government attorneys, and more. Check the Bar's website and the Montana Lawyer in the coming months for more information.


Neukom

About Bill Neukom: William H. Neukom received his law degree from Stanford in 1967. He then clerked in King County Superior Court in Seattle. Neukom began doing legal work for the fledgling Microsoft in the late '70s, and was the company's lead legal counsel for more than two decades. For 17 of those years he was a Microsoft employee and an executive vice president. He led Microsoft in several of its highest-profile cases, including *Apple v. Microsoft*.

Neukom was a managing general partner of the San Francisco Giants (2008-2011). During this time, the Giants won the World Series (2010) for the first time since they moved from New York to San Francisco.

He served as ABA president in 2007-2008.

— Info from abanow.org, wikipedia.org.

MEMBER NEWS, from previous page

Nels Swandal, who recently retired from the bench after presiding for eighteen years as the 6th Judicial District Judge, has joined Rebecca Swandal and Kendra Anderson to practice law. Swandal Law PLLC is a general practice law firm, including Estate Planning, Family Law, Civil Litigation, Business Formation, and Criminal Defense.

Additionally, Kendra Anderson & Nels Swandal focus on mediation, offering mediation services throughout Montana.

Visit online at www.swandallaw.com.

DOJ selects Fowler for new bureau chief position

C. Mark Fowler, 50, has been selected as the new Appellate Bureau Chief for the Legal Services Division of the Montana Department of Justice. Mr. Fowler has been an assistant attorney general in the Montana Department of Justice since 1994, working in the Legal Services Divisions' Appellate Bureau and in the Gambling Control Division. Mr. Fowler was a Spring 2009 Fellow with the National Association of Attorneys General Supreme Court Fellowship Program in Washington, D.C. From late 1990 to 1994, he was an assistant attorney general in Tennessee, specializing in capital litigation, criminal appeals and peace officer standards and training. Mr. Fowler has had more than 100 oral arguments in various state intermediate courts of appeal, supreme courts and federal circuit courts of appeal. He has been a member of the capital litigation teams in both Montana and Tennessee. He holds an undergraduate degree from Jacksonville University. He earned his law degree from the University of Florida College of Law in 1989, and was the editor-in-chief of the university's Journal of Law & Public Policy.


Fowler

IN RE ADDING TO THE MONTANA RULES OF APPELLATE PROCEDURE A RULE ON JUDICIAL WAIVER APPEALS

Summarized from May 8 order No. AF 07-0016

In November of 2012, the People of the State of Montana approved by referendum the Parental Notice of Abortion Act of 2011. That Act provides, in pertinent part, that this Court may adopt rules providing for an expedited confidential appeal by a petitioner if the youth court denies a petition for a waiver of the Act's parental notification requirement. The Office of the Appellate Defender (OAD) proposed a rule to be added to the Montana Rules of Appellate Procedure to address expedited confidential appeals in such matters. We published the proposed rule and invited public comment. Numerous comments were filed; the comment period has now expired.

In the meantime, the 2013 Montana Legislature enacted HB 391, which repeals the

Parental Notice of Abortion Act as of July 1, 2013. HB 391 generally requires parental consent prior to an abortion for a minor and, in a provision that parallels the expedited confidential appeal provision of the Parental Notification of Abortion Act, provides for an expedited confidential appeal by a petitioner if a youth court denies a petition for waiver of the parental consent requirement. HB 391 has an effective date of July 1, 2013.

With some modifications, including some suggested in the public comments already filed and some suggested by members of the Court, OAD's proposed rule for expedited confidential appeals appears to be appropriate for adoption for use with the statutes enacted underHB 391 (2013).

Therefore,

IT IS ORDERED that, for 30 days following the date of this Order, public comments will be accepted on the attached proposed rule on judicial waiver appeals under HB 391. Persons wishing to make such comments shall file their comments, in writing, with the Clerk of this Court. Following the expiration of the public comment period, the Court will take such further action as it deems appropriate.

Propsed Rule 30. Judicial waiver appeals.

(1) Scope. This rule applies to an appeal from an order denying or dismissing a petition filed by a minor under age 16 to waive parental consent to an abortion, pursuant to Title 50, Chapter 20. In such appeals, this rule supersedes the other appellate rules to the extent they may be inconsistent with this rule.

(2) Notice of appeal.

(a) A minor may appeal an order denying or dismissing a petition to waive parental consent by filing a notice of appeal with the clerk of the supreme court. The notice of appeal may be filed in person, by mail, or by fax. If a transcript or written order is available, it should be attached to the notice of appeal, but such notice shall not be defective if it does not include such transcript or order.

(b) If a notice of appeal is incorrectly filed in a youth or district court, the clerk thereof shall immediately notify the clerk of the supreme court of such filing, and shall transmit a copy of the notice of appeal by fax or e-mail for filing with the supreme court.

(c) The notice of appeal must indicate that the appeal is being filed pursuant to this rule, but the court will apply this rule to cases within its scope whether they are so identified or not.

(d) Blank notice of appeal forms and copies of these rules will be available at all court locations and will be mailed, emailed, or faxed to a minor upon request.

(e) No filing fees or fee for any service may be required of a minor who files an appeal under this provision.

(3) Record on appeal; standard of review. A youth court that conducts proceedings for judicial waiver of consent shall issue written and specific findings of fact and conclusions of law supporting its decision and shall order that a confidential record of the evidence, findings, and conclusions be maintained. The record on appeal consists of the confidential record of the youth court, including all papers and exhibits filed in the youth court, the written findings and conclusions of the youth court, and, if available, a recording or transcript of the proceedings before the youth court. If the appellant has counsel, counsel shall serve the clerk of the youth court with a copy of the notice of appeal, request the record from the clerk of the youth court, and arrange for expedited preparation of the transcript immediately upon filing the notice of appeal. If the appellant does not have counsel, the clerk of the supreme court shall request the record immediately upon receiving notice that a self-represented minor has filed a notice of appeal, and the clerk of the youth court shall arrange for expedited preparation of any transcript directly with the court reporter. Upon receiving a request for the record from counsel for the appellant or from the clerk of the supreme court, the clerk of the youth court shall forthwith transmit the record to the supreme court by fax, e-mail, overnight mail or in another manner that will cause it to arrive within 48 hours, including weekends and holidays, after the youth court's receipt of the request for the record.

(4) Brief. A brief is not required. However, the minor may file a memorandum in support of the appeal within 48 hours, including weekends and holidays, after filing the notice of appeal.

(5) Disposition. The supreme court may designate a panel of five or more of its members to consider the appeal. The supreme court shall review the decision ofthe youth court de novo. The supreme court shall enter an order stating its decision within 72 hours, not including weekends and holidays, after the record referred to in (3) is filed. The supreme court shall

ORDERS, next page

ORDERS, from previous page

issue an opinion explaining the decision as soon as practicable following entry of the order.

(6) Confidentiality.

(a) Documents, proceedings, and audio or video recordings in an appeal under this rule are sealed. All persons are strictly prohibited from notifying the minor's parents, guardian, or custodian that the minor is pregnant or wants to have an abortion, and from disclosing this information to any person. The court shall not release the name of, or any other identifying information concerning, a minor who files a judicial waiver appeal.

(b) All statistical and general information that the court system may have concerning judicial waiver appeals is confidential, except the number of appeals filed, granted, and denied statewide each year is public information.

(7) Attorney. If the minor is not represented by an attorney, the clerk of the supreme court shall appoint the office of the state public defender to represent the minor in the appeal. If counsel was assigned to represent the minor in the youth court, the appointment continues through the appeal. All counsel shall immediately be served with copies of the Court's order by fax or e-mail. In the event a minor waives the right to have counsel appointed on appeal, then notice of the court's order will be served upon her at the address or location she has provided to the clerk of the supreme court. The minor or her counsel shall be provided a certified copy of the order upon request.

(8) Filing defined. For purposes of this rule only, an appeal is deemed filed at the time and on the date it is received by the clerk of the supreme court.

(9) Special rule for interpreting time requirements. If the end of a time limit set out in this rule falls upon a weekend or holiday, then the time limit is extended to noon on the next business day.

IN RE RULES OF PROCEDURE OF THE MONTANA MEDICAL LEGAL PANEL

Summarized from May 7 order No. AF 13-0027

Section 27-6-204, MCA, authorizes the Director of the Montana Medical Legal Panel, in consultation with the State Bar of Montana and subject to the approval of this Court, to adopt and publish rules of procedure necessary to implement and carry out the duties of the Panel. In December of 2012, after consultation with the State Bar of Montana and other affected organizations, the Director of the Panel presented to the Court proposed changes to the Rules of Procedure of the Panel. The Director stated the intent that all proposed changes will improve the style and language of the Rules, and that the substantive changes conform the Rules to statutes and provide clarification in matters that have arisen since the Rules were last revised in 2001.

This Court discussed the proposed changes to the Montana Medical Legal Panel Rules of Procedure at a public meeting, and decided it would be advisable to invite public comments on the proposals. As a result of the public comments filed with the Clerk of this Court, several changes have been incorporated into the rules presented by the Director of the Montana Medical Legal Panel. Not all suggested changes have been adopted, however.

IT IS NOW ORDERED that the attached Rules of Procedure for the Montana Medical

Legal Panel are approved, effective immediately.

COMMISSION ON CHARACTER AND FITNESS

Summarized from May 7 order AF 13-0276

A member of the Montana Supreme Court's Commission on Character and Fitness, James W. Johnson, has resigned from the Commission due to his retirement from the practice of law. We take this opportunity to extend the thanks of a grateful Court, on behalf of the people of Montana, for Mr. Johnson's valuable contributions to the Commission on Character and Fitness and to the legal profession.

With the consent of the appointee, IT IS ORDERED that Michael C. Prezeau of Whitefish, Montana, is hereby appointed to the Commission on Character and Fitness, effective the date of this Order.

IN THE MATTER OF THE APPOINTMENT OF CHIEF WATER JUDGE

Summarized May 14 order AF 09-0379

Section 3-7-221, MCA, provides that the Chief Justice of the Montana Supreme Court appoint the Chief Water Judge.

Pursuant to § 3-1-1010, MCA, the Judicial Nominating Commission has submitted a list of two nominees for the position. Having considered the abilities, background, and qualifications of each nominee, I have concluded that the appointment of William Russell McElyea is in the best interest of the citizens of Montana.

Therefore, IT IS ORDERED that William Russell McElyea of Bozeman, Montana, is hereby appointed to the position of Chief Water Judge of the State of Montana for a four-year term commencing on August 1, 2013, and ending July 31, 2017.

DISCIPLINE - DISMISSED COMPLAINT

Summarized from May 15 order PR 12-0268

On April 27, 2012, a formal complaint was filed against Montana attorney Kris Copenhaver. The disciplinary complaint may be reviewed by any interested persons in the office of the

ORDERS, next page

ORDERS, from previous page

Clerk of this Court.

The Commission on Practice held a hearing on the complaint on January 17, 2013, at which hearing Copenhaver appeared with counsel and testified on her own behalf. On April 1, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation that the complaint against Copenhaver be dismissed. Copenhaver did not file any objections within the time allowed.

The complaint in this matter is based upon Copenhaver's defense of an individual charged with sexual intercourse without consent and with unlawful transactions with children. The Commission has concluded, based on the evidence produced at the hearing, that it was not established by clear and convincing evidence that Copenhaver violated Rule 1.1 of the Montana Rules of Professional Conduct (MRPC), by failing to provide her client with competent representation. The Commission further concluded it had not been established by clear and convincing evidence that Copenhaver violated Rule 1.3, MRPC, by failing to act with reasonable diligence and promptness when representing her client, or that Copenhaver's conduct was prejudicial to the administration of justice in violation of Rule 8.4, MRPC.

The Commission recommends that the formal complaint against Kris Copenhaver be dismissed.

Based upon the foregoing and upon our examination of the record, IT IS HEREBY ORDERED:

1. The Commission's Findings of Fact, Conclusions of Law, and Recommendation are ACCEPTED and ADOPTED.

2. This disciplinary complaint against Montana attorney Kris Copenhaver is DISMISSED.

DISCIPLINE

Summarized from May 29 order PR 12-0470

On August 9, 2012, a formal disciplinary complaint was filed against Montana attorney Tracey L. Morin. The disciplinary complaint may be reviewed by any interested persons in the office of the Clerk of this Court.

On April 15, 2013, Morin filed notice, pursuant to Rule 28(A)(l) of the Rules for Lawyer Disciplinary Enforcement (MRLDE), that she is unable to assist in the defense of the disciplinary proceedings against her. As a result, Morin acknowledges that she shall be transferred to disability/inactive status and that the pending proceedings shall be deferred during the period of her inability to defend. Accordingly, on April16, 2013, the Commission on Practice issued an order deferring these disciplinary proceedings during the period of Morin's inability to defend.

Therefore, IT IS ORDERED that Tracey L. Morin is transferred to disability/inactive status in the Bar of the State of Montana, and that these disciplinary proceedings are deferred while she is on disability/inactive status. Morin is directed to provide notice of her change in status to her clients and others as required by MRLDE 30, and to arrange for the delivery to her clients of any papers or other property to which they are entitled.

Summarized from May 15 order PR 12-0664

On September 15, 2010, a formal disciplinary complaint was filed in this matter against Montana attorney Martin J. Eveland. The disciplinary complaint may be reviewed by any interested persons in the office of the Clerk of this Court. Eveland did not respond to the complaint in any manner.

The Commission on Practice held a hearing on the complaint on January 18, 2013. Eveland did not appear at the hearing either in person or by counsel. On April 1, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. Eveland did not file any objections within the time allowed.

In its findings, conclusions, and recommendation, the Commission found that, as a result of a previous disciplinary proceeding, Eveland was on probation and was to be supervised by a mentor attorney at the time the complaint in this matter was filed. Eveland's mentor attorney had informed the Commission that Eveland had not communicated with him and had apparently discontinued the practice of law.

In relation to the present complaint, the Commission found by clear and convincing evidence that Eveland violated Rule 8.1(b) of the Montana Rules of Professional Conduct and Rule 8A(6) of the Montana Rules for Lawyer Disciplinary Enforcement in that he repeatedly failed to respond to a lawyer disciplinary authority's lawful demands for information, and that he failed to justify his refusal or nonresponse.

The Commission recommends that, as a result of these violations of the Montana Rules of Professional Conduct and the Montana Rules for Lawyer Disciplinary Enforcement, Eveland be disciplined by suspension from the practice of law in Montana for an indefinite period of not less than one year. The Commission also recommends that Eveland be ordered to pay the costs of these proceedings.

Based upon the foregoing,

IT IS HEREBY ORDERED:

1. The Commission's Findings of Fact, Conclusions of Law, and Recommendation are ACCEPTED and ADOPTED.

2. Martin J. Eveland is hereby suspended from the practice of law in Montana for an indefinite period of not less than one year, effective as ofthe date ofthis Order.

3. To the extent that he is counsel of record in any pending matters in Montana courts, Eveland shall give notice of his suspension, as required under Rule 30, MRLDE, to his clients, co-counsel, opposing counsel or unrepresented adverse parties, and courts. Eveland also shall deliver to all clients being represented in pending matters any papers or other property to which they are entitled, as required under Rule 30, MRLDE.

4. Eveland shall pay the costs of these proceedings subject to the provisions of

Rule 9(A)(8), MRLDE, allowing objections to be filed to the statement of costs.

ORDERS, next page

ORDERS, from previous page

Summarized from May 1 orderPR 12-0448

On August 2, 2012, a formal disciplinary complaint was filed against Montana attorney R. Allen Beck, who at that time had been indefinitely suspended from the practice of law in Montana as a result of previous disciplinary proceedings. The disciplinary complaint may be reviewed by any interested persons in the office of the Clerk of this Court. Beck did not file a response to the complaint.

The day before the scheduled Commission on Practice hearing on the complaint, Beck surrendered his license to practice law in Montana. Pursuant to Rule 7 of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE), the Commission nevertheless retained jurisdiction.

Beck did not attend the hearing held before the Commission on January 16, 2013. On March 15, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. Beck did not file any objections within the time allowed.

Because of Beck's failure to answer within the time allowed or at all, the Commission deemed the allegations of the complaint admitted. The Commission concluded that, in 2010, Beck failed to provide a client with competent representation during an appeal to this Court, that he failed to act with reasonable diligence and promptness, and that he failed to make reasonable efforts to expedite the litigation consistent with his client's interests. The Commission further concluded that, in 2011, Beck failed to provide his client with competent representation in post-appeal enforcement proceedings, failed to act with reasonable diligence and promptness in representing his client in those proceedings, and failed to keep his client reasonably informed about the status of his case. Finally, the Commission concluded that Beck had asserted a motion that required an opposing party to turn over property without first determining after diligent investigation a bona fide basis existed for the motion, and that he asserted the motion for the purpose of harassment, delay, advancement of a non meritorious claim, or solely to gain leverage. The Commission concluded there is clear and convincing evidence that Beck has violated Rules 1.1, 1.3, 1.4, 3.1, and 3.2, of the Montana Rules of Professional Conduct.

The Commission recommends that, as a result of these violations of the Montana Rules of Professional Conduct, Beck be disciplined by disbarment from the practice of law in Montana. The Commission also recommends that Beck be ordered to pay the costs of these proceedings.

Based upon the foregoing,

IT IS HEREBY ORDERED:

1. The Commission's Findings of Fact, Conclusions of Law, and Recommendation are ACCEPTED and ADOPTED.

2. R. Allen Beck is hereby disbarred from the practice of law in the state of Montana.

3. Beck shall pay the costs of these proceedings subject to the provisions of Rule

9(A)(8), MRLDE, allowing objections to be filed to the statement of costs.

Exploitation: The sometimes invisible abuse of our elderly

By Cynthia H. Shott

Our elderly clients, family members, friends and acquaintances are being abused. Why don't we see it? They don't have bruises or signs of being physically abused – but they may be financially abused, exploited. Why don't they speak out? Do they even realize it is happening and are they too embarrassed to say anything? Do they even know who to trust or ask? How can we help?

As attorneys we see elderly clients in our practices. We also see them every day; they are our family, friends, neighbors, and people from church or the country club. But unlike physical abuse, financial abuse is even harder to discern. Older Montanans are for the most part not very open about their finances, even to their attorneys. Often the husband has handled the family's finances and on his passing the wife may have no idea what assets they have, much less where those assets are located. Also, as people age there is a tendency to become paranoid and secretive about things, especially money. This leads to unwillingness to discuss finances with anyone, including their attorney or their family members. People at this point are extremely vulnerable, especially to scammers. The embarrassment of being scammed puts millions of dollars in the hands of scammers. Even if they do trust someone to assist them with their finances, sometimes those very people may be the ones to exploit the situation for their own benefit.

The list of potential exploiters is long. A few of the more common culprits include family members, care providers, charities, dating services, lotteries - both national and international, a neighbor or stranger they have met out in the community or who has come to their door. As we age, money may become less valuable than friendship and a sense of being needed.

We as attorneys have the opportunity to assist our elderly clients, especially when they come in to discuss a probate of their spouse or maybe some estate planning. Some red flags that may come up in a conversation that would trigger closer scrutiny would be:

1. Sudden changes in bank accounts or banking practices.
2. Uncharacteristic and unexplained withdrawals of large sums of money by the client or someone acting under their power of attorney.
3. Large credit card transactions or checks written to unusual recipients, like salespersons, telemarketers, or "cash."
4. Requests to make abrupt changes in their will or other financial or estate planning documents, or the transfer of their assets to a family member or acquaintance without a reasonable explanation.
5. Complaints of stolen or misplaced credit cards, valuables, checkbooks, or checks from the Social Security Administration, pensions or annuities.
6. Clients who appear nervous when accompanied by another individual or who give far-fetched explanations of why they need money, maybe wanting to loan funds to someone, or finance a business venture.
7. Sudden increases in debt or inexplicable credit card transactions.
8. A person accompanying your client who does not allow the client to speak for him or herself.
9. New signatories added to a client's account or newly formed joint accounts between the client and another individual.

"Exploitation" is defined in MCA 52-3-803(3), as

> (a) the unreasonable use of an older person or a person with a developmental disability or of a power of attorney, conservatorship, or guardianship with regard to an older person or a person with a developmental disability in order to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of or interest in the person's money, assets, or property by means of deception, duress, menace, fraud, undue influence, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the ownership, use, benefit, or possession of or interest in the person's money, assets, or property;
>
> (b) an act taken by a person who has the trust and confidence of an older person or a person with a developmental disability to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of or interest in the person's money, assets, or property by means of deception, duress, menace, fraud, undue influence, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the ownership, use, benefit, or possession of or interest in the person's money, assets, or property;
>
> (c) the unreasonable use of an older person or

EXPLOITATION, page 13

EXPLOITATION, from previous page

> a person with a developmental disability or of a power of attorney, conservatorship, or guardianship with regard to an older person or a person with a developmental disability done in the course of an offer or sale of insurance or securities in order to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of the person's money, assets, or property by means of deception, duress, menace, fraud, undue influence, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the ownership, use, benefit, or possession of the person's money, assets, or property.

If you suspect that your client may be being exploited, what can you do? As an attorney you are a mandatory reporter under Montana law. MCA 52-8-511 states that, if you know or have reasonable cause to suspect that an older person or a person with a developmental disability known to you in your professional or official capacity has been subjected to abuse, sexual abuse, neglect, or exploitation, you shall report it, unless, under subsection (f), you acquired this knowledge under the attorney-client privilege.

If you suspect that your client may be being exploited, what can you do? As an attorney you are a mandatory reporter under Montana law.

When are you, as an attorney, required to contact Adult Protective Services (APS) or the County Attorney with regards to suspected elder abuse? If you suspect that your elderly neighbor is being abused by a caregiver are you obligated under the statue to report? One could argue no, you did not learn of this in your professional or official capacity so you are not legally obligated to report. But aren't you morally obligated? All you need to do is call APS at 800-551-3191 and report your suspicions – all reports are confidential. APS then takes on the responsibility of investigating the potential abuse.

What if a client comes in and tells you that their family members are stealing from him or her, and provides you with solid proof that the client's child has stolen tens of thousands of dollars? But, your client does not want to see their child in jail, they just want the money back. You have proof of the exploitation. It is a crime. Do you report? If you learned of this crime under the attorney-client privilege, you cannot go against your client's wishes, so at this point can you report the crime? Maybe, maybe not. If you reasonably believe that your client is competent then probably not. You can work with the client and the family to stop the exploitation. But by now the client has already been exploited and all you can do is work to stop the abuse and maybe get some of the funds returned.

What if you believe that your client is of diminished capacity? Then under rule 1.14(b) of the Montana Rules of Professional Conduct you may be able to take action. The rules state at that if an attorney "reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." MRPC Rule 1.14 (b). This is when you should contact APS or the County Attorney and work to make sure that your client's assets are protected.

The best thing you can do for your client is to prevent abuse from happening in the first place. That is easier said than done. But there are things you can do. The key is having a good and trusting relationship with your older clients and keeping the lines of communication open. Working with the client's accountant can also be important, as hopefully the accountant will notice any significant changes in finances on an annual basis. Assisting your clients in drafting estate planning documents that protect their assets is important, but in the meantime they can be exploited to a point that when they need the funds there aren't any – or nothing is left at the time of their death, rendering all that estate planning useless. Clients need to feel comfortable that they can advise their attorney with any changes in their finances, such as changes of beneficiaries on life insurance policies, adding or changing signatures on accounts, and gifting. Those changes can be the red flags that you need in order to have that very difficult conversation with your client regarding the possibility that someone is taking advantage of them.

A fairly common scenario is when a client comes in with concerns about their parents. Someone is taking advantage of their parent. It could be another sibling, or possibly a caregiver or new friend. Or it could be simply that your client is concerned that their parent is no longer able to adequately handle their finances, bills are going unpaid, etc. What can you do to assist this client? You can advise your client about obtaining a power of attorney from their parent, or getting their name on the parent's bank account so that they can pay the bills and insure that the funds are being appropriately spent. But, are you setting up a situation whereby your client might become the abuser? Another solution may be to petition the court for a conservatorship. Then there would at least be court oversight of the finances.

There are no simple answers or solutions to elder abuse. Each situation is different, and you, as an attorney, need to do your best to protect our aging population from exploitation. Remember, you will probably be there someday and hopefully someone will be looking out for you and making sure that you are not being exploited.

For more information on elder abuse, see http://www.preventelderabuse.org/elderabuse/fin_abuse.html

Cynthia H. Shott is the In-House Counsel for the Western Montana Chapter, a private non-profit organization dedicated to providing clients with professional services. The Chapter acts as a neutral, objective third party, focusing on the best interest of its clients through sustainable management of assets and comprehensive case management. It is located in Missoula, Montana.

Montana Justice Foundation approves $260,000 in grants

The Montana Justice Foundation annually awards grants to nonprofit organizations that provide civil legal services to eligible persons; promote knowledge and awareness of the law; and/or facilitate the effective administration of justice. In May 2013, MJF approved $260,000 in operating and special project grant awards to fourteen organizations for the award year ending June 30, 2013. Since 1986, the MJF has contributed over five million dollars to Montana access to justice programs. More information about the grant process, application deadline and descriptions of current grantees is available at www.mtjustice.org.

CASA-CAN of Cascade County

$6,000 Operating
Lisa Goff, Executive Director

CASA-CAN provides highly trained volunteer guardians ad litem to speak on behalf of abused and neglected children involved in youth-in-need-of-care cases in the Eighth Judicial District Court.

CASA of Missoula, Inc.

$4,000 Operating
Tara Jensen, Executive Director

Through independent, trained volunteers, CASA of Missoula provides consistent, long-term advocacy for children who are at risk or have experienced abuse and neglect in Missoula and Mineral counties.

Cascade County Law Clinic

$6,000 Operating
Judith Pylar, Executive Director

The Clinic serves low-income clients in Cascade County through the efforts of a small in-house staff and a roster of local attorneys handling cases on a pro-bono basis. The Clinic accepts family law and guardianship cases, provides limited pro se assistance, and makes referrals for services not available through the Clinic.

Community Dispute Resolution Center of Missoula County (CDRC)

$3,000 Operating
Stephan Edwards, Executive Director

The CDRC educates, empowers, and supports low-income Missoula County community members in creating peaceful and collaborative solutions by providing low and no-cost mediations. Services are provided through the efforts of a part-time Executive Director and volunteer board and mediators.

Community Mediation Center

$6,000 Operating
Connie Campbell, Executive Director

The Center provides quality, affordable dispute resolution services and education using trained, volunteer mediators. The CMC's Low-income Family Mediation Program serves clients in the Eighteenth and Sixth judicial district courts.

Disability Rights Montana

$10,000 Special Project
Bernadette Franks-Ongoy, Executive Director

Disability Rights Montana works to protect and advocate for the human, legal, and civil rights of Montanans with disabilities by providing education and training, information and referral, advocacy and legal representation, and system advocacy to people with disabilities and their families. Disability Rights Montana's special project will provide parents with technical and legal assistance in developing their children's educational programs.

Domestic Violence Education & Services (DOVES)

$4,000 Operating
Jenifer Blumberg, Executive Director

DOVES provides assistance to victims of domestic abuse in Lake County and on the Flathead Indian Reservation with a variety of civil legal needs, ranging from representation at Order of Protection hearings to complex family law, housing, and immigration issues.

Eastern Montana CASA/GAL Inc.

$8,000 Operating
Cherie LeBlanc, Executive Director

Eastern Montana CASA/GAL serves twelve counties in Eastern Montana by providing the Seventh and Sixteenth judicial district courts with trained volunteers to represent the best interests of a child or children in neglect and abuse court proceedings.

HAVEN

$3,000 Operating
Kristy McFetridge, Executive Director

Through its Legal Advocacy Program, HAVEN assists victims of domestic or sexual violence in seeking Orders of Protection and provides information, education, and referrals for other civil law matters.

GRANTS, next page

GRANTS, from previous page

Montana Fair Housing

$8,000 Special Project
Pam Bean, Executive Director

Montana Fair Housing offers a broad range of services to identify and combat discrimination in housing across Montana, including the state's most rural areas. Montana Fair Housing works to further fair housing through outreach, providing educational opportunities for housing providers and consumers, and pursuing meritorious claims to address discriminatory housing practices. Montana Fair Housing's special project will address housing violations prohibited by state or local laws.

Montana Innocence Project (MTIP)

$2,000 Operating
Jessie McQuillan, Executive Director

MTIP provides legal assistance to indigent Montanans with credible, evidence-based claims of wrongful conviction. Legal assistance is provided through the Innocence Clinic, affiliated with the University of Montana Schools of Law and Journalism. Client services for post-conviction civil legal matters are provided through a small staff assisted by pro-bono attorneys and student interns.

Montana Legal Services Association (MLSA)

$193,000 Operating
Alison Paul, Executive Director

MLSA provides statewide free legal services to low-income Montanans in the areas of family, housing, consumer, and public benefits law. In addition to direct representation, MLSA provides community legal education, coordination and support for pro bono resources, and legal advice and referrals.

State Bar of Montana

$2,000 Special Project
Chris Manos, Executive Director

The State Bar of Montana provides services to Montana courts, attorneys, and the public in pursuit of its mission to lead the legal profession and serve the public interest. The State Bar of Montana's special project will provide a printed "Guide to Turning 18" (2nd Ed.) to schools and students across Montana, intended to introduce teens to the new legal issues they face upon turning 18.

Yellowstone CASA, Inc.

$5,000 Operating
Angela Campbell, Executive Director

Yellowstone CASA trains volunteers to provide a voice for abused and neglected children in the Yellowstone County court system. CASA volunteers promote children's best interests and advocate for safe, permanent homes.

Montana Justice Foundation celebrates local civic education

MJF Staff

This past January, the Montana Justice Foundation's Board of Directors unanimously agreed to adopt *We the People: the Citizen and the Constitution* as part of MJF's law-related education program. The staff and Board of the MJF are excited about this opportunity to help sustain and manage this proven civics education curriculum, making sure that we are doing our part to help build the next generation of thoughtful, informed leaders.

We the People: The Citizen and the Constitution is a national civic education program developed and directed by the Center for Civic Education under the Education for Democracy Act approved by the United States Congress. The primary goal of the program is to promote civic competence and responsibility in students. Each year, participating Montana High School Government and History classes compete in a statewide simulated congressional hearing. Traditionally, the winning class goes on to represent Montana at the National Finals competition of *We the People* in Washington, DC.

They say you often have to fight for anything worthwhile. Glacier High School's *We the People* team certainly fought long and hard to compete at the national finals in April. After two hours of intense head-to-head competition at the Montana Supreme Court in Helena last February, Glacier took first place in Montana's state competition, qualifying the team to represent Montana. However, in the wake of their hard-won victory the Glacier students faced what seemed to be an insurmountable obstacle: in order to compete in the national finals, Glacier High School would have to raise approximately $40,000 in just over two months.

Before 2011, *We the People* received federal funding through the U.S. Department of Education. In the 2011 Congressional Session, civic education program funding was cut as a casualty of doing away with "earmarks." As such, Montana's *We the People* lost approximately $75,000 in annual funding needed to run the program, which included the costs of sending the Montana state champion team to Washington, DC, to compete in the national finals.

Following the loss of federal funding, the winning school must raise about $1,500 per student in order to participate in the finals. This year, that task fell to Glacier High School.

Just weeks before its state champion team was scheduled to leave for our nation's Capitol, Glacier High School faced the crushing reality that it would not be possible to raise the necessary funding, despite having spent the previous eighteen weeks preparing for the national competition. However, the day after the school's administration made the grim decision to suspend fundraising efforts, an eleventh-hour emergency grant of $10,000 from the Center of Civic Education breathed new hope into the endeavor.

In a collaboration with the Montana Justice Foundation, Glacier's *We the People* state champion team performed a showcase at the MJF's March Lunch for Justice event in Kalispell. Through the truly extraordinary efforts of students,

EDUCATION, next page

Meet the statewide coordinator

MJF welcomes Richard Hildner as the new We the People state coordinator. Richard is a retired Montana high school history and government teacher who has been involved with We the People since 2006. Richard's enthusiastic dedication to Montana's students has continued far beyond his retirement from Glacier High School last June.

Richard is a 1968 graduate of the University of Montana. Richard worked his way through school by spending college summers as a smokejumper, and entered the Peace Corps immediately after graduation. He spent the next two years helping to establish the first nationwide fire management organization in Chile, where, if tales are to be believed, he shared office space with then-President Salvador Allende.

After returning from Chile, Richard spent seventeen years working for the US Forest Service in Oregon, Idaho, and Montana. He spent the next six years as a stay-at-home dad to his two children.

Richard began his teaching career in 1994, first at Flathead High and then at Glacier High School, teaching history and government. Later in his teaching career, Richard used We the People with great success, engaging students in the enduring questions of our democracy. In addition to guiding high school students and teachers across the state through We the People's curriculum and culminating competition, Richard serves on the Whitefish City Council.

Richard and his wife Suzanne are passionate about fly fishing and distance running. Trout tremble when they hear the pair splashing about on the North Fork of the Flathead River. They are both closing in on having run fifty marathons, and last October they completed their second 50-mile ultra marathon.

EDUCATION, from previous page

families, and community members, teacher Beau Wright and his team of champions were able to travel to Washington, DC and demonstrate their hard work and impressive understanding of our government and the constitution.

At the 2013 *We the People* national finals, Glacier High School students presented prepared arguments and answered extemporaneous questions about both current and historical Constitutional issues. In addition to two days of intense competition, the students were able to explore our nation's capital and witness government in action for themselves.

The MJF would like to extend a hearty congratulations on a job well done to Beau and the Glacier High School team. Thank you for your first-class representation of Montana at the finals this year.

Kate Kuykendall, MJF program director, was asked to serve as a judge in the competition, and very much enjoyed the opportunity to participate in two days of enthusiastic discussion of constitutional issues with students from across the nation. Kuykendall found the level of understanding and engagement displayed by this year's students to be both impressive and refreshing.

MJF's hopes for *We the People* in Montana are high. In the coming months, MJF will be sending two dedicated high school government teachers to the Grand Teton Summer Institute, where they will participate in a week of rigorous professional development focused on building the skills to teach civics and constitutional concepts with confidence. In addition, the MJF is exploring opportunities to bring *We the People* to schools in rural high-need areas, and hopes to collaborate with programs in Wyoming and Idaho to develop a strategy to reach high needs students and strengthen the civic capacity of students, schools, and communities.

Richard Hildner, coordinator for the *We the People* program in Montana, speaks very highly of the impact the program has on students and teachers.

"As a classroom teacher the *We the People* program was a powerful teaching device that empowered, motivated, and stimulated my government students. The program has all the ingredients of a progressive 21st century curriculum; academic rigor, cooperative learning, practical application, and critical thinking. In the classroom I witnessed my students becoming excited about their study of the constitution and the importance of civil discourse. From a professional standpoint, *We the People* invigorated my career and motivated me to work even harder to provide materials and resources for my students."

For more information on *We the People* or to support the program, please contact Kate Kuykendall at kkuykendall@mtjustice.org, call (406) 523-3920, or visit www.mtjustice.org.

—A RUSSIAN JOURNEY—

Stepping out of your comfort zone

By Lynn D. Baker

I believe that life is greatly enriched by occasionally stepping out of one's comfort zone. For some people, that can be as simple as going to an exotic foreign restaurant or engaging in a new adventure such as skydiving. My wife and I step out of our comfort zones when we travel to foreign countries where everything is different.

My wife, Sandra Erickson, has a doctorate in international business. Her area of interest is "cultural intelligence," a specialty that attempts to predict whether business people assigned overseas will succeed or fail in those assignments based on a number of factors and measurements she is developing. Her specialty is extremely important to the business world since a majority of Americans assigned to overseas positions fail at a cost to the company of up to a million dollars! As a result of Sandra's research, she has been invited to speak at a number of international business conferences in the United States as well as in Singapore, Thailand and other countries.

In addition, Sandra and I are very involved with the Open World Program which is funded through the Library of Congress and which brings small groups of professionals, governmental employees and businesspeople from former Soviet countries to the United States to learn more about certain topics. Sandra was chairman of the Great Falls Commission on International Relationships, the organization that sponsors these groups in Great Falls, for a number of years. Zander, Andy and Anders Blewett as well as Keith Tokerud and Steve Potts have also been active in the Great Falls Open World project.

In 2010, four Supreme Court justices and one District Court judge from the Russian Independent Republic of Tatarstan came to Great Falls through the Open World Program to study the rule of law. Sandra and I were lucky enough to spend 8 days with this group. They met with Judge Ken Neill, learning about the excellent juvenile justice program he started in Cascade County. They also spent several hours in Helena with Justice Pat Cotter who impressed them with her knowledge and hospitality. They were welcomed by the members of the Cascade County Bar Association at an evening reception. Their days were filled with many other meaningful and instructional activities. The judges, Maxim Belyaev, Radik Gilmanov, Lenar Valishin, Roman Dayvdov and Rafis Gafiyullin had never traveled to the United States before and were very impressed by their reception in Montana.

In November, 2011, we received an invitation from Evguenia (Jane), wife of Justice Maxim, inviting us to Russia to teach at the Tatar University of Management and Law (TISBI) in Kazan, 400 miles east of Moscow. Kazan is the capital of the Independent Republic of Taterstan, a Russian Federation economic hub which is 54 percent Muslim and predates Russia.

We were asked to teach law and business students for two weeks. We would teach two classes per day of 80 minutes each, five days per week. Of course, we accepted immediately and started making plans to be in Kazan at the beginning of the first semester of 2012 which started in September.

Coincidently, in January, 2012 Sandra received an invitation to present her research at an international business seminar to be held in September in Irkutsk, Siberia. Irkutsk is the capital of eastern Siberia and is located 80 miles north of Mongolia. We were also asked to teach students at Baikal National University of Economics and Law.

We quickly coordinated the two events and arranged to leave Montana on September 2 and go first to Irkutsk for the conference and then to Kazan with trips to Moscow and St. Petersburg as possible. We also arranged to meet with the Open World Country Director and staff in Moscow

We arrived in Moscow where we spent three days exploring the city and meeting with Open World staff before flying to Irkutsk, another 2,700 miles to the east.

Irkutsk is a modern city of 750,000 inhabitants. Baikal University has 30,000 students from all over central Asia and China and we taught two classes per day of 80 minutes each, just like we had agreed to do in Kazan. Our classes were attended by between fifty and seventy-five students. We were housed in a university-owned apartment on campus and all of

JOURNEY, next page

Photo courtesy of Lynn D. Baker

President and Justices of the Tatarstan Supreme Court and invaluable translator, Jane (second from left). Lynn Baker and Sandra Erickson are center and center left.

JOURNEY, from previous page

our meals were provided.

After our first class, we enlisted the assistance of the English language department to translate since we were uncertain of the students' level of understanding conceptual English. My subjects included: The Rule of Law; The Foundations of American Democracy: the Declaration of Independence, the Constitution and the Bill of Rights, Slavery, The Civil Rights Movement and Human Rights. My wife taught Cultural Intelligence, Cross Cultural Adaptation and international business subjects.

My wife and I had developed these classes together so we mainly team- taught which was apparently a novel approach there. We were continually asked about our teaching methods of power point, show and tell with objects and team teaching system. Frankly, if one is going to present two back to back classes of 80 minutes each, team teaching is the only way to go.

We had arrived on Monday and started teaching only a few hours after our all night flight, something I would not do again. On Thursday the international economic conference began. Sandra presented her paper on Thursday afternoon with delegates from Indonesia, Monaco, France, Russia and Morocco to name a few countries. The delegates from Morocco, whom we had quickly befriended, turned out to be economic advisors to the King of Morocco. Sandra's presentation was well received and she entertained the most questions of any of the speakers. Later, the delegates from Indonesia invited her to speak at conference in Jakarta in the spring.

While Sandra remained at the conference, I slipped away to work with a group of English teachers from the law faculty. In Russia, as in most of the world, a law degree is earned after either four or five years of undergraduate education. The English teachers were extremely interested in discussing the differences between the two legal systems and legal education. I had difficulty ending the conversation even after the meeting ended.

The remainder of our time in Irkutsk was spent socializing with conference delegates at the rector's datcha (summer house), touring Lake Baikal, (the largest fresh-water lake in the world with 22% of the world's fresh water)and talking with faculty and students. In all, we were received warmly and treated with the upmost courtesy and respect. We were the only native English-speaking teachers that had taught at Baikal University. We agreed to return to Baikal University in two years to teach for a longer time.

The flight from Irkutsk to Moscow was uneventful after our seat-mate, a large Russian-speaking man who apparently believed he could make me understand more Russian by speaking

JOURNEY, next page

JOURNEY, from previous page

louder and louder, finally went to sleep. As an aside, the meals were served in transit were very good, something we experienced on both Russian planes and trains.

In Moscow we were met by Henry Hodgkins who is originally from Helena but now lives in Kazan. Henry had purchased our railroad tickets (rail tickets cannot be purchased out of country and must be purchased within 30 days of travel as the train schedule changes every month) and had agreed to help us navigate the trip between the Moscow airport, the train station and Kazan this part of the trip took 36 hours.

After an interesting trip on the train, sharing our compartment with both Henry and a young Russian woman, we arrived in Kazan to be greeted by four of our Russian judge friends and Maxim's wife, Jane. They loaded us and our luggage into two Land Cruisers and whisked us off to our beautiful 1000 square foot, two-bath apartment, generously provided by the university.

We were also provided a Russian cell phone, a SIM card for our laptop which allowed internet access from anywhere, and, we were soon to discover, a shiny new BMW and driver, courtesy of our friend Maxim who had been presented this luxury as a result of his elevation to the Deputy in Charge of Criminal Matters in the Tatarstan Supreme Court.

Kazan is a modern city of 1.5 million people and the capital of the Independent Republic of Tatarstan. Taterstan is an economic powerhouse in Russia. It has enormous oil fields and therefore enormous wealth. When the Soviet Union broke up in 1991, there was some talk about Tatarstan becoming totally independent but a deal was reached with Moscow which gave Tatarstan a great measure of political and economic independence but kept them part of Russia. As a result of that deal, Tatarstan receives much more in assistance from Moscow than it pays in taxes.

Our friends, Maxim, Radik, and Lenar are all Supreme Court Justices. Our other friend, Roman, is currently a district court judge but has been appointed to the supreme court and took office in January, 2013. Maxim just received a doctorate in law and his wife, Jane, has a doctorate in languages and is the vice-rector at TISBY University. These are truly wonderful friends who are at the very top of Russian society.

While we were teaching at the TISBY, our friends arranged an amazing array of activities for us. Including listening to live American Jazz at a blues and jazz club, boating and dining on the Volga River with Maxim, Jane and their friend Murrat, attending a hockey game in Kazan's new 10,000 seat arena (in a private box, no less, with a catered dinner), attending the Kazan Opera and much, much more. We had been treated very well in Irkutsk but our reception in Kazan was truly outstanding.

Our classes went very well. Again, we taught two classes a day, each 80 minutes long. We team-taught again and I spent most of my time teaching about the rule of law and how it had been build into the American legal and political structure. Sandra continued with her business subjects.

Even though TISBY University has only 10,000 students, we generally had between 60 and 75 students in each class. We tried, with limited success, to have student-teacher interaction. Apparently, Russian students are used to a strictly lecture (no questions) approach.

Each day we would either walk or be driven to the university, teach our classes and go to lunch at a private dining room with Jane, and then be whisked off to one of the adventures stated above.

During our second week in Kazan, I was interviewed on Russian television. The questions were about my perceptions of Russia, my thoughts about the jury system and my interaction with Russian students. I was given a copy of that interview.

On another day we had lunch with the president and vice president of the Tatarstan Supreme Court, as well as Maxim and Jane. Both had been to the United States as part of the Open World Program. We spent several hours toasting the program and our future relationship and discussing differences between our legal systems.

In addition, we spent several afternoons looking at both the district courts and the supreme court. The Tatarstan District Courts are trial courts of limited jurisdiction, much like our justice courts although judges must be lawyers. The Supreme Court is like our state district court. All judges are appointed and are government employees. Criminal prosecutors are also government employees and are required to wear uniforms.

Courtrooms are similar but arranged somewhat differently. Opposing attorneys sit behind tables facing each other just in front of the judge. Criminal defendants are seated away from their attorneys or locked inside a glass or metal-barred enclosure.

There are nine district courts in Kazan housed in functional, well-appointed buildings holding 10 or more judges, holding cells, six to eight courtrooms and administrative offices. The Tatarstan Supreme Court building is two years old and reminded me of our new federal court houses. In fact, the judges stated they had made revisions to their building after visiting the Missouri River Federal Court House in Great Falls and talking to Judge Magistrate Keith Strong. There are 100 Supreme Court judges in Tatarstan and 50 additional judges were added in January.

We watched part of a criminal trial in both the Supreme Court and in one district court. The district court trial was a real estate dispute which involved the sale and development of a piece of land with an unclear title. Such disputes are fairly common since private land ownership has only been around since the fall of communism.

The Supreme Court case was more interesting in that a former police officer had been charged with intimidating businessmen to purchase services from his new business. We watched a hearing during which the defendant asked for a change of venue. Our friend Maxim was the judge and he didn't expect the defendant's attorney to show up for the hearing. Maxim told us that it was not uncommon for defense attorneys to miss hearings. Maxim let the defendant testify and made an immediate ruling to allow the change of venue.

One afternoon, Jane took us to meet with the officers and senior members of the Taterstan Bar Association. We spent an enjoyable four hours discussing various legal topics including fees (our contingency fee needed some explanation), courtroom

JOURNEY, next page

Photo courtesy of Lynn D. Baker

Classroom photo: 75-plus students per class.

JOURNEY, from previous page

procedures, new opportunities for attorneys now that Russia is entering the World Trade Organization and normalizing trade with the US, and other topics. Of course, as always, the hottest topic was the jury system.

Even though the jury system was adopted fifteen years ago, it is still viewed with great suspicion. When I was interviewed on Russian television there were several questions about the effectiveness of the jury system. Several members of the bar association also expressed concerns that jurists are not legal experts and therefore could not be expected to make sound legal decisions; too emotional or forgiving, they thought.

The judges told me that an accused criminal could choose a trial with one judge, a three judge panel or a jury. Maxim said that many criminals chose a jury because Russians are very forgiving people. In criminal trials witnesses can have their identity hidden for good cause and the officials demonstrated "voice altering" software which made my voice sound like that of a 6-year-old girl.

The day of departure from Kazan, Jane and the driver took us to the airport where we flew to Moscow and then on to St. Petersburg. In St. Petersburg we met our friend Pasha who had been a facilitator for two of the Open World delegations in Great Falls where he had stayed with Zander and Andy Blewett.

The next five days were spent touring the most fascinating city of Europe with visits to the many palaces of the Romanovs, the Tzars of Russia for 300 years. In fact, we learned, it was largely the excesses of the Romanovs that prompted the Russian Revolution of 1917.

We took the high speed train back to Moscow were we once again met with the Open World staff and US Embassy staff. During our initial visit they had asked us to give presentations about Open World in Russia and to gather as much information as possible about interest in the program. We spent one hour and $30.00 to get to the Open World office by taxi and $1.00 and fifteen minutes returning to our hotel by metro. It pays to learn the subway.

Thirty-one thousand miles, 22 hours and 14 time zones later we were very happy to arrive home in Great Falls. We had experienced a serious adventure that definitely made us step out of our comfort zone!

As I write this, we have been home for several months and have had a chance to record all the things we learned on our adventure. Let me share some of them with you.

Salaries in Russia are generally low compared to American standards. Attorneys in Russia make between $7,500 and $30,000 per year with some attorneys from top law firms in Moscow making more. University professors with a Ph.D. and seven years of experience, make about $700.00 per month with a housing allowance.

One of the largest problems in Russia is the lack of

JOURNEY, next page

Photo courtesy of Lynn D. Baker

Tatarstan Bar Association officers and directors.

JOURNEY, from previous page

implementation of the rule of law. Currently, Russia works under the law of relationships. Russia is a country in transition with regard to the rule of law, a fact that impedes the development of business and makes foreign companies nervous about expanding into Russia. The Russian government has recognized this problem and is attempting to strengthen the rule of law but the progress is slow.

One of the problems in strengthening the rule of law in Russia is the absence of rule of law education in most law schools. Although moves have been made in recent years to broaden law school curricula, most law schools teach a rigid schedule of required courses with almost no options. This rigidity stems from Soviet times when lawyers were trained exclusively to work in government enterprises, not represent individuals or companies. The concept of the rule of law is either not taught at all or is just casually taught in most law schools. And, it is impossible for individual law schools to make changes in the curriculum since approval must come from Moscow.

Under the Soviet education system, students received a free university education if their high school grades and pre-university testing scores were high enough. Now, with the creation of a growing number of private universities, things are changing. If students have low high school grades and do poorly on the pre-university tests, they may still enter university but have to pay tuition, generally $1,500 to $5,000 per year, depending on the school.

On this trip, Sandra and I learned more than we could ever write. We learned that Russians and Tatars are wonderful people with kind hearts and unequaled hospitality. We learned that all people want the same things: a good life, enough to eat, education for their children and a job. We also learned that a society built on relationships is not necessarily a bad thing.

We will return to both Irkutsk and Kazan. We thank our new friends in Irkutsk for their hospitality and our old friends in Kazan for their kindness and friendship. The judges in Kazan have promised to write an article for The Montana Lawyer and Jane has agreed to translate. We will hold them to that promise.

If you have the chance to go to Russia, by all means go to Irkutsk in beautiful Siberia. But, as I promised my Tatar friends, I would tell you to go to Kazan first, it is truly the heart of Russia.

Lynn D. Baker is an attorney practicing in Great Falls.

In-court identifications not hearsay, are admissible

By Cynthia Ford

Sworn witness, in court, subject to jury observation and cross-examination:

> A: "I was there, I saw him run out of the liquor store with a gun in his hand."
>
> Q: "Can you identify the person you saw?"
>
> A: "Yes, he is right over there (pointing), wearing the orange jumpsuit."

This is not hearsay, because of the first requirement of the hearsay definition in 801. This is not an out-of-court statement. The fact that it is an in-court statement means that the hearsay rule does not apply. The dangers of hearsay do not exist: the witness is sworn, the jury can observe the witness as she testifies and use that observation to help decide if she is telling the truth, and opposing counsel has the opportunity to test the identification through cross-examination, ""greatest legal engine ever invented for the discovery of truth."[1] Because the in-court identification is not hearsay, and it is based on the witness' personal knowledge, Rule 802 does not apply and the testimony is admissible.

Out-of-court identifications look like, smell like, hearsay, but are also admissible as non-hearsay

As we have seen in earlier installments, Rule 801(d) operates as an exception not to the hearsay rule (802), but to the hearsay definition of 801(c). M.R.E. 801(c) provides that "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." M.R.E. 801(d) is entitled "Statements which are not hearsay." The statements it lists are all made out-of-court and are offered to prove the truth of the matter they assert. Nonetheless, 801(d)'s magic wand transforms them from clear hearsay to clear non-hearsay and thus beyond the reach of Rule 802. Rule 801(d)(1) lists three types of prior statements, made out-of-court, by people who later come to court as witnesses,[2] which are not hearsay even when offered for the truth of the matter.

The last of these prior statements by witnesses is M.R.E. 801(d)(1)(C):

> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … (C) **one of identification of a person made after perceiving the person.** (Emphasis added).

The Montana Commission Comment to this subsection indicates that, different from the variation between the Montana and federal versions of Rule 801(d)(1)(B), the Montana language of (C) is identical to the then-existing version of F.R.E. 801(d)(1)(C). [3] The Commission gave three reasons for this exception to the hearsay definition, quoting both McCormick and the federal Advisory Committee:

> There is substantial authority for the admissibility of these statements, "often without recognition of the presence of a hearsay problem". McCormick, Handbook on the Law of Evidence 603 (2d ed. 1972). The reasons for admitting these types of statements are first, "the generally unsatisfactory and inconclusive nature of courtroom identification ... "; second, the higher reliability of prior identifications "made at an earlier time under less suggestive conditions" (Advisory Committee's Note, supra 56 F.R.D. at 296); and third, questions as to the reliability of identifications are really concerned with constitutional issues and not a hearsay problem. Id.

The Commission also noted that there were only two Montana cases dealing with the admissibility of out-of-court identifications, and stated that "neither is on point."

Montana Caselaw before MRE 801(d)(1)(C)

The two cases cited by the Commission are State v. Fisher, 54 Mont. 211, 215, 169 P 282 (1917), and State v. McSloy, 127 Mont. 265, 273, 261 P2d 263 (1953). In both, there were pretrial identifications which were recounted at trial, over objection, and the Montana Supreme Court affirmed the admissibility of the

IDENTIFICATIONS, next page

1 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 1367, at 32 (James H. Chabourn ed., Little Brown 1974). See generally Davis v. Alaska, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.")

2 I have previously discussed the admissibility of prior inconsistent statements (801(d)(1)(a)) and prior consistent statements (801(d)(1)(b)) in the two previous issues of Montana Lawyer.

3 The current language of F.R.E. 801(d)(1)(C) is still similar:
"(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement: … (C) identifies a person as someone the declarant perceived earlier."

IDENTIFICATIONS, from previous page

identifications on appeal.

State v. Fisher was a murder case, in which the two defendants were convicted and sentenced to death for a Butte murder during a "hold-up." The victim, Higgins, was taken to a hospital and lived several weeks before succumbing to septicemia. The police brought the two defendants to his bedside twice, once on the day after the shooting and again a few days later. The first time, Higgins identified O'Neill, one of the men in custody, as the man who shot him (he was not sure about the other man). The Supreme Court opinion reproduces the colloquy between accused and accuser which followed the identification:

> O'Neill responded: "Brother, look here; this is a very serious proposition; be careful, you know, and be sure."
>
> Higgins rejoined:"I am quite sure; it was either you or your ghost."
>
> The second identification occurred at the hospital later in the month, a day or two before Higgins died:
>
> Towards the last of September the appellants, pursuant to a promise made them by the officers, were again taken before Higgins in the St. James Hospital. Higgins had been told that the officers did not wish the appellants inculpated unless they were the guilty parties; yet upon their presentation Higgins said to O'Neill:
>
> "You are the man that laid me here in bed; you are the man that shot me; I am positive of that," –to which O'Neill answered:
>
> "This is a very serious proposition; be careful; are you sure I am the man?"
>
> And Higgins rejoined:
>
> "You are the man."

State v. Fisher, 169 P. 282, 283 (Mont. 1917).

Higgins died before trial, and thus was not a witness; the police officers at the two hospital identifications did testify about those identifications.

On appeal, the defendants contested the admissibility of Higgins' out-of-court identifications, arguing that the prosecution had not laid adequate foundation for a "dying declaration."

The Supreme Court upheld the admission of the identifications, but on grounds different from either "identification" or "dying declaration:" "The evidence was admissible as showing the conduct and declarations of Higgins within the observation of the accused, and their conduct in relation thereto, all touching a matter vital to the issues in this case." State v. Fisher, 169 P. 282, 284 (Mont. 1917). (This seems to be the "res gestae" or "transaction" trump to a specific evidentiary objection, which itself is grist for an entire mill and hopefully would not work today). What is important for our purposes is that the pretrial identification was admissible. Note, however, that Higgins' identifications fail the definition of non-hearsay under M.R.E. 801(d)(1)(C) because Higgins did not testify at trial and was not subject to cross-examination about the pretrial identifications. Thus, today his identifications would be hearsay (and, even if a hearsay exception applied, would violate the defendants' constitutional right of confrontation).

Similarly, the pretrial identification in State v. McSloy was admitted and affirmed on appeal. (McSloy later was overruled on other grounds). The McSloy case involved the rape of a 10 year old boy by a stranger in Anaconda. The stranger had been in a car, talking to a boy named Freddie "Sonny" Martz. The victim, James Connors, knew Sonny and rode his bicycle up to the driver's side of the car. The driver asked James if he wanted a job, which would require driving a bit west of town but would only take a short time. James agreed and got in the car. The driver took Jimmy to a secluded spot, tied him up, and raped him. Jimmy escaped and ran to a nearby home.

McSloy was soon arrested and placed in a lineup. Sonny Martz was brought in and immediately identified McSloy. Sonny testified at trial. In the courtroom (so not hearsay), he identified defendant McSloy as the man who drove Jimmy away. Sonny also testified that the defendant was the same man he had identified in the sheriff's office lineup shortly after the crime. Defense counsel cross-examined Sonny about the identifications, and the prosecutor conducted redirect. Then the victim's father testified about what he saw when Sonny was confronted with the lineup and identified McSloy as the perpetrator.

Error is assigned in permitting Pat Connors, the father of prosecuting witness, to testify as to what he observed when the witness Martz identified defendant in the sheriff's office. He testified: "Mr. Derzay called Sonny Martz into the office where they placed various men in a line-up around the office-men in plain clothes, and these men were mostly dressed for the rodeo-it was about the time of the rodeo here in Anaconda and they were dressed up in western outfits, plaid shirts, etc., and they asked Sonny Martz if he saw the man in here that had offered him the job and the ride, and the boy said, 'That's the man,' and the door to the office was open a little and Mr. Derzay told Sonny to go over and touch the man."

The cases bearing upon this method of proving the identification of defendant are in conflict but the trend of recent cases is to admit such evidence.

State v. McSloy, 127 Mont. 265, 273-74, 261 P.2d 663, 667 (1953). The Montana court followed the trend it described, and held the testimony about the pretrial identification admissible:

> The court did not err in permitting the witness to testify as to what he saw and observed regarding the identification. The only effect of the corroborating evidence is to show that the prosecuting witness identified the accused at a time when there had been no opportunity for the witness to be swayed by any suggestion of others. Defendant's counsel was still privileged to argue to the jury that the witness was mistaken in the identification, and this is so whether one or a dozen persons witnessed the identification.

IDENTIFICATIONS, next page

IDENTIFICATIONS, from previous page

> In other words, the correctness of the identification still depends upon the accuracy of the recollections of the one person making the identification.

State v. McSloy, 127 Mont. 265, 275, 261 P.2d 663, 668 (1953). The Court supported its admission of pretrial identifications with an extensive quote:

> Mr. Wigmore in his work on Evidence discusses this question as follows: 'Ordinarily, when a witness is asked to identify the assailant, or thief, or other person who is the subject of his testimony, the witness' act of pointing out the accused (or other person), then and there in the court-room, is of little testimonial force. After all that has intervened, it would seldom happen that the witness would not have come to believe in the person's identity. The failure to recognize would tell for the accused; but the affirmative recognition might mean little against him.
>
> 'The psychology of the situation is practically the same as when Recent Contrivance is alleged. To corroborate the witness, therefore, it is entirely proper (on the principle of § 1129, ante) to prove that at a former time, when the suggestions of others could not have intervened to create a fancied recognition in the witness' mind, he recognized and declared the present accused to be the person. If, moreover (as sometimes is done) the person was then so placed among others that all probability of suggestion (by seeing him handcuffed, for example) is still further removed, the evidence becomes stronger. The typical illustration is that of the identification of an accused person at the time of arrest * * *.
>
> 'This is a simple dictate of common sense, and was never doubted in orthodox practice. That some modern Courts are on record for rejecting such evidence is a telling illustration of the power of a technical rule of thumb to paralyze the judicial nerves of natural reasoning.' IV Wigmore on Evidence, 3d ed., § 1130, pp. 208, 210. Many cases are there cited, some taking the one view and some the other. In the note on page 214 the author in criticizing an Oklahoma case excluding such testimony said, 'Courts are lamentably blind to the error of this doctrine, which flies in the face of common experience.'

127 Mont. at 274-75, 261 P.2d at 667-68 (1953).

Thus, before the M.R.E. were promulgated and adopted, the Montana Supreme Court allowed pretrial identifications into evidence, whether through the testimony of the identifier or through the testimony of others who observed the prior identification. M.R.E. 801(d)(1)(C) is consistent with this jurisprudence, but imposes a requirement that the identifier testify at trial.

Montana Caselaw after MRE 801(d)(1)(C)

The "identification exemption" from the definition of hearsay is virtually absent from Montana jurisprudence. I searched Westlaw Next for the term "801(d)(1)(C)" and came up with 20 cases. However, when I read and analyzed these cases, I found that none of them actually applied 801(d)(1)(C) at all. Interestingly, in several of the reported cases a pretrial identification made by a person who later testified at trial could have been admitted simply under Rule 801(d)(1)(C), but that subsection was never discussed in the appellate opinion, and apparently not at trial either. Using this subsection would have greatly reduced the difficulties in these cases, at both the trial and appellate levels. I will discuss the cases in reverse chronological order.

In the 2001 case of State v. Giant, the victim reported to both the hospital and police that she had been attacked by her husband, Giant. Accordingly, the State charged and prosecuted the husband, relying so heavily on the victim's identification that it failed to do any forensic testing of the evidence found at the home. At trial, though, Mrs. Giant surprisingly testified that the attacker was not the husband but her eldest son, and that she purposely misidentified the husband both to protect her son and to punish her husband. The jury convicted the husband, although the only evidence of his guilt was the prior identification (recanted at trial) and the fact that the husband had fled after the attack. Under Montana law, neither piece of evidence standing alone could justify the verdict.[4] On appeal, the issue was whether the combination of the two would suffice.

The Montana Supreme Court approached the problem as one of admissibility of the witness' prior inconsistent statement, rather than of identification. The Supreme Court observed that the rationale for admission of such statements outside the definition of hearsay was similar to that for the admission of pretrial identifications:

> ¶ 18 The original version was initially recommended by the Advisory Committee on Rules of Evidence, Rules of Practice and Procedure of the Judicial Conference of the United States (Advisory Committee). Rules of Evidence for United States

4 "We have previously held that a criminal conviction cannot be sustained where the only evidence of some essential element of the crime is a prior inconsistent statement. State v. White Water (1981), 194 Mont. 85, 89, 634 P.2d 636, 639; State v. Gommenginger (1990), 242 Mont. 265, 278, 790 P.2d 455, 463; State v. Jolly (1941), 112 Mont. 352, 355-56, 116 P.2d 686, 687-88 (holding prior inconsistent statement insufficient for conviction before the current Montana rule was enacted); compare State v. Fitzpatrick (1980), 186 Mont. 187, 195-98, 606 P.2d 1343, 1348-49 (holding prior inconsistent statement of witness admissible as substantive evidence); State v. Woods (1983), 203 Mont. 401, 411-12, 662 P.2d 579, 584." State v. Giant, 2001 MT 245, 307 Mont. 74, 79-80, 37 P.3d 49, 52-53 overruled by State v. Swann, 2007 MT 126, 337 Mont. 326, 160 P.3d 511.
"Further, we have frequently held that evidence of flight is not sufficient in itself to prove guilt. State v. Davis, 2000 MT 199, ¶ 41, 300 Mont. 458, ¶ 41, 5 P.3d 547, ¶ 41; State v. Hall, 1999 MT 297, ¶ 47, 297 Mont. 111, ¶ 47, 991 P.2d 929, ¶ 47; State v. Patton (1996), 280 Mont. 278, 290, 930 P.2d 635, 642; State v. Bonning (1921), 60 Mont. 362, 364-65, 199 P. 274, 275 overruled on other grounds by State v. Campbell (1965), 146 Mont. 251, 263, 405 P.2d 978, 985; State v. Paisley (1907), 36 Mont. 237, 252, 92 P. 566, 571; see also United States v. Flores (5th Cir.1977), 564 F.2d 717, 718-19 (finding flight alone insufficient to infer guilt beyond a reasonable doubt)." State v. Giant, 2001 MT 245, 307 Mont. 74, 80, 37 P.3d 49, 53 overruled by State v. Swann, 2007 MT 126, 337 Mont. 326, 160 P.3d 511.

IDENTIFICATIONS, next page

IDENTIFICATIONS, from previous page

> Courts and Magistrates, Amendments to the Federal Rules of Civil and Criminal Procedure, 56 F.R.D. 183, 293 (1973); Blakey, at 6. This version was recommended based on the assertion by modern commentators on evidence that cross examination during trial was sufficient both to remove prior inconsistent statements from the definition of hearsay, and to provide the jury a means to assess the reliability and trustworthiness of these statements. WEINSTEIN'S, §§ 801App.01 [4] at 14-18, [5] at 36-36.3 (Advisory Committee's letter to the Senate Judiciary Committee and clarification after Rule 801(d)(1)(A) was enacted); Blakey, at 41; 56 F.R.D. at 295-96. These commentators asserted that this reasoning was as sound as the rationale behind the other exclusions and exceptions from the hearsay rule. WEINSTEIN'S, § 801App.01[4] at 18; compare Rule 801(d)(1)(C), M.R.Evid., (pretrial identification); … Finally, the original proposal was also supported by findings that prior statements made nearer in time to an incident were more accurate and free from outside influences. MCCORMICK, § 251, at 116 & n.12; WEINSTEIN'S, § 801 App.01[4] at 15-16.
>
> ¶ 19 The Commission Comments to Montana Rule 801(d)(1)(A) indicate that Montana relied on the above rationale behind the original federal proposal in enacting this State's rule. The Comments state that the Commission believed cross examination during trial was sufficient to remove such statements from the definition of hearsay and that to require the prior inconsistent statement be made under trial conditions would defeat the usefulness of the rule. (Emphasis added).

State v. Giant, 2001 MT 245, 307 Mont. 74, 81-82, 37 P.3d 49, 54 overruled by State v. Swann, 2007 MT 126, 337 Mont. 326, 160 P.3d 511d. However, the Court never made the direct connection between 801(d)(1)(C) and the witness' identification of the husband as her attacker. If M.R.E. 801(d)(1)(C) had been used, it clearly would have allowed evidence that the wife had first identified the husband, without having to establish that this was inconsistent with her trial testimony. As always, the proponent should point out that there are two separate bases for admission of the contested evidence
wherever possible.

The Montana Supreme Court also decided an "identification" case in 1996, but again inexplicably made no reference at all to M.R.E. 801(d)(1)(C). Further, the Court wrongly held that the pretrial identification of the father as "the shooter" by his daughter, who testified at trial, was inadmissible. State v. Stuit, 277 Mont. 227, 921 P.2d 866 (1996). Stuit was convicted of felony criminal endangerment. At trial, the investigating police officer testified that he saw bullet holes in the door jamb leading to the children's room. The mother and the daughter told the officer that the father was the shooter. The father's defense was that someone else, who had recently moved from the house, shot the gun.

The mother did not testify at trial, but Shannon, the daughter, did:

> Shannon testified the offense occurred in the month of December 1992. She further testified that she was sitting on the couch with her mother and Stuit when he shot the rifle five times into the wall. Thus, Shannon testified from personal observation as to the shooting, the identity of the shooter, and the approximate date. The admissible testimony from the officer that there were at least seven bullet holes in the wall and door jamb, and that from his experience the five bullet holes in the wall could have been made from someone sitting on the couch in the living room, corroborated her testimony. He also testified that he had recovered a .22 rifle from the bedroom Sharon and Stuit had shared. From Shannon's testimony as to her personal observations and the admissible corroborating testimony of the officer, the State established the occurrence of the shooting and the identity of the shooter.
>
> State v. Stuit, 277 Mont. 227, 232, 921 P.2d 866, 870 (1996)

However, the Court held that that part of the officer's trial testimony in which he identified Stuit as the shooter, based on the identification of Shannon before trial, was inadmissible. The Supreme Court applied the general definition of hearsay, but apparently neither counsel nor the Court read any further in Rule 801 than (c):

> Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), M.R.Evid. The police officer's testimony at trial as to the identity of the shooter and the specific date of the offense was admittedly based on out-of-court statements made to him by Sharon McLain and her daughter, Shannon. The officer had no personal knowledge of the alleged incident which had occurred approximately two weeks prior to his investigation.

State v. Stuit, 277 Mont. 227, 230-31, 921 P.2d 866, 868-69 (1996). The State apparently conceded that the pretrial statement of identity was hearsay, and claimed on appeal that Shannon's pretrial identification as admissible under an exception to the hearsay rule, M.R.E. 804(a)(3). The State did not argue at either level that it was not hearsay at all per 801(d)(1)(C). The Supreme Court held that the trial judge had erred in admitting the officer's testimony as to the identity of the shooter. (It found the error to be harmless, and affirmed the conviction).

In fact, if the prosecutor and the Supreme Court had correctly applied M.R.E. 801(d)(1)(C), the jury should have been able to hear both Shannon's in-court identification of her father and, from either Shannon herself or the police officer or both, the fact that on the night of the investigation, Shannon also identified her father as the shooter.

IDENTIFICATIONS, next page

IDENTIFICATIONS, from previous page

The opinion does not contain the verbatim testimony of the police officer, so perhaps the problem lay in the phrasing of the question. If the prosecution asked the officer: "Who was the shooter?" a proper and sustained objection would be either (or both—they are the flip sides of each other) "Foundation—no personal knowledge—may I voir dire?" or "Hearsay—may I voir dire?" However, M.R.E. 801(d)(1)(C) clearly would allow these questions from either side: "Did Shannon identify the shooter on the night you first visited the home?" and "Whom did she identify then?" Different from 801(d)(1)(A) and (B), it does not matter whether the identification is consistent or inconsistent with the testimony at trial. Thus, 801(d)(1)(C) authorizes all parties to admit pretrial identifications so long as the identifier does testify at trial.

In State v. Harris, 247 Mont. 405, 808 P.2d 453 (1991), defendant Harris was accused of sexual abuse of two young children for whom she babysat. One of the witnesses at trial was a therapist who specialized in sexual abuse patients, and who had treated both children. The Supreme Court, and presumably the trial court and lawyers, embarked on a difficult and divisive analysis of Montana's hearsay exception for medical diagnosis and treatment (803(4)) and the residual or catch-all exceptions found at the end of Rules 803 and 804.

The opinion, again, totally omits any discussion of Rule 801(d)(1)(C), even though the dissent framed one issue as "Did the District Court err in allowing Ms. Burns [the therapist] to identify the defendant as the perpetrator of the alleged crimes by testifying as to hearsay statements made to her by the victims during the course of therapy?" State v. Harris, 247 Mont. 405, 422, 808 P.2d 453, 463 (1991).

The plain language of Rule 801(d)(1)(B) answers the question: if the identifier testifies at trial (as both victims did), then evidence of pretrial "identification of a person made after perceiving the person" is not hearsay. There is no need to discuss the parameters of any specific hearsay exception, or of the residual exceptions. Ms. Burns should have been able to tell the jury that the victims had identified to her the person or persons who had abused them. The majority of the Supreme Court held just the opposite: "Because Robby was available to identify and did indeed **identify** defendant as the perpetrator of the crime, the hearsay statements to which Burns testified were not the most probative evidence on the matter. As we noted above, Burns' testimony on this issue was merely cumulative, serving only to bolster Robby's testimony." State v. Harris, 247 Mont. 405, 414, 808 P.2d 453, 458 (1991) (emphasis added). The strong dissent also failed to apply the clearest and easiest analysis, 801(d)(1)(C).

In contrast to the dearth of Montana cases, there is a plethora of federal cases interpreting 801(d)(1)(C)

The United States Supreme Court decided the seminal case on identification as non-hearsay in Owens v. U.S., 484 U.S. 556 (1988). A prison guard was assaulted, resulting in a severe head injury and memory problems. The FBI visited him twice in the hospital shortly after the attack. On the first visit, he couldn't remember anything about the incident. On the second visit, he named Owens as the attacker, and then picked him out of an array of photographs. The victim testified at trial, but said that he no longer had had any present recollection of the event. He did remember making the prior identification in the hospital. On appeal, the 9th Circuit upheld both of the defendant's challenges to introduction of the pretrial identification: hearsay and confrontation.

The Supreme Court granted cert to resolve conflicts in the circuits on both issues, and concluded that neither the hearsay rule nor the right of confrontation clause had been violated.

The conviction was affirmed. Discussing F.R.E. 801(d)(1)(C), the Court observed:

> This reading seems even more compelling when the Rule is compared with Rule 804(a)(3), which defines "[u]navailability as a witness" to include situations in which a declarant "testifies to a lack of memory of the subject matter of the declarant's statement." Congress plainly was aware of the recurrent evidentiary problem at issue here-witness forgetfulness of an underlying event-but chose not to make it an exception to Rule 801(d)(1)(C).
>
> The reasons for that choice are apparent from the Advisory Committee's Notes on Rule 801 and its legislative history. The premise for Rule 801(d)(1)(C) was that, given adequate safeguards against suggestiveness, out-of-court identifications were generally preferable to courtroom identifications. Advisory Committee's Notes on Rule 801, 28 U.S.C. App., p. 717. Thus, despite the traditional view that such statements were hearsay, the Advisory Committee believed that their use was to be fostered rather than discouraged. Similarly, the House Report on the Rule noted that since, "[a]s time goes by, a witness' memory will fade and his identification will become less reliable," minimizing the barriers to admission of more contemporaneous identification is fairer to defendants and prevents "cases falling through because the witness can no longer recall the identity of the person he saw commit the crime." H.R.Rep. No. 94-355, p. 3 (1975). See also S.Rep. No. 94-199, p. 2 (1975), U.S.Code Cong. & Admin.News, 1975, pp. 1092, 1094. To judge from the House and Senate Reports, Rule 801(d)(1)(C) was in part directed to the very problem here at issue: a memory loss that makes it impossible for the witness to provide an in-court identification or testify about details of the events underlying an earlier identification.

U.S. v. Owens, 484 U.S. at 562-63, 108 S.Ct. at 844 (1988). Thus, the Court held that neither the Confrontation Clause nor Federal Rule of Evidence 802 is violated by admission of an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification.

484 U.S. at 564, 108 S.CT. at 845.

WestlawNext reports 411 federal cases which discuss *Owens* and therefore pretrial identifications. (For the purposes of this article, I have not read all of those cases. Obviously, some of them

IDENTIFICATIONS, next page

IDENTIFICATIONS, from previous page

are solely about the Confrontation Clause component, while others focus on the rule.) When the search is changed to find for all federal cases discussing 801(d)(1)(C), it brings back 121 cases. The most recent of these sums up the current federal application:

> [E]xtrajudicial witness identifications are routinely used as substantive evidence of guilt." Foxworth v. St. Amand, 570 F.3d 414, 427 (1st Cir.2009) (citing Samuels v. Mann, 13 F.3d 522, 527 (2nd Cir.1993); Fed.R.Evid. 801(d)(1)(C). Moreover, the fact that neither of the Taits identified petitioner in court would not render the evidence insufficient to convict petitioner. "There is no requirement, either in the Constitution or in the usual rules that apply to the admission of evidence, that a witness who makes an extrajudicial identification of a criminal defendant must repeat the identification in the courtroom." Foxworth, 570 F.3d at 427; See also Bugh v. Mitchell, 329 F.3d 496, 505–11 (6th Cir.2003) (upholding the admission of out-of-court statements of a minor victim which were admitted under Ohio Evid. R 801(d)(1)(C) as a prior identification of petitioner, even though victim was unwilling to testify about the statements at trial and did not remember making them).
>
> Thomas v. Perry, 2013 WL 1747799 (E.D.Mich. 2013).

The fact that Montana's version of 801(d)(1)(C) was specifically adopted verbatim from the F.R.E. version means that these federal cases will be very helpful to Montana lawyers and judges who are faced with pretrial identification admissibility issues in our state courts.

Pretrial Identifications may be unconstitutional, even if they meet the requirements of M.R.E. 801(d)(1)(C)

Lots of Montana criminal cases do deal with admissibility of formal police-sponsored identifications on constitutional, rather than evidentiary, grounds. The absence of discussion of a hearsay objection probably indicates that both sides understood that these identifications are defined as non-hearsay, but counsel should always consider making raising two grounds rather than just one, if at all possible. Identifications made by witnesses at trial are not hearsay, but if the identifier does not testify at trial, the opponent should object on hearsay as well as constitutional grounds. U.S. v. Owens, supra, dealt with the Confrontation Clause; many other cases raise Due Process objections to government-sponsored identifications.

As an example of the second type of constitutional objection, in State v. Lally, a police officer who unsuccessfully chased two vehicles but saw at least one driver was shown photographs of two suspects, and identified one of them, who was then charged and tried. The photograph the officer-witness identified was a mug shot, labeled "Sheriff's Office, Missoula MT;" the other was a photo shot in a person's living room. The defendant moved to exclude all evidence of the officer's identification. After a pretrial hearing, the judge denied the motion and the Supreme Court affirmed his decision.

Lally's challenge and the Supreme Court decision were both based on the Due Process Clause. Neither made any mention of M.R.E. 801(d)(1)(C), which clearly would have allowed the evidence.

> ¶ 14 A defendant's constitutional right to due process bars the admission of evidence deriving from suggestive identification procedures where there is a substantial likelihood of irreparable misidentification. See Neil v. Biggers, 409 U.S. 188, 196–98, 93 S.Ct. 375, 380–82, 34 L.Ed.2d 401 (1972); State v. Lara, 179 Mont. 201, 204–05, 587 P.2d 930, 931–32 (1978); *63 State v. Higley, 190 Mont. 412, 420–21, 621 P.2d 1043, 1049 (1980); State v. Schoffner, 248 Mont. 260, 265–66, 811 P.2d 548, 552 (1991)….
>
> ¶ 15 We apply a two-part test to determine whether an in-court identification based on a pretrial identification is admissible. We first determine whether the pretrial identification procedure was impermissibly suggestive. If it was, we then determine, based on the totality of the circumstances, whether the suggestive procedure created a substantial likelihood of irreparable misidentification.
>
> State v. Lally, 2008 MT 452, 348 Mont. 59, 62-63, 199 P.3d 818, 821. (The Court ultimately held that although the procedure used was possibly too suggestive, in the end, it did not "create a substantial likelihood of irreparable misidentification.") See also, State v. Baldwin, 318 Mont. 489, 81 P.3d 488 (2003); State v. DuBray, 317 Mont. 377, 77 P.3d 247 (2003); State v. Rudolph, 238 Mont. 135, 777 P.2d 296 (1989).

These cases are good reminders that trial lawyers cannot rely solely on the rules of evidence to protect their clients. Even where the M.R.E. appear to allow a piece of evidence, the federal and state constitutions may provide a firmer basis for objection. (In a later piece, I will discuss the most recent U.S. and Montana Supreme Court cases on the right to confrontation).

Conclusion

Montana's version of 801(d)(1)(C) mirrors F.R.E. 801(d)(1)(C), but it does not seem that the Montana rule is used very often in reported cases. It is a good tool to escape from a hearsay objection, and thus avoid a protracted excursion into the numerous hearsay exceptions. By its plain terms, M.R.E. 801(d)(1)(C) applies in both civil and criminal cases, to both sides in any case. (There are additional constitutional considerations when pretrial identifications are used by the prosecution in criminal cases.) Try using it.

***Cynthia Ford** is a professor at the University of Montana School of Law where she teaches Civil Procedure, Evidence, Family Law, and Remedies.*

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AGENDA
Thursday. July 11. 2013
- 7:30 a.m. Registration and Breakfast
- 8:00 a.m. Opening Prayer, Flag Song & Honor Song
- Drum Group
- Welcoming & Opening Remarks Tribal Council Representative Welcome and Conference Overview; Eldena Bear Don't Walk, Chief Justice, CSKT Appellate Court
- 8:30 a.m. Violence Against Women Act: What Now? Lucy Simpson--National Indigenous Women's Resource Center
- 10:00 a.m. Environmental Law; Ken Pitt, Associate Justice, CSKT Appellate Court
- 11:00 a.m. Holistic Defense; Ann Sherwood, Public Defender, CSKT
- 12:00 p.m. Lunch Provided
- 1:00 p.m. Drafting Wills in Indian Country--Special Considerations; Urban J. Bear Don't Walk
- 2:00p.m. Legal Services in Indian Country; Jennifer Hill-Hart, Montana Legal Services
- 2:45 p.m. Break
- 3:00 p.m. Ethics in Indian Country: Practical Problems in Small Communities; Eldena Bear Don't Walk, Chief JusticeCSKT Appellate Court
- 5:00p.m. Conclude for Day

Friday, July 12, 2013
- 7:30 a.m. Breakfast
- 8:30 a.m. Sovereign Immunity and Issues of Waiver; David House, Berkley Williams, LLP
- 9:30 a.m. Community Issues: Montana Indian Teen Suicide; Anna Whiting Sorrell, Area Director, Billings IHS*
- 10:45 a.m. Break
- 11:00 a.m. The Innocence Project; Jessie McQuillan, Director
- 12:00 p.m. Lunch Provided
- 1:00 p.m. Indian Child Welfare Act: Threats and Achievements Maylinn Smith, UM School of Law, Indian Law Clinic Director
- 2:00 p.m. International Indigenous Law: Where Are We? Tim Coulter, Indian Law Resource Center
- 3:00p.m. Break
- 3:15p.m. Legal Research for the Indian Law Practitioner; Stacey Gordon, UM, Dean of Library Services
- 4:00p.m. Avoiding SAMI(substance abuse and mental illness): The health risks of practicing law and what you can do to prevent them; Jamison Starbuck, JD,ND
- 5:00 p.m. Conference Concludes

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July

July 25-26 — Annual Bankruptcy Section CLE. Starts at Federal Courthouse in Butte with 30-minute presentation and Bankruptcy Appellate Panel Oral Arguments Thursday morning, followed by an afternoon of CLE presentations at Fairmont Hot Springs, just west of Butte. An optional Reception and Dinner will be held at Fairmont Thursday evening. The CLE will continue all day Friday. Total program has been approved for 14.25 CLE credits, including 1.00 Ethics credit. More information and registration available at www.montanabar.org.

September

Sept. 19-20 — State Bar's Annual Meeting. At the Red Lion in Helena. Approximately 10 CLE credits. Keynote speaker is Bill Neukom, former ABA president, chief legal officer for Microsoft, and the founder of the World Justice Project. CLE Topics include modern discovery, health care law, Indian law jurisdiction issues, tax update, Supreme Court arguments, a special segment for government attorneys, and more. Check the Bar's website and the Montana Lawyer in the coming months for more information.

October

Oct. 4 — Women's Law Section CLE. Chico Hot Springs Spa & Resort. Credits pending.

Oct. 11 — Issues, Ethics and Opportunities in Dispute Resolution. Sponsored by Dispute Resolution Committee. Bozeman. 6.75 CLE/2.0 ethics.

Oct. 18 — Annual Construction Law Institute. Bozeman. Sponsored by Construction Law Section. Credits pending.

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- SAMI - Is It Time to Retire? | Jan. 2012
- SAMI Smorgasbord | April 2012
- SAMI - Ethical Duties and the Problem of Attorney Impairment | April 2012
- Ethics and Elder Law | Jan. 2013
- SAMI - Understanding Behavioral Addictions in the Legal Professional | Feb. 2013
- SAMI - The Aging Lawyer | March 2013
- All Ethics, Nothing But Ethics | March 2013
    - Regulating Lawyers in Light Of Globalization and Technology: ABA Commission on Ethics 20/20 and other Recent Developments
    - Ethics and Elder Law Part 1: Elder Law, Powers of Attorney, Capacity, Dementia and Model Rules
    - Ethics and Elder Law Part 2: Litigating Guardian and Conservatorship
    - Do Loose Lips Sink Ships? Ethical Implications Of Confidentiality Agreements
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- Settlement Conference Dos and Don'ts | Feb. 2012
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- Income, Estate, & Gift Tax Consequences Of Divorce | Jan. 2013
- Hendershott v. Westphal, 2011 MT 73 | Feb. 2013
- Point of Transformation: Divorce | March 2013
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- Recurring Issues in the Defense of Cities and Counties | March 2012

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- Probate Update | Dec. 2011

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- Online Resources for Lawyers | Feb. 2012
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- Contested Case Procedures Before the Department of Labor and Industry | March 2012

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- Rules Update - Bankruptcy Court Local Rules | Feb. 2011
- Rules Update - Federal Rules of Civil Procedure | Feb. 2011
- Rules Update - Montana Rules of Civil Procedure Revisions | Feb. 2011
- Rules Update - New Federal Pleading Standard | Feb. 2011
- Rules Update - Practicing Under Revised Montana Rules of Civil Procedure | Feb. 2011
- Rules Update - Revisions to Rules for lawyer Disciplinary Enforcement | Feb. 2011
- Rules Update -Water Law Adjudication Update | Feb. 2011
- Rules Update -Workers' Comp Court | Feb. 2011

Appellate Practice and Procedure

- Appellate Practice Tips: Ground Zero | Feb. 2012
- Appellate Practice Tips: Brief Writing and Oral Argument | March 2012

Healthcare

- A Look Inside: OCR Compliance Audits

Court cases from March 15 - April 30

By Beth Brennan

The Montana Supreme Court issued 33 published opinions between March 15 - April 30, 2013. Of those, 29 were 5-0, two were 7-0, one was 5-1, and and one was 4-1.

- Of the 33 decisions, 26 affirmed the district court, 3 reversed, and 4 affirmed in part and reversed in part. (Two affirmances included remands to correct the written judgment.)
- Chief Justice McGrath authored six opinions, five of which affirmed and one of which reversed.
- Justice Baker authored six opinions, four of which affirmed, one of which reversed, and one of which affirmed in part and reversed in part.
- Justice McKinnon authored five majority opinions, all of which affirmed, and one dissent (In the Matter of KEG, 2013 MT 82).
- Justice Cotter authored four opinions, two of which affirmed, and two of which affirmed in part and reversed in part. Additionally, she dissented in State v. McDonald, 2013 MT 97.
- Justice Morris authored four opinions, three of which affirmed and one of which reversed.
- Justice Wheat authored four opinions, all of which affirmed.
- During this period, the Court also issued 12 unpublished decisions.

Ptarmigan Owners' Assoc. v. Alton, 2013 MT 69 (March 20, 2013) (5-0) (Morris J.)

Issue: Whether the district court slightly abused its discretion by denying Alton's motion to set aside the default judgment.

Short Answer: No.

Affirmed

Facts: Alton purchased a vacation home in Ptarmigan Village. The homeowners' association collected fees and dues from owners, and maintained Ptarmigan Village. Alton stopped paying fees and dues, and Ptarmigan filed a lien on his house in November 2010. Alton gave Ptarmigan a Postal Plus mailbox as his address rather than the address of his Arizona residence. Ptarmigan sent Alton's bills and notices to this mailbox, including notice of the lien by certified mail. Ptarmigan received the certified mail confirmation receipt.

Ptarmigan filed a complaint to foreclose the lien on Jan. 20, 2011. Ptarmigan mailed the complaint and summons to Alton's mailbox. Alton did not respond. Ptarmigan contacted an Arizona constable to serve Alton, but the constable could not locate Alton through the Postal Plus mailbox. Ptarmigan filed an affidavit in support of service by publication on April 18, 2011, and the clerk of court issued the order. Ptarmigan published the complaint and summons, and mailed a second copy to the mailbox. Ptarmigan requested entry of default judgment 20 days after the final publication. The district court granted default judgment on June 13, 2011, and Ptarmigan mailed a copy of the judgment to the mailbox.

Procedural Posture & Holding: On Oct. 26, 2011, Ptarmigan moved for a writ of execution and order of sale. The court issued the order on Oct. 31, 2011, and Ptarmigan mailed them to the Postal Plus mailbox. Ptarmigan sent a courtesy copy of the documents to Alton via email on Nov. 11, 2011. The sheriff posted notice of the sale on Alton's property on Nov. 29, 2011, and scheduled the sale for Dec. 27, 2011. Alton moved to postpone the sale, and the court granted the motion. Alton's lender then foreclosed on the Ptarmigan house, rendering the sheriff's sale moot. Alton also moved to set aside the default judgment, claiming he had not received any litigation documents and had been unaware of the default judgment until the sheriff posted notice on his property. He claimed Ptarmigan had his email and telephone but failed to contact him. Alton's motion to set aside the judgment was deemed denied when the district court failed to rule on it within 60 days.

Alton appeals, and the Supreme Court affirms.

State v. Wilson, 2013 MT 70 (March 20, 2013) (5-0) (Morris, J.)

Issue: Whether the defendant's absence from a sidebar conference during jury selection requires reversal of the verdict.

Short Answer: No.

Affirmed

Facts: Wilson was drinking whiskey at a Colstrip bar in December 2009, and started a fistfight with Terran Harris. Jason Burnett, who was with Harris at the bar to celebrate Burnett's engagement, and whose family owned the bar, ordered Wilson to leave. Wilson left, but returned 30 minutes later with a gun. Heath Becker, another of Burnett's party, was standing outside; Wilson killed Becker with a shot to his head. Spencer Benson, another of Burnett's friends, was also outside near his car; Wilson killed him with a shot to the chest. Wilson went into the

CASES, next page

CASES, from previous page

bar and shot Burnett in the head. He injured Burnett, but did not kill him. Burnett's friends disarmed Wilson.

Wilson was charged with deliberate homicide. The list of potential jurors included several EMTs who had responded to the shooting, many of whom were on the prosecutor's witness list. The Court discussed this with the parties, and the prosecutor said he no longer anticipated calling any of the EMTs as witnesses. The prosecutor refused to stipulate that the EMTs were unfit for jury service.

Procedural Posture & Holding: The first group of jurors included an EMT, Amanda McCarthy. After she was called, defense counsel requested a sidebar with the juror. The Court held a sidebar with the attorneys, then said, "By stipulation you are excused."

The jury found Wilson guilty of deliberate homicide, attempted deliberate homicide, and negligent homicide. The court sentenced Wilson to 220 years in the Montana State Prison. Wilson appeals, arguing that his absence from the sidebar after which the district court removed McCarthy as a juror violated his fundamental right to be present at all critical stages of the proceedings. The Supreme Court affirms.

State v. Robins, 2013 MT 71 (March 20, 2013) (5-0) (McGrath, C.J.)

Issue: Whether the district court abused its discretion by allowing the state to present expert testimony regarding child sexual abuse victims.

Short Answer: No.

Affirmed

Facts: Robins' stepdaughter, CG, testified that Robins abused her over a six-month period in 2010, when she was 13-14 years old. She testified that it made her feel loved and beautiful, and that Robins treated her better than her siblings after the abuse began. When CG was in eighth grade, she took a sex education class at school and realized that the things Robins did to her were wrong. She wrote a note to him and put it in his pillowcase. CG's mother found the note. Robins was charged with incest, two counts of attempted sexual intercourse without consent, and sexual assault.

The state filed notice that a child sex abuse expert, Wendy Dutton, would testify at trial. Robins moved in limine to preclude the testimony, arguing the danger of unfair prejudice outweighed any probative value. The court allowed Dutton to testify but gave a cautionary instruction that her testimony could not be used as substantive evidence or as her opinion that Robins had committed the alleged crimes. Dutton testified about the process of victimization, how victims disclose abuse, children's typical reactions to abuse, the most common situations when children make false allegations, and the proper protocol for conducting a forensic interview with a child. She did not discuss Robins' case or offer any opinion about whether CG had been abused.

Procedural Posture & Holding: The jury convicted Robins of all four charges, but the district court later dismissed one count of attempted sexual intercourse without consent because the state had failed to establish jurisdiction for that charge. The court sentenced Robins to 30 years in Montana State Prison for each of the three convictions, to run consecutively. Robins appeals, and the Supreme Court affirms.

In the Estate of CKO, 2013 MT 72 (March 20, 2013) (5-0) (McKinnon, J.)

Issue: (1) Whether the custodial parents of a minor child have the right to demand that a particular law firm represent the child when the GAL and conservator disagree; (2) whether §§ 37-61-403 and 72-5-427, MCA, are unconstitutional as applied; and (3) whether § 37-61-403 conflicts with the Montana Rules of Professional Conduct.

Short Answer: (1) No; (2) no; and (3) no.

Affirmed

Facts: In July 2007, CKO's mother was in a car accident. CKO was delivered by emergency C-section that day. Soon after, CKO's parents hired several attorneys to represent CKO and her mother in their claims arising from the accident. In December 2007, one of their attorneys petitioned for a guardian ad litem and conservator for CKO, because a significant settlement was expected. CKO's parents signed the petition.

The mother's case settled in October 2009. A lawsuit for CKO has not yet been filed, as it is too early for her doctors to provide a medical opinion regarding her prognosis.

In November 2011, CKO's parents retained Morales Law Office to pursue legal action against one of their earlier attorneys, Greg Ingraham, and Edward Engel, for usury arising from personal loans Ingraham and Engel had made to CKO's parents. The law firm that settled the mother's case, Viscomi, paid the loans out of the mother's settlement funds.

In December 2011, Morales sent a letter to Viscomi stating that Morales would henceforth be representing CKO. Viscomi refused to withdraw, stating the GAL and conservator did not believe it was in CKO's best interests. Morales contended it was CKO's parents' prerogative to choose CKO's counsel.

Procedural Posture & Holding: Morales filed a notice of substitution of counsel with the district court. Viscomi sent a letter to Morales stating that pursuant to § 75-5-427 the GAL and conservator had authority to make decisions as to CKO's counsel, and that Morales' notice was void because it was filed without consent or a court order. The GAL and conservator, Matthew O'Neill, filed a report with the district court stating it was not in CKO's best interests to change legal counsel. Morales moved to disqualify counsel, asserting natural parents retain the right to choose the law firm representing their minor children regardless of the parents' prior consent to the appointment of a GAL and conservator. The district court denied the motion to disqualify, holding Morales had no authority to sign documents on CKO's behalf because he had not complied with § 37-61-403, MCA. CKO's parents appeal, and the Supreme Court affirms.

Conway v. Benefis Health System, Inc., 2013 MT 73 (March 19, 2013) (5-0) (Cotter, J.)

CASES, next page

CASES, from previous page

Issue: (1) Whether the district court properly converted Conway's motion for judgment on the pleadings into a motion for summary judgment, and (2) whether the district court properly granted summary judgment to Conway.

Short Answer: (1) Yes, and (2) no.

Affirmed issue 1 & reversed issue 2

Facts: After being injured in a car accident, Shannon Conway was treated at Benefis. His treatment cost $2,073.65. Benefis billed Conway's health and auto insurers, and accepted $662.74 from his health insurer, TRICARE, as full payment in accordance with the preferred provider agreement between BCBS, TRICARE's subcontractor, and Benefis. A few weeks later, Benefis received $1,866.29 from Conway's auto insurer, Kemper, and reimbursed TRICARE (a secondary payer) in full. Conway claims he is entitled to the $1,203.55 the Benefis received over and above the TRICARE reimbursement rate.

Conway filed an individual and class action complaint against Benefis alleging breach of contract, breach of third party beneficiary contract, and intentional interference with contractual relations, as well as individual fraud and consumer claims.

Procedural Posture & Holding: Conway moved for class certification, and for judgment on the pleadings. The district court treated the motion as one for summary judgment after Benefis asked the court to consider the preferred provider agreement. The court granted summary judgment to Conway on his individual breach of contract claims, holding Benefis breached the contract by accepting more money than the maximum allowable charge. The district court then granted Conway's motion for class certification, and entered final judgment. Benefis appeals, and the Supreme Court affirms the decision to convert the motion into one for summary judgment and reverses summary judgment for Conway. It does not reach the issue of class certification.

Stubblefield v. West Yellowstone, 2013 MT 78 (March 26, 2013) (5-0) (Wheat, J.)

Issue: Whether substantial credible evidence supported the jury verdict in favor of the Town on the plaintiff police officers' FLSA claim.

Short Answer: Yes.

Affirmed

Facts: The three plaintiffs are police officers in the Town of West Yellowstone. The plaintiffs relocated to West Yellowstone primarily because of its proximity to recreational opportunities; however, they contend the Town's on-call policy up until 2009 was so restrictive that they had no time for personal activities between their shifts.

The town generally employs four police officers. One is on duty at all times, with one working 6 am-6 pm and another 6 pm-6 am. Officers work three 12-hour shifts one week and four the next, totaling 84 hours of work every two weeks. Until a change in the collective bargaining agreement in March 2009, each officer was also required to be on call for 12 hours immediately preceding his next shift. The on-call officer provided backup as needed for crimes in progress, or at the responding officer's discretion. While on call, the officers had to carry a cell phone, stay within service areas, and be ready to respond immediately. If actually called out, the officer received a minimum of 2.5 hours of overtime pay, but were not otherwise compensated for their time spent on call. One officer was called out 18 times in 609 on-call shifts, another three times in 234 on-call shifts, and the third six times in 186 on-call shifts.

Procedural Posture & Holding: The officers filed suit against the town under the Fair Labor Standards Act, alleging they should be compensated for the time they were on call, not just the time they were called out. During trial, the officers testified of the adverse effect of the on-call requirement on their personal lives, including their ability to sleep, and the benefits that accrued to the town from their being on-call. The town elicited testimony that officers sometimes failed to show up when called, or were late, and suffered no consequences. The town also claimed the infrequent nature of calls lessened the burden of on-call shifts.

The jury returned a verdict for the town. The district court denied plaintiffs' motion to amend the judgment and for a new trial, and they appeal. The Supreme Court affirms.

State v. Jay, 2013 MT 79 (March 26, 2013) (5-0) (Rice, J.)

Issue: (1) Whether the district court erred in denying Jay's challenge for cause; (2) whether the district court erred in excluding Jay's expert witness; (3) whether the district court erred in denying Jay's request to instruct on DUI as a lesser-included offense of Vehicular Homicide While Under the Influence; and (4) whether the district court erred in ordering Jay to pay restitution to the state, the victims, and the victims' family members.

Short Answer: (1) No; (2) no; (3) no; and (4) yes.

Affirmed issues 1-3 and reversed issue 4

Facts: One night in October 2008, Jay was driving westbound on I-90 between Laurel and Billings when he crossed the median and began driving into oncoming eastbound traffic. Two cars avoided him, but Jay's pickup struck a third, killing two people.

EMTs smelled alcohol on Jay's breath, and asked if he had been drinking. He said he had drunk two beers, and was "driving tired." The weather was fine and there was no debris on the road. According to his truck's computer, Jay did not apply his brakes during the 25 seconds preceding the crash. Jay's BAC was between .0706 and .088.

Jay was charged with two counts of vehicular homicide while under the influence, and in the alternative, negligent homicide. He was also charged with two counts of criminal endangerment for forcing other drivers off the road. Jay's defense was that he lost consciousness prior to the crash, perhaps because of a seizure. Prior to trial he disclosed that he intended to call a neurology expert, Dr. Peterson, to testify on seizure disorders. The state moved to exclude Dr. Peterson after interviewing him, because he had never examined Jay, and his only basis of knowledge about Jay was Jay's lawyer's oral account and an EEG from the day of the accident that showed no evidence of seizures.

Procedural Posture & Holding: At a hearing on pretrial motions, Jay's counsel said Dr. Peterson would explain the typical

CASES, next page

CASES, from previous page

symptoms of partial seizures and the difficulty in diagnosing them, but would not opine whether Jay suffered a seizure while driving. The court excluded him under M.R. Evid. 402, 403, and 702.

Jay challenged a juror for cause after she voiced concerns about her ability to be impartial about drinking and driving, but the district court denied the challenge and Jay removed her with a peremptory challenge.

Jay submitted a proposed instruction that DUI was a lesser-included offense, and the court denied it because the fact of Jay's case did not support the instruction.

The jury convicted Jay of two counts of negligent homicide and two counts of negligent endangerment, a lesser-included offense of criminal endangerment. The court sentenced Jay to 30 years in prison with 10 suspended, and ordered Jay to pay $600 in restitution to the state for expenses incurred in interviewing Dr. Peterson, as well as the cost of mental health treatment for the victims and their family members. Jay appeals, and the Supreme Court affirms in part and reverses in part.

Coleman v. State, 2013 MT 80 (March 26, 2013) (5-0) (Wheat. J.)

Issue: Whether Coleman's truck was properly held not to be exempt from the statute prohibiting dyed diesel fuel above a certain concentration.

Short Answer: Yes.

Affirmed

Facts: Larry Coleman operates a cattle ranch near Charlo. In November 2008, he was driving his 1999 International Harvester truck on Hwy. 212. The truck had been modified with a feedbox, hoist, and tailgate. It was not licensed or registered. A state Dept. of Transportation officer stopped Coleman, and with permission, took a sample of the fuel for analysis. The fuel was dyed diesel and was in excess of the concentration allowed on a non-exempt vehicle on a public highway. Coleman was cited for violating § 15-70-330, MCA.

Coleman sought formal review of his citation, arguing he is entitled to an exemption from the dyed diesel fuel prohibition under ARM 18.10.110.

At a hearing, Coleman admitted the truck was originally designed for highway use, but that it had been converted into a vehicle used primarily off-road for farming. He used the truck that day to go to Charlo to pick up a load of corn and take it back to the ranch. The DOT officer testified that, based on his training, Coleman's truck was neither an off-road or special mobile vehicle, and that whether Coleman used the truck for agricultural purposes was irrelevant.

The hearing examiner issued Findings of Fact and Conclusions of Law upholding Coleman's citation. MDOT adopted the proposed decision, and Coleman appealed to STAB, which affirmed.

Procedural Posture & Holding: Coleman sought judicial review from the district court, which also affirmed. Coleman appeals, and the Supreme Court affirms.

State v. Nixon, 2013 MT 81 (March 26, 2013) (5-0) (Baker, J.)

Issue: Whether the lower court erred in denying Nixon's motion to suppress statements made during a custodial interrogation.

Short Answer: No.

Affirmed

Facts: Jeffrey Nixon and his father were returning home from a bachelor party late one night when they were stopped. Four policemen approached the car with their guns drawn. An arresting officer told Nixon he was being arrested on two outstanding misdemeanor warrants; he was not told that he was the subject of a homicide investigation into the death of Wesley Collins. He arrived at the police station at about 4:30 a.m.; all of his movements and statements were videotaped. He slept on a bench for a few hours, and was awakened just before 7 a.m. to be interviewed.

The officer asked if Nixon had been drinking; he said he had consumed about 10 drinks during the 7-hour party. The officer asked Nixon to provide a breath sample, which showed Nixon's BAC to be .08. The officer asked Nixon a series of background questions, then read him his Miranda rights. Nixon said a few times that he had nothing to talk about. The officer told him "there's a little more to it than that" and asked him to sign a Miranda waiver. Nixon read it and signed it, after which the officer questioned him about the murder of Collins.

Procedural Posture & Holding: Nixon was charged with several offenses, including accountability for deliberate homicide or alternatively deliberate homicide, robbery, burglary, and tampering with evidence. Nixon moved to suppress the statement he made during his interview at the police station. The district court held a hearing at which both Nixon and the interviewing officer testified. The court denied Nixon's motion, finding that Nixon voluntarily agreed to answer questions and did not unambiguously invoke his right to remain silent.

After a five-day trial, the jury found Nixon guilty of robbery, accountability for deliberate homicide, tampering with evidence, and burglary. The court sentenced Nixon to 100 years in prison. Nixon appeals, and the Supreme Court affirms.

In the Matter of KEG, 2013 MT 82 (April 2, 2013) (5-1) (Baker, J., for the majority; McKinnon, J., concurring and dissenting)

Issue: Whether the Youth Court committed plain error in concluding KEG was jointly and severally liable for the full amount of restitution without considering KEG's ability to pay.

Short Answer: Yes.

Reversed

Facts: Over an 11-day period in December 2011, vandals in Billings shot the windows out of homes and vehicles with air guns, damaged vehicles with baseball bats, and set two cars on fire. An investigation indicated that KEG, a 15-year-old male, was one of the vandals. KEG and his mother met with a Billings police officer in January 2012. KEG waived his rights

CASES, next page

CASES, from previous page

and admitted to participating in the vandalism on two days, but no other days. He admitted he hit two windows with the gun and four to five windows with a bat on the first night, and five windows with a BB gun and three with a bat on the second night.

The county attorney filed a petition alleging KEG was a delinquent youth for having committed criminal mischief. Other youths were similarly charged. KEG pled guilty to the specific acts of vandalism he had committed.

Procedural Posture & Holding: The state attempted to hold KEG jointly and severally liable for all damage caused during the 11-day period, which totaled $78,702.09. KEG countered that he should be held liable only for the damage caused on the two nights to which he had confessed and pled guilty, for a total of $16,020.63. Although the court did not inquire into KEG's assets or prospects for future earning, it acknowledged that "it will be nearly impossible" for KEG to pay the restitution, but expressed its hope that KEG would make some payments. The Youth Court held that KEG admitted to participating in a common scheme, and was therefore liable for the entire amount of damages. It adjudicated KEG a delinquent youth and committed him to the Dept. of Corrections until his 18th birthday. The court retained jurisdiction for restitution purposes until KEG turns 21 or the restitution is paid in full. KEG appeals the restitution order, and the Supreme Court reverses and orders the Youth Court to hold a new hearing in which it considers KEG's ability to pay.

Justice McKinnon's Concurrence & Dissent: Justice McKinnon concurs in the decision to reverse and remand, but dissents from the Court's analysis. The state never proved KEG caused damage beyond that which he pled to. Justice McKinnon would reverse and remand for entry of a restitution order of $16,020.63, the amount of damage KEG admitted causing.

Baxter Homeowners Association, Inc. v. Angel, 2013 MT 83 (April 2, 2013) (5-0) (Baker, J.)

Issue: Whether Angel had standing to bring a discrimination claim on behalf of unidentified, potential clients.

Short Answer: No.

Affirmed

Facts: Geoffrey Angel, a Bozeman attorney, rented second-floor office space in the Baxter Hotel. The first three floors are rented for commercial purposes to businesses that are open to the public. The top four floors house residential condos. The building has a single elevator and a stairway that allows access to all floors. Angel also owned a residential condo in the building, and was thus a member of the Baxter Homeowners Association. The BHA's Declarations require the elevator to be locked all times to protect the safety of occupants and their property.

In 2007, BHA began receiving complaints about the elevator not being locked. In January 2008 the board voted to restrict access to the elevator to owners and tenants via swipe cards. Members of the public could access the elevator only when accompanied by someone with a swipe card. The stairwell remained unlocked during business hours.

Angel complained that the locked elevator denied access to his second-floor office to people with disabilities. Angel filed a complaint with the Human Rights Bureau in March 2008. In January 2009, the BHA board installed a time-clock system that keeps the elevator unlocked during business hours, and locked at night. Angel moved out of the Baxter in July 2008.

The Human Rights Bureau investigated Angel's complaint, and found reasonable cause to proceed. BHA moved for summary judgment, arguing Angel lacked standing. The hearing officer denied the motion, finding Angel had a specific legal interest to be protected by the Human Rights Act, but held that Angel could not recover damages for lost profits because he refused to identify anyone who had been denied access to his office.

After a contested case hearing, the hearing officer concluded Angel had not been discriminated against because the time-clock was a reasonable accommodation. Angel appealed to the Human Rights Commission; BHA did not cross-appeal the denial of its summary judgment motion. The commission concluded the hearing officer had applied an incorrect legal standard. On remand, the hearing officer concluded BHA violated § 49-2-304(1)(a) by failing to provide a reasonable alteration. The officer concluded BHA's discrimination did not cause Angel to vacate his office space, but awarded Angel $6,000 for the assessments he paid as a member of BHA to cover attorneys' fees and expenses in defending Angel's claim. Both parties appealed to the commission, which affirmed.

Procedural Posture & Holding: BHA and Angel sought judicial review. The district court reversed, and denied BHA's motion for attorneys' fees. Both parties appeal, and the Supreme Court affirms, holding Angel did not have standing.

In the Matter of PAC, 2013 MT 84 (April 2, 2013) (5-0) (McGrath, C.J.)

Issue: Whether the district court obtained a proper waiver from PAC or her attorney before allowing her to be voluntarily absent from her commitment hearing.

Short Answer: No.

Reversed

Facts: In July 2012, PAC went to the emergency room in Helena and was voluntarily admitted to the Behavioral Health Unit. She was engaged in disruptive and threatening behavior, and was transferred to the Montana State Hospital. The state petitioned for PAC's commitment to the state hospital for 90 days. PAC made her initial court appearance via video conferencing. The district court appointed counsel and informed her of her rights. PAC asked the court to explain a "72-hour police hold." The court said it would not answer questions, ordered an evaluation, and set the commitment hearing for the next day.

PAC was transported to Helena the next day. She did not cooperate with the evaluation, asserting nothing was wrong with her and she only needed alcohol and marijuana.

Procedural Posture & Holding: Although PAC was in the courthouse, she did not appear at the commitment hearing. PAC's attorney told the court that she had met with PAC and informed her of all of her rights, including the right to be present, and PAC had declined. The district court proceeded with the

CASES, next page

CASES, from previous page

hearing, and ordered commitment for not more than 90 days. PAC appeals, and the Supreme Court reverses.

State v. Birthmark, 2013 MT 86 (April 9, 2013) (5-0) (McGrath, C.J.)

Issue: (1) Whether Birthmark's attorney provided ineffective assistance of counsel; (2) whether the Court should exercise plain error review of the jury instructions regarding the mental state for partner-family member assault; and (3) whether the written judgment should be corrected.

Short Answer: (1) No; (2) no; and (3) yes.

Affirmed & remanded for correction of the written judgment

Facts: After drinking at a party, Birthmark returned to the house shared by his mother, brother, and sister. He began yelling, threatening to bash their heads in, and then went to the kitchen to get a knife. His mother left the house and called 911.

Procedural Posture & Holding: Birthmark was charged with partner/family member assault for causing reasonable apprehension of bodily injury to his mother and brother. As it was his third offense, it was a felony charge. His attorney did not offer any proposed jury instructions, and did not object to the state's instructions. Birthmark was convicted and sentenced to the Department of Corrections for four years with one year suspended. Birthmark appeals, asking the Court to conduct plain error review. The Supreme Court affirms, but remands for correction of the written judgment, which improperly imposed terms and conditions of parole or conditional release.

State v. Buslayev, 2013 MT 88 (April 9, 2013) (5-0) (McKinnon, J.)

Issue: Whether the district court improperly admitted into evidence five photos of the victim's body.

Short Answer: No.

Affirmed

Facts: Jerry Parrick, a volunteer firefighter, was killed while responding to a call one night on I-90 in Mineral County. As rescue workers extricated a family from an overturned vehicle, Patrick moved his truck to alert oncoming traffic of the hazard and provide an area for rescue personnel to work. Snow was falling, the interstate was snow-packed and slippery, and the temperature was five degrees.

Parrick was in his pickup, which was equipped with emergency lighting and parked on the shoulder to warn oncoming traffic of the accident. Sergey Buslayev approached, driving a commercial tractor trailer, and began merging into the left lane. He downshifted and used the brake, causing the tractor trailer to jackknife and hit Parrick's pickup. The force of the collision pushed the cargo area of the pickup into the cab, killing Parrick.

Buslayev was charged with negligent homicide and criminal endangerment. Before trial, the parties stipulated that Parrick died as a result of injuries when his vehicle was struck by a tractor trailer driven by Buslayev. Buslayev moved in limine to exclude five photos of the victim's body, which showed Parrick in his firefighter's gear, and his position in the cab of his pickup after impact. His face was covered with a cloth. Buslayev argued the photos were highly prejudicial, and in light of the stipulation, not probative. The state argued the photos demonstrated that Parrick's position in the cab was due to Buslayev's excessive speed. Both parties produced expert witnesses in crash reconstruction. Whether Buslayev was traveling too fast for the conditions was a primary consideration for the jury.

Procedural Posture & Holding: The district court noted that the photos helped explain the accident and were not unduly sensational. It granted Buslayev's motion as to one photo, which showed Parrick's face, but allowed the remaining four photos. The jury found Buslayev guilty of negligent homicide and criminal endangerment. Buslayev appeals, and the Supreme Court affirms.

McCulley v. American Land Title Co., 2013 MT 89 (April 9, 2013) (5-0) (Cotter. J.)

Issue: Whether the district court properly granted summary judgment to the bank and the title company.

Short Answer: (1) Yes to the title company; (2) yes to the contract and negligence claims against the bank; (3) no as to the fraud claim against the bank.

Affirmed in part and reversed in part

Facts: Mary McCulley bought a condo in Bozeman in 2006 for $395,000. She sought a $300,000 loan from Heritage Bank, predecessor to U.S. Bank of Montana. American Land Title Co. provided a commitment for title insurance. McCulley signed a promissory note and deed of trust. The deed indicated the condo was for residential purposes. Subsequently, without McCulley's knowledge, the title company changed the designated use of the condo on the deed from residential to commercial.

After closing, McCulley discovered the bank had issued her an 18-month, $300,000 commercial loan rather than the 30-year residential loan for which she had applied. The bank contends it told McCulley prior to closing that it could not issue a residential loan because the lot was zoned commercial, and therefore proposed the 18-month "consumer bridge" loan it issued. McCulley denies this. The disclosure statement McCulley signed at closing states the $300,000 loan would mature 18 months later.

McCulley made monthly payments through 2006 and 2007 until she received notice that a balloon payment was due in a few months. While trying to resolve the dispute with the bank, she twice renegotiated the loan to extend the maturity date. Unable to find long-term financing, she eventually sold the condo and paid off the note.

Procedural Posture & Holding: All parties moved for summary judgment. The district court granted the defendants' motions and denied McCulley's. McCulley appeals. The Supreme Court affirms summary judgment for the bank on the contract and negligence claims, and for the title company on the negligence and fraud claims against it, but reverses summary judgment on the fraud claim against the bank, and remands.

CASES, next page

CASES, from previous page

Feller v. First Interstate Bancsystem, 2013 MT 90 (April 9, 2013) (5-0) (Cotter, J.)

Issue: (1) Whether the district court erred in granting summary judgment to the bank on the basis of preemption by the Fair Credit Reporting Act; (2) whether the district court erred in granting the bank summary judgment on Feller's conversion claim; and (3) whether the district court erred in dismissing Fellers' emotion distress claims.

Short Answer: (1) No; (2) no; and (3) no.

Affirmed

Facts: Marilyn Feller was a bank customer for many years, and had her home mortgage though the bank. Her primary contact with the bank was Diane Becker, who was married to Feller's ex-husband. Becker went to federal prison in December 2009 for embezzlement; she booked phony loans or lines of credit in friends' names and appropriated the money for her personal use. Becker was suspended from the bank in late 2007.

The FBI questioned Feller in April 2008 about Becker, and told her not to talk about the investigation. Soon after, Becker helped Feller obtain a loan from a lender unrelated to the bank, and Feller paid off her home mortgage with the funds. Her escrow account balance at the bank was $449.60. When Feller asked a bank employee in late 2008 about withdrawing the balance, she was referred to the bank president. Feller did not speak with him, or anyone else at the bank, even after Becker was sent to prison.

In April 2011, Feller filed a complaint against the bank alleging several tort and contract claims, alleging her financial standing and credit reputation were damaged, and that she suffered extreme physical and emotional distress.

On May 13, 2011, the bank sent a check to Feller for $582.13, which represented her escrow balance plus 10% interest.

Procedural Posture & Holding: The bank moved for summary judgment, and Feller filed a cross-motion for summary judgment on the conversion claim. After a hearing on all of the motions, the court granted the bank's motion and denied Feller's. The district court held that Feller's state law claims were preempted by the FCRA, Feller had failed to provide any evidence of severe emotional distress, and she had failed to establish that the bank had unauthorized control over her funds, thereby defeating her conversion claim. Feller appeals, and the Supreme Court affirms.

Western Montana Water Users Assoc., LLC v. Mission Irrigation District, 2013 MT 92 (April 9, 2013) (7-0) (Morris, J.)

Issue: (1) Whether the district court issued a final appealable order; (2) whether the district court properly granted the writ of mandate and injunction; and (3) whether the district court properly determined that the irrigation districts had to comply with §§ 85-7-1956 and 85-7-1957, MCA, before executing the Water Use Agreement.

Short Answer: (1) Yes, because the order included an injunction; (2) no, because the district court issued its order on grounds not raised or argued by the parties; and (3) no, because those statutes apply only to contracts with the U.S. for a loan of money.

Reversed

Facts: Congress authorized the Secretary of the Interior to construct the Flathead Indian Irrigation Project to deliver water to irrigable reservation lands in 1908. The Flathead Joint Board of Control and the United States have submitted claims for these water rights to the Montana Water Court. The Western Montana Water Users Association, LLC, comprise a group of landowners who claim to possess irrigation project water rights for irrigation.

The Confederated Salish and Kootenai Tribes claim aboriginal water rights and water rights reserved by the Hellgate Treaty of 1855, including water used by individual tribal members and non-members for irrigation. The state created a Reserved Water Rights Compact Commission to negotiate a settlement of water rights claim by Indian tribes, including the CSK Tribes' claim to irrigation project water rights.

The state, the CSK Tribes, and the United States negotiated a proposed compact to settle the CSK Tribes' water rights claim. The irrigation districts are not party to the compact. The compact is not at issue in this case. The CSK Tribes, the United States, and the irrigation districts drafted a second document, the Water Use Agreement, as an appendix to the proposed compact. The Water Use Agreement states that one purpose of the agreement is to settle the rights of irrigators served by the Flathead Indian irrigation project to receive irrigation water.

The Water Users sought a writ of mandate against the irrigation districts, arguing §§ 85-7-1956 and 85-7-1957, MCA, apply to the Water Use Agreement. These statutes would require the irrigation districts to submit the final Water Use Agreement to a vote of the irrigators, and to receive approval from a district court for the Water Use Agreement.

Procedural Posture & Holding: The district court issued an alternative writ of mandate, ordering the irrigation districts to comply with §§ 85-7-1956 and 85-7-1957, MCA. After holding a hearing on the applicability of the statutes to the Water Use Agreement, the court issued an order finding the question of whether the statues applied moot, and issued a writ of mandate enjoining the irrigation districts from entering into the Water Use Agreement or any similar agreement on the basis that the agreement contained provisions that exceeded the irrigation districts' authority. The irrigation districts appeal, and the Supreme Court vacates the writ of mandate and injunction as well as the alternative writ of mandate.

State v. Jent, 2013 MT 93 (April 9, 2013) (5-0) (McKinnon, J.)

Issue: Whether the district court properly ordered Jent to pay $19,867 in restitution for his assault victim's medical bills from her subsequent suicide attempt?

Short Answer: Yes.

Affirmed

Facts: Brian Jent and Nancylee Cadorette, husband and wife, have a tumultuous and often violent relationship. In October 2011, they got into a drunken argument, and Jent struck Cadorette in the face, fracturing her right eye socket.

CASES, next page

CASES, from previous page

The state charged Jent with aggravated assault. Jent pled guilty, and the prosecutor recommended a sentence of eight years to the Dept. of Corrections with six suspended, and various conditions, including restitution. Jent agreed to pay for Cadorette's medical bills in an amount to be determined before sentencing.

On the day Jent pled guilty, Cadorette ingested a bottle of Ambien and two bottles of Crown Royal whiskey. Her medical expenses from this totaled $19,866.69.

In the presentence investigation report, the probation officer noted that Cadorette blames herself for Jent's offense. Cadorette testified at the sentencing hearing that her suicide attempt was "directly related" to Jent's assault, and that the meeting with the prosecutor and defense counsel two days before her suicide attempt had "drudged up" memories of the assault.

Procedural Posture & Holding: The district court ordered Jent to pay $44,112.74 in restitution, including $19,866.69 for his wife's medical expenses arising from her suicide attempt. Jent appeals only the $19,866.69, claiming Cadorette is not a "victim" for restitution purposes and there was no causal connection between his criminal conduct and her suicide attempt. The Supreme Court affirms.

Ensey v. Mini Mart, Inc., 2013 MT 94 (April 10, 2013) (5-0) (Wheat, J.)

Issue: (1) Whether the district court erred by dismissing Ensey's complaint for lack of jurisdiction; and (2) whether the district court erred in finding that § 39-2-915, MCA does not violate Ensey's constitutional rights.

Short Answer:(1) No, and (2) yes.

Affirmed issue 1, set aside issue 2

Facts: Ensey worked at a Mini Mart store in Great Falls for 17 years, eventually becoming assistant manager. At some point, Mini Mart created a policy that it would immediately fire employees if they twice failed to ask for a customer loyalty card. It then sent secret shoppers into the stores, and Ensey failed to ask for a loyalty card. She was fired.

Ensey filed suit for wrongful discharge. Mini Mart offered to arbitrate, and Ensey accepted, stating in her letter that she felt compelled to accept because § 39-1-915, MCA would force her to pay Mini Mart's attorney fees if she declined the offer and lost at trial. Simultaneously, Ensey moved to amend her complaint to add a declaratory judgment claim that § 39-1-915, MCA, violated her rights to a jury trial, equal protection, and due process.

Procedural Posture & Holding: The district court granted Ensey's motion to amend and Ensey filed an amended complaint. Mini Mart moved to dismiss for lack of subject matter jurisdiction based on Ensey's agreement to arbitrate. Ensey moved for partial summary judgment on the declaratory judgment claim, and moved to stay the arbitration.

The district court granted Mini Mart's motion to dismiss, vacating its previous decision to allow Ensey to amend her complaint, and concluding it lost jurisdiction once Ensey accepted the offer to arbitrate. Nonetheless, the court noted the dilemma Ensey faced regarding the appropriate time to raise her constitutional challenge, and held the statute constitutional. Ensey appeals, and the Supreme Court affirms the dismissal but sets aside the ruling on the constitutionality of § 39-1-915, MCA.

State v. McDonald, 2013 MT 97 (April 10, 2013) (4-1) (Rice, J., for the majority; Cotter, J. dissenting)

Issue: Whether the prosecutor's comments during closing argument constitute plain error.

Short Answer: No.

Affirmed

Facts: Rama Irene McDonald was an inmate at the Missoula County Detention Center, and became involved in a heated exchange with an officer over McDonald's unwillingness to remove paper from the window of her cell that obstructed the view into the cell. McDonald bit the officer on the arm, and was charged with felony assault on a police officer.

The first trial resulted in a mistrial when the jury was unable to reach a verdict. At the second trial, the officer testified she had been bitten by McDonald, and two other officers in the room testified that the third officer has yelled she was being bitten. A fourth officer testified to seeing a red mark and saliva on the officer's arm. McDonald testified she did not bite the officer, and another inmate testified she did not see McDonald bite the officer.

Procedural Posture & Holding: During closing argument, the prosecutor made several comments about the credibility of the witnesses. Referring to the officer who was bitten, the prosecutor said, "She's a completely believable witness." During rebuttal, the prosecutor said: "It's not even proper for you to consider, but I don't believe the evidence shows that there was an overreaction here by officer Pavalone. I don't believe their evidence shows there was excessive force used. I don't believe that the evidence shows Ms. McDonald was injured, significantly. I don't believe that the evidence shows that this was a fight picked by Paige Pavalone. . . [The officers are] coming in and telling you the truth."

McDonald's counsel did not object to any of these statements. The jury returned a guilty verdict, and McDonald appeals. The Supreme Court affirms.

Justice Cotter's Dissent: A prosecutor may not attest personally to the veracity of witnesses, or tell the jurors whom he personally believes to be telling the truth. This is what happened in Hayden, leading a unanimous Court to find plain error. The majority's efforts to distinguish Hayden from this case are unavailing. The prosecutor's comments were replete with his beliefs of who was telling the truth. The evidence against McDonald was anything but "overwhelming," as in State v. Arlington, 265 Mont. 127 (1994). There was no direct evidence that the officer here was bitten; thus, the entire trial boiled down to whom the jury would believe. The prosecutor wrongly inserted himself into this critical determination. Justice Cotter would reverse and remand.

Mountain West Bank v. Cherrad, LLC, 2013 MT 99 (April 16, 2013) (5-0) (Wheat, J.)

Issue: (1) Whether the estate's appeal of the order finding its

CASES, next page

CASES, from previous page

construction lien invalid is moot due to sale of the property to bona fide purchasers; (2) whether the district court erred in calculating the amount of money Cherrad owed the estate for costs related to the condo construction project.

Short Answer: (1) Yes, and (2) no.

Affirmed, and remanded for attorneys' fees incurred on appeal

Facts: The parties developed condominiums at Lakeside Village on Hauser Lake. Several of the parties are LLCs owned by the Hales; Kinnaman was sole proprietor of CK Design. Kinnaman died in September 2007; his estate is a party. The Hales and Kinnaman discussed building a condo project, with Cherrad as the developer and Mountain West Bank as Cherrad's banker. The bank made three loans to Cherrad for the project. The first was in April 2006 for $1.38 million; the second in July 2006 for $78,602, and the third in May 2007 for $152,319. All three loans were secured by the Hauser Lake property and guaranteed by two of the Hale LLCs and the Hales (hereinafter Hales).

The bank required Cherrad and CK Design to execute construction contracts. The contracts included provisions the parties did not follow, including biweekly invoices from CK to Cherrad that were to be accompanied by a partial release of liens, and progress payments to CK from Cherrad. Instead, the parties paid CK as the units sold.

CK fell behind on the project, and several subcontractors and suppliers filed liens. The bank refused to further finance the project unless CK and Cherrad shielded the bank from those liens. In May 2007, the parties executed a agreement in which CK agreed to subordinate its interest to the bank's.

In July 2007, CK left the project, and in September 2007, the parties entered an agreement regarding outstanding debts on the entire project, totaling $180,731. The agreement provided that these debts would be paid before CK or Cherrad. Kinnaman committed suicide in September 2007. In November 2007, his estate recorded a $3.3 million construction lien on the Lakeside Village Condominiums. As a result Cherrad could no longer borrow money to complete the project.

Unit 2 sold for $700,000 in September 2007, and payments to subcontractors, suppliers and creditors totaled $223,898. Cherrad was paid $63,739 and the estate was paid $57,360. In October 2008, Unit 5 sold "as is" for $225,635, Unit 6 for $212,132, and Unit 3 for $325,000. CK received nothing from these sales. The bank filed suit against the Hales and the Kinnaman estate in January 2008, seeking foreclosure if its three loans made to Cherrad. Although Cherrad was not behind on any of its payments, the bank alleged it was insecure because of the estate's lien. The bank asked the court to declare the estate's lien inferior to the bank's interests.

The bank and Hale moved for summary judgment against the estate, arguing the construction lien was invalid for failure to comply with § 71-3-535, MCA. The court granted the motions and declared the lien invalid.

Procedural Posture & Holding: After a bench trial, the court held that CK Designs was entitled to some payment for units 3, 5, and 6, and that based on the course of conduct of the parties, a fair amount was 10% of the sale price for those units, or $76,278. The court found that CK's invoices supported the lien amount of $3.3 million, but that the invoices were "difficult to credit," and the lien was not supportable given Kinnaman's warrant that $180,731 was owed, and the practice of the parties regarding payment to CK.

The estate appeals the order granting summary judgment and the final judgment awarding the estate $76,278. The Supreme Court affirms.

CHS, Inc. v. Montana State Dept. of Revenue, 2013 MT 100 (April 16, 2013) (5-0) (McGrath, C.J.)

Issue: (1) Whether CHS's challenge to DOR's assessment methods may be brought as a declaratory judgment action in district court without first appealing to an administrative tax appeal board; (2) whether summary judgment was proper for CHS's claim that DOR failed to equalize its valuation of CHS's property; and (3) whether DOR's assessment of CHS's property was too late for 2009.

Short Answer: (1) No, as the only issues of fact CHS raised went to valuation; (2) yes; and (3) no.

Affirmed

Facts: CHS owns a coking refinery in Laurel and petroleum marketing terminals in Gallatin and Missoula counties. It disagreed with DOR's assessment of CHR's property taxes for 2009 and 2010. It paid its taxes under protest and filed this declaratory judgment action as well as appeals with the county tax appeals boards, as allowed by statute. The county tax boards have stayed the proceedings before them pending this proceeding.

Procedural Posture & Holding: DOR moved for summary judgment. The court granted judgment to DOR on all of CHS's claims, and CHS appeals. The Supreme Court affirms.

State v. Torres, 2013 MT 101 (April 16, 2013) (5-0) (Baker, J.)

Issue: (1) Whether Torres' aggravated assault conviction was supported by sufficient evidence; (2) whether Torres' burglary conviction was supported by sufficient evidence; and (3) whether the Court should exercise plain error review of Torres' claim that his convictions violated double jeopardy.

Short Answer: (1) Yes; (2) yes; and (3) no.

Affirmed

Facts: Zachariah Torres and his wife, Grendy, got into an argument after Torres discovered Grendy was taking money from him and his family and sending it to her family in Costa Rica. Grendy went to a friend's house, and Torres came looking for her. When Grendy's friend would not open the door, Torres broke the door down, entered the home, found Grendy, and left with her. The friend called 911 and reported the incident. After they arrived home, Torres got a Glock .45 from his truck and followed Grendy upstairs, pointing the gun at his own head. As the police arrived, they heard a muffled gunshot; Torres had opened the sliding glass door from the bedroom and fired a shot into the ground. The police surrounded the house and heard yelling and threats. Torres saw an officer aiming a rifle in his direction and closed the sliding glass door. He then fired a shot that shattered the glass and passed over the officers' heads. Torres fired a third

CASES, next page

CASES, from previous page

shot into the floor before surrendering.

The day after, Grendy told a victim's advocate that that Torres had taken her from her friend's house against her will, and that he had pushed her head into the windshield on the way home. She told a different story at trial, however, as did the friend.

Procedural Posture & Holding: After a five-day jury trial, Torres was convicted of aggravated assault, burglary, criminal endangerment, and assault on a peace officer. He was sentenced to eight years in prison with five suspended. Torres appeals, and the Supreme Court affirms.

Payne v. Berry's Auto, Inc., 2013 MT 102 (April 16, 2013) (5-0) (Rice, J.)

Issue: (1) Whether Berry's disclaimed implied warranties of a used vehicle when the transaction included purchase of a service contract, and (2) whether the district court erred in affirming the justice court's denial of Payne's implied warranty claim.

Short Answer: (1) No, and (2) no.

Affirmed

Facts: Linda Payne bought a used 1997 Ford Explorer from Berry's in September 2007. She paid an additional $1,870 for an extended service contract. She signed several documents, including the Buyer's Guide, a double-sided form to be affixed to the window of a used vehicle. The box next to "AS IS -- NO WARRANTY" was checked, as was the box next to "SERVICE CONTRACT," which stated, "If you buy a service contract within 90 days of the time of sale, state law 'implied warranties' may give you additional rights." Similar language stating that the vehicle was being sold "as is" was in the retail installment contract and the retail purchase agreement. The service contract was offered through a separate company, Wynn's, although sold by the Berry's salesman. The service contract price was included in the amount Payne financed, but paid to Wynn's.

Three weeks after buying the vehicle, Payne brought it to Berry's for minor repairs. After picking it up, and while driving on the interstate, the engine died. Payne contacted Berry's, which initially gave her a loaner vehicle but told her it would not be responsible for repairs and she should contact Wynn's. Wynn's initially declined to cover the costs of the repair, although Payne testified at trial that negotiations were ongoing.

Payne filed suit against Berry's in justice court, seeking damages for Berry's failure to honor implied warranties and for committing an unfair trade practice. Payne argued that she bought the service contract from Berry's not Wynn's, and that under the Magnuson-Moss Warranty Act, Berry's cannot disclaim the implied warranties. After a bench trial, the justice court issued entered judgment for Berry's,finding that the service contract was with Wynn's, and holding that implied warranties do not apply unless the service contract is with the vehicle seller.

Procedural Posture & Holding: Payne appealed to the district court, which affirmed. Payne appeals, and Berry's did not file an appellee's brief or otherwise participate. The Court therefore takes the appellant's positions as correct if they are supported by the record, and affirms on the basis of state, rather than federal, law.

State v. MacDonald, 2013 MT 105 (April 23, 2013) (7-0) (Baker, J.)

Issue: (1) Whether the district court erred by ordering a change in parenting arrangements for John Doe as part of the criminal sentence, despite pending dependency and neglect proceedings, and (2) whether the district court exceeded statutory mandates by ordering MacDonald to pay fees, costs, and surcharges without inquiring into her ability to pay.

Short Answer: (1) No, but the court should not have included a statement in the written judgment that John Doe's father should be presumed to have custody; and (2) no.

Affirmed and remanded to strike part of written judgment

Facts: In March 2011, Ashli MacDonald and her boyfriend, Pete Lapham, brought Ashli's seven-week-old son, John Doe, to the hospital due to swelling and bruising of his upper right leg. After determining that the baby had a fracture in his upper right femur and suspecting non-accidental trauma, the doctor conducted a routine skeletal survey and found an older, already healing fracture in his right humerus. MacDonald and Lapham were interviewed separately by the police. MacDonald initially denied knowing what had happened to her son, but then said she had become frustrated by his crying, grabbed him by the leg and flipped him over. She described another time when she jerked his right arm. At trial, she said these were lies she told so she could get out of there more quickly, and testified that Lapham, not she, had injured the baby.

Procedural Posture & Holding: A jury convicted MacDonald of assault on a minor and aggravated assault, both felonies. The district court held a sentencing hearing, and the baby's father, Andrew Cox, attended. When asked by the court about his preferred residential agreement, Cox said he thought John Doe should live with him, and MacDonald should be allowed supervised visitation. MacDonald's counsel noted that the parenting arrangements were being considered in MacDonald's dependency and neglect proceeding, and suggested the court await the outcome of that case. The court said it would defer to the dependency and neglect matter, but in the interim, placed the baby with the father, allowing MacDonald three supervised visits a week.

The district court sentenced MacDonald to five years in prison for assault on a minor and 15 years for aggravated assault, to be served concurrently, with both sentences suspended. It ordered MacDonald to pay fines, fees, and surcharges, including prosecution and defense costs, totaling $1,060. The court made no findings regarding MacDonald's financial situation. MacDonald appeals, and the Supreme Court affirms but remands for removal from the written judgment of the statement regarding John Doe's custody.

Sullivan v. Continental Construction of Montana, LLC, 2013 MT 106 (April 23, 2013) (5-0) (Morris, J.)

Issue: (1) Whether the district court properly held that Continental had good cause to terminate Sullivan's employment; (2) whether Continental improperly considered hearsay evidence in deciding to terminate Sullivan's employment; (3) whether the

CASES, next page

CASES, from previous page

district court improperly considered hearsay evidence in deciding that Continental had good cause to terminate Sullivan's employment; and (4) whether the district court properly concluded that Continental did not violate the provisions of its employee handbook when it terminated Sullivan's employment.

Short Answer: (1) Yes; (2) no; (3) no; and (4) yes.

Affirmed

Facts: Continental Construction operates from its headquarters in Florida. It hired Michael Sullivan as a construction site supervisor in April 2008. Sullivan supervised many of Continental's construction employees in Montana, and worked with many of Continental's subcontractors and clients. Sullivan left Montana on a scheduled vacation on Oct. 21, 2010. John Cecil, Continental's VP of construction, traveled to Montana from Florida to replace Sullivan while he was on vacation. A group of employees approached Cecil and said they were unhappy with Sullivan as a supervisor. Cecil understood the employees to be threatening to quit unless Sullivan was immediately terminated as their supervisor.

Cecil spoke with Continental's office manager in Florida, Peg Wilson, who instructed Cecil to interview each employee individually about their experiences with Sullivan. Cecil and John Wallace, another Continental employee, did so the next day. The interviews revealed that many employees heard Sullivan routinely make derogatory comments about Continental's management to employees and non-employees, as well as derogatory comments to employees and subcontractors about their work. Several employees said that Sullivan often showed up late for work, and would disappear for long periods of time during his shift. Many felt that Sullivan negatively affected employee morale.

Wallace shared his notes from the employee interviews with Continental management, who decided to terminate Sullivan immediately. Continental called Sullivan to notify him he was being fired, and sent him a letter setting forth the reasons.

Procedural Posture & Holding: Sullivan sued Continental for wrongful discharge, and Continental defended on the grounds that it had a valid business reason to terminate Sullivan's employment. The parties filed cross-motions for summary judgment, and the district court granted Continental's motion. Sullivan appeals, and the Supreme Court affirms.

Stewart v. Liberty Northwest, 2013 MT 107 (April 23, 2013) (5-0) (McKinnon, J.)

Issue: (1) Whether the Work Comp Court erred in determining that Stewart is entitled to continued payment for the pain patches prescribed for her; (2) whether the court erred in determining Stewart was not entitled to attorneys' fees; and (3) whether the court erred in failing to impose the statutory penalty on Liberty, pursuant to § 39-71-2907, MCA.

Short Answer: (1) No; (2) no; and (3) no.

Affirmed

Facts: Sharon Stewart suffered an injury at work in August 2002. Her employer was insured by Liberty, which accepted liability and paid Stewart wage loss and medical benefits with an 18% whole person impairment rating. Stewart's initial diagnosis was a probable meniscal tear of her knee. She had two surgeries but continued having pain and decreased range of motion.

The following year, a different doctor assigned Stewart a 33% impairment rating based on a different diagnosis of a possible nerve neuroma. Stewart petitioned the Work Comp Court for an increased impairment rating, and the court held a hearing at which the new doctor testified that he did not know how Stewart's saphonous nerve could have been injured during her surgeries and could not point to any medical evidence supporting a relationship between her surgeries and her symptoms. As a result, the court determined Stewart failed to prove causation and denied her request for an increased impairment rating. She did not appeal.

A year later, Stewart was told by her pharmacist that Liberty would no longer pay for her pain patches, which she had been using for her knee pain. Stewart petitioned for relief to reinstate payment of the patches, and attorneys' fees and penalties against Liberty. She supported her request with a medical opinion that either the original injury or the two surgeries were the cause of her chronic pain. After a short break in payments, Liberty resumed paying under a reservation of rights.

Procedural Posture & Holding: The parties submitted the case to the Work Comp Court on a stipulated record, which held that Stewart had met her burden and was entitled to payment for her pain medication, but was not entitled to attorneys' fees or a statutory penalty. Liberty appeals, Stewart cross-appeals, and the Supreme Court affirms.

Lane v. Caler, 2013 MT 108 (April 23, 2013) (5-0) (Rice, J.)

Issue: Whether the district court correctly interpreted the Maxine Lane Irrevocable Trust to require the trustee to distribute $100,000 to Maxine's brothers when the trust property was sold during Maxine's lifetime.

Short Answer: Yes.

Affirmed

Facts: In 2003, with her mother's contribution of the $50,000 down payment, Maxine Lane bought a house, where she lived until it sold in July 2011. The debt was originally secured by a fixed-rate mortgage, but Maxine refinanced with an adjustable-rate mortgage in 2004. When the interest rate spiked in 2007, Maxine could no longer make the monthly mortgage payments. Maxine's mother paid off the $203,278 owing against the property, and Maxine transferred title to the newly created Maxine Lane Irrevocable Trust. The trust strictly prohibited any encumbrances on the property, and provided that if the property sold during Maxine's lifetime, $50,000 was to be paid to each of Maxine's brothers, Homer and Karl. Maxine's daughter, Linda, was named trustee; Maxine was the sole beneficiary; the trust's sole asset was Maxine's house. The trust's only source of income was rent paid by Maxine and other tenants, which income was used for repairs and maintenance.

In 2009, the house's septic system began backing up. To permanently fix the problem, Linda suggested connecting to city sewer; however, the trust funds were depleted because Maxine had stopped paying rent and the tenants had moved out.

CASES, next page

CASES, from previous page

Maxine's other daughter, Jackie, offered to make an interest-free, unsecured loan to the trust to finance the sewer, asking only that the loan be repaid without interest when the house was sold. However, she attached two conditions for the loan -- first, that Maxine comply with the city ordinance regarding the number of dogs on the property, and second, that Maxine keep no more than four dogs no matter what the city allowed. Maxine, who bred and raised long-haired Dachsunds, rejected the offer so that she could keep 8-12 dogs. No commercial lender would make an unsecured loan to pay for the sewer work.

Maxine moved out in 2011, and the house sold, resulting in $176,469 in net proceeds. Maxine wanted to use the money to buy a new house, but Linda indicated she was obligated to first pay Homer and Karl $100,000. Maxine moved into a rental unit, and the trust continues to pay her monthly rent.

Procedural Posture & Holding: Maxine filed a declaratory judgment action against Linda as trustee, asking the court to determine whether the trust required the distributions to Homer and Karl. The parties filed cross-motions for summary judgment, and the district court granted judgment to Linda. Maxine appeals, and the Supreme Court affirms.

In the Matter of DSB and DSB, 2013 MT 112 (April 30, 2013) (5-0) (McGrath, C.J.)

Issue: (1) Whether the district court properly concluded that birth father JH's treatment plans were appropriate, and (2) whether the state presented sufficient evidence to terminate JH's parental rights under the Indian Child Welfare Act.

Short Answer: (1) Yes, and (2) yes.

Affirmed

Facts: The state petitioned for emergency protective services, adjudication as youths in need of care, and temporary legal custody of DSB1 and DSB2, alleging their father, JH, had sexually abused, medically neglected, and physically neglected the children, and exposed them to unreasonable risks. JH stipulated that the children should be adjudicated as youths in need of care. At a July 2010 hearing, the district court held that the children are Indian, and the Indian Child Welfare Act (ICWA) applies.

The Department of Public Health and Human Services prepared treatment plans for JH, which were approved by the court. At the time they were approved, JH was in the Department of Correction's custody for failing to register as a violent offender.

Procedural Posture & Holding: The state petitioned for permanent legal custody and termination of JH's parental rights in February 2010. The district court held four hearings, and took testimony from an ICWA expert, a state child protection specialist, the children's therapist, and JH. On Aug. 2, 2012, the district court issued an order terminating JH's parental rights to the children. JH appeals, and the Supreme Court affirms.

State v. Baker, 2013 MT 113 (April 30, 2013) (5-0) (McGrath, C.J.)

Issue: (1) Whether the district court erred in admitting into evidence a recorded interview with the victim; (2) whether sufficient evidence supported the conviction; (3) whether the district court erred in denying Baker's motion for a new trial; and (4) whether's Baker's attorney provided ineffective assistance at trial.

Short Answer: (1) No; (2) yes; (3) no; and (4) the Court declines to address this issue.

Affirmed

Facts: Jeffrey Baker began a relationship with HB's mother when HB was 2. When HB was 4, she told her mother about sexual contact Baker had with her, which Baker denied. Later, HB told her mother than Baker "touches his pee to my pee pee and it kind of hurts." HB's mother called the police.

A trained forensic interviewer, Dawn Spencer, interviewed HB before trial. HB was reluctant to talk about Baker, but said he had touched her "in a bad way," and put his privates into her privates. Baker denied any inappropriate contact with HB. The interview was recorded.

The state charged Baker with felony sexual assault.

Procedural Posture & Holding: HB was 7 when she testified as the first witness at Baker's jury trial in January 2012. She testified that he was mean and she was afraid of him, but refused to elaborate. She said she had not told her secret to anyone but her mother, and would not tell because she was afraid. The state called Dawn Spencer as a witness, and moved to admit the tape of her interview with HB. Baker objected, and the court denied the objection. The tape was played to the jury.

HB's mother testified about Baker having put his penis into HB's mouth when she was 4, and touching her inappropriately. HB's therapist also testified that Baker had "tortured" her and did "something gross" that she didn't want to talk about.

The jury convicted Baker of sexual assault, and the court sentenced him to 40 years in prison with 20 suspended. Baker appeals, and the Supreme Court affirms.

Ecton v. Ecton, 2013 MT 114 (April 30, 2013) (5-0) (Cotter, J.)

Issue: (1) Whether the district court erred in interpreting Zales Ecton, Jr.'s will requiring IRC § 2032A property to be distributed as part of the residuary estate as requiring a specific devise rather than a devise to the residuary beneficiaries; and (2) whether the district court erred in allowing Zales III to object to the PR's decision to award the income from the IRC § 2032A property to residuary beneficiaries more than 30 days after the proposed distribution was submitted for approval.

Short Answer: (1) No, and (2) no.

Affirmed

Facts: This case involves a dispute between siblings over who was entitled to receive farm and ranch land owned by their parents. The Home Ranch consists of more than 1900 acres near Amsterdam, Montana. Zales, Jr. (Dad) and his wife, Patricia (Mom), had three children: Zales III, of Amsterdam, Doug, of Spokane, WA, and Elaine, of Spokane. Zales III has operated the farm and ranch business on the Home Ranch for nearly 40 years.

Mom died in 1998. She owned an undivided one-half interest in the Home Ranch as a tenant in common with Dad. Her will

CASES, next page

CASES, from previous page

created a trust and transferred her interest to the trust upon her death. Dad was the sole beneficiary. Mom's trust was to terminate upon Dad's death. A reciprocal provision of Mom's will provided that upon Dad's death, any portion of the Home Ranch that was an asset of the trust estate was to be distributed to Zales III.

Dad died in 2006. Doug was PR of Dad's estate, and successor trustee to Mom's trust. Doug partitioned the Home Ranch so that half of the real estate could be separately deed to Zales III, the trust beneficiary. The remaining acreage was subject to probate. Because the valuation of all of Dad's assets exceeded the $2 million exemption from federal estate tax, Doug used a special valuation statute for farm property, IRC § 2032A, to reduce the estate's value by classifying 528 acres of the Home Ranch as farm property.

Doug filed a final accounting in 2009. Relying on the provision that the PR was to distribute IRC § 2032A property as part of the residuary estate, the final accounting proposed distributing the 528 acres equally between Doug and Elaine. Zales III objected.

Procedural Posture & Holding: The district court determined that Dad clearly intended to devise the entire Home Ranch to Zales III, and not distribute part of it to Doug and Elaine. Subsequently, Doug submitted an amended final accounting, which distributed the 2009, 2010, and 2011 income from the 2032A property to Doug and Elaine. Zales objected, and the district court agreed that distributing "all property known as the Home Ranch" would necessarily include any associated income and proceeds from the property, and granted Zales III's objection. Doug appeals, and the Supreme Court affirms.

State v. Kelm, 2013 MT 115 (April 30, 2013) (5-0) (Baker, J.)

Issue: (1) Whether the district court properly suppressed all evidence gathered after Kelm's arrest because the arresting officer did not comply with § 46-6-312, MCA; (2) whether the district court properly suppressed all evidence obtained after Kelm's arrest because the officer failed to advise Kelm of her Miranda rights; (3) whether the district court properly suppressed evidence seized from Kelm's vehicle.

Short Answer: (1) No, as the failure to comply did not affect Kelm's substantial rights; (2) no, as Miranda protects only self-incriminating statements made while in custodial interrogation; and (3) no, as the officer was lawfully present in Kelm's vehicle when he returned to turn her lights off.

Affirmed in part, reversed in part, and remanded

Facts: Early on February morning, Deputy Krause saw Kristin Kelm driving erratically. Krause followed Kelm for several miles, and saw her vehicle weave within its lane, touch the fog line and the center line, and cross the center line 2-3 times. Krause initiated a traffic stop. When Krause approached the driver's side window, Kelm gave him her driver's license. He remarked that her eyes looked bloodshot and glassy, and asked if she had been drinking. Kelm said no.

Without having Kelm get out of the car, Krause administered a horizontal nystagmus test to determine if she was intoxicated. He scored her at 4 out of a possible 6, indicating intoxication. When asked again, Kelm said she'd had one drink.

Krause determined Kelm had to pass field sobriety tests before resuming driving. Because it was minus-one degree outside, with snow and ice on the highway, Krause asked if Kelm would perform the tests at the Sheridan County Jail. She agreed, turned off her truck, and gave the keys to Krause. In accordance with department policy, Krause handcuffed Kelm before placing her in the back of his patrol car. Krause did not inform Kelm she was under arrest.

Krause then saw that Kelm had not turned off her truck's lights. She gave him permission to do so, and he unlocked the truck, reached in from the driver's side and turned off the lights. As he walked away he saw the dome light was still on, so returned to the truck and opened the door again. He immediately noticed a half-full beer bottle on the floor as well as a plastic cup in the passenger cup holder filled with green liquid that smelled like alcohol. Krause emptied both, and asked Kelm about the green liquid. She could not identify it and denied drinking it.

At the jail, Kelm performed and failed three field sobriety tests. Deputy Ginn informed Kelm she was under arrest for DUI. Kelm agreed to take a breath test, which showed her BAC as .198. Krause read Kelm her Miranda rights, and formally booked her.

Kelm was charged with unlawful possession of an open container, failure to drive on the right side of the road, and DUI. The justice court denied Kelm's motion to suppress all evidence collected after her arrest, and Kelm pled guilty but reserved her right to appeal the denial of her motion to suppress.

Procedural Posture & Holding: Kelm moved the district court to suppress evidence against her. After a hearing, the court denied Kelm's motion regarding the HGN test. It granted Kelm's motion to suppress evidence of the beer bottle and cup, holding Krause was not lawfully present in Kelm's vehicle and that the plain view doctrine did not apply. Finally, it granted Kelm's motion to suppress all evidence gathered between her arrest and the Miranda warnings, and further held that because Krause did not advise Kelm of her Miranda rights immediately after arresting her, her arrest was unlawful and all evidence subsequently obtained must be suppressed. The state appeals, and the Supreme Court affirms, reverses, and remands to allow Kelm to withdraw her guilty plea and proceed to trial.

Case briefs courtesy of Beth Brennan, who practices in Missoula with Brennan Law & Mediation, PLLC.

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ATTORNEY POSITIONS

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NATURAL RESOURCE STAFF ATTORNEY: The Wyoming County Commissioners' Association (WCCA) is looking to hire a natural resource staff attorney. The natural resource staff attorney is responsible for providing County Commissioners with legal information/education on natural resource and public land law topics, assist the Commissioners in their role in federal public land planning efforts, conduct outreach with stakeholders, assist the Commissioners in participating in litigation, if necessary, and other duties as assigned by the WCCA Executive Director. The WCCA natural resource staff attorney works closely with County Commissioners of all 23 counties, the Wyoming Governor's Office, Wyoming state agencies, federal agencies (locally, regionally and nationally), and other stakeholders. The Candidate should have a firm knowledge of natural resource and public land law including NEPA, ESA, FLMPA and NFMA, as well as agency regulatory requirements and administrative process. The Candidate should also possess excellent communication, technical writing, legal research and computer skills. The Candidate must be a member in good standing of the Wyoming Bar Association and possess the ability to organize and apply legal concepts and principals, establish and maintain effective working relationships and be willing to travel when necessary. The Candidate must successfully pass a background check.
Note: This is a two-year grant position funded by the Wyoming Federal Natural Resource Policy Account
Salary Dependent on Experience
Application Deadline July 1, 2013

Benefits: WCCA health package including medical insurance, dental insurance and vision insurance
sick/vacation leave, participation in the Wyoming State retirement system

Application Instructions: Interested applicants should submit a writing sample and resume to:

Cindy DeLancey
Wyoming County Commissioner's Association
P.O. Box 86
Cheyenne, WY 82003

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For application procedure and a full job description:
www.aclumontana.org/images/stories/documents/legaldirectorjobpostingmay2013.pdf

Application deadline is July 1 or until filled.

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Office of Legal Counsel, Crow Tribe
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Crow Agency, MT 59022

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JOBS/CLASSIFIEDS, next page

JOBS/CLASSIFIEDS, from previous page

DNRC ATTORNEY: Attorney for State agency Department of Natural Resources and Conservation. Located in Helena. This position will provide legal advice and representation to DNRC primarily in areas of real estate management. Please see full vacancy announcement at: https://svc.mt.gov/statejobsearch . Deadline is June 10.

SUPERVISING ATTORNEY (ATTORNEY III): The ND Commission on Legal Counsel for Indigents has an opening for a Supervising Attorney in its Williston, ND Public Defender Office. The person selected will supervise office attorneys and staff, and provide legal counsel services to indigent clients in criminal and juvenile matters. Salary: $5723-$9539 per month; Hiring Range: $5723-$7631 per month. Position requires ND license to practice law (applications from persons eligible for ND license will be considered), four years experience in the practice of law, criminal defense experience, and two years supervisory experience. If no qualified applicants, will consider underfilling as an Attorney II. Please visit http://www.nd.gov/hrms/jobs/18824522.html for complete information and application details, or call the Commission at 701-845-8632.

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COMPLICATED CASE? I can help you sort through issues, design a strategy, and write excellent briefs, at either the trial or appellate level. 17+ years experience in state and federal courts, including 5 years teaching at UM Law School and 1 year clerking for Hon. D.W. Molloy. Let me help you help your clients. Beth Brennan, Brennan Law & Mediation, (406) 240-0145, babrennan@gmail.com.

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MEDIATION

AVAILABLE FOR MEDIATIONS: Brent Cromley, of counsel to Moulton Bellingham PC, Billings. 406-248-7731.

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MISSOULA OFFICE: One or two professional offices for lease in historic building in downtown area. Share use of reception area; two conference rooms; copy and fax machines; library; secretarial space; kitchen; basement storage; locker room with shower; and private yard. Call Mark at (406) 327-1517.

BOZEMAN OFFICE: One professional office for lease in historic building in downtown area. Share use of reception/waiting area, conference room, and copy/fax machine – terms negotiable. Next door to parking garage. Contact us at (406) 994-0000 or clrochford@yahoo.com for more info.

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BAD FAITH AND INSURANCE COVERAGE EXPERT WITNESS: David E. Bauer, JD (U of M 1980), CPCU. 20 + years as in-house counsel for major property and casualty insurer. 406-671-0885.

E-DISCOVERY, TECHNOLOGY LAW, EARLY CASE ASSESSMENT: Ph.D. in Computer Science, faculty member at UM, and member of the Montana bar available as expert witness, consultant, co-counsel, mediator or arbitrator. Experienced in technology law, e-discovery, and early case assessment using technology. Let me handle the technology aspects of your case in ways that lawyers, judges, and juries can understand. Dr. Joel Henry, (406) 251-0305; henry.j@bresnan.net.

BANKING EXPERT: 34 years banking experience. Expert banking services including documentation review, workout negotiation assistance, settlement assistance, credit restructure, expert witness, preparation and/or evaluation of borrowers' and lenders' positions. Expert testimony provided for depositions and trials. Attorney references provided upon request. Michael F. Richards, Bozeman MT (406) 581-8797; mike@mrichardsconsulting.com.

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EVICTIONS LAWYER: We do hundreds of evictions statewide. Send your landlord clients to us. We'll respect your "ownership" of their other business. Call for prices. Hess-Homeier Law Firm, (406) 549-9611, ted@montanaevictions.com. See website at www.montanaevictions.com.

The more things change ...

By Bob Sullivan

It was ten years ago that I had the privilege to assume the office of President of the State Bar. It seems that a lot has changed in the way we practice law in the last ten years. Most of it has been in the technological area of the practice of law. Unfortunately, some things have not changed.

When I started my term as President, I had a goal of working to improve civility among lawyers and in the legal system. When my term ended, I recognized that it was a lofty goal that was not going to be accomplished in the year of my term but hoped that the interest in improving civility would continue to grow and improvement be seen. I recall at the end of my term that the presidents of both the plaintiff and defense bars advised me that they agreed that the issue needed to be addressed and would be in their organizations. I also heard from other lawyers and judges that they would be working on the issue. It appeared that the discussions that we had planted a seed that I hoped would continue to grow and bear fruit. Apparently, the soil was not as well fertilized as I had hoped because lack of civility between lawyers remains an issue today. It is not just a Montana issue but is a nationwide issue in the practice of law. Unfortunately, the lack of civility is not limited to the practice of law but seems to permeate these days in numerous areas of society.

We all have heard of, or experienced, situations involving lack of cooperation between lawyers on scheduling matters, rudeness, deceptiveness, abusive discovery practices and personal attacks on opposing counsel and parties. The practice of law can be difficult and trying without these unnecessary and inappropriate side issues. The issue of civility between lawyers was the topic of a recent ABA Journal article in January 2013. In the article, the disciplinary counsel for the Supreme Court of South Carolina stated the South Carolina Supreme Court has issued "four or five opinions that are strictly on civility, including three in one year and one for a lawyer hitting an opponent in a deposition." South Carolina has a required oath for attorneys admitted to practice that mandates that lawyers act with "fairness, integrity and civility, not only in court, but also in all written and oral communications." I have not found any decision by the Montana Supreme Court on the issue of a lawyer's lack of civility but the Office of Disciplinary Counsel reports that there have been two formal complaints filed before the Commission on Practice recently dealing mainly with civility issues in Montana. The alleged conduct of the attorneys in those formal cases is disturbing. As formal cases, the allegations are public. The Office of Disciplinary Counsel has advised me that civility issues are more frequently being raised in complaints to the office in recent years. Do a Google search for the "lack of civility between lawyers" and you will find a plentiful amount of material on the subject.

Why is civility continuing to be an issue in the practice of law? Theories on the causes of the lack of civility that have been expressed as: inexperienced lawyers and lack of mentoring; an unclear line between aggressive advocacy and rudeness; the country's current fractious public discourse; competition in practice and the need to succeed at all costs; and today's technology involving lack of personal communication and the ability to act anonymously online. Whatever the causes, the solution is in our own hands. Each of us as practicing attorneys control our own conduct. We can advocate our client's positions and still maintain civility. If we cannot, maybe is it time for it to be imposed and enforced upon us.

In 2010, the late Don Robinson, individually and on behalf of the Montana Chapter of the American Board of Trial Advocates (ABOTA), petitioned the Montana Supreme Court to adopt and implement an ABOTA program known as "Civility Matters." The program is designed to address the increased incivility in the legal system by adopting ABOTA's Principals of Professionalism and Civility, revising the Montana oath to include a commitment to civility and initiate a mentoring and referring program to address the issues. While the Court found the application clearly laudable, the Court had concerns about potential conflicts with current rules and practices and declined to grant the petition at that time. (Order AF 06-0632, Dated August 3, 2010.) The Court also stated that parts of the program could be implemented without order of the Court and encouraged ABOTA to provide information about the program and opportunities to participate to Montana lawyers and judges. This was done by ABOTA. But my understanding after checking with a member of ABOTA is that no one has taken advantage of the program at this time. Maybe it is time to address the Court's concerns and reconsider implementation of a modified version of the program. I encourage you to read and adopt the Principles of Civility, Integrity and Professionalism for members of ABOTA for yourself. If we all did, lack of civility would no longer be an issue.

When I finished my term as President, I challenged the members to continue to improve civility. Apparently no one was listening. While I am now just a member of the bar, I still challenge my fellow bar members to work to improve civility. This is an honorable profession to which we are privileged to belong and we need to uphold that honor by acting civilly with each other. We each control our own actions and conduct. Sound advice that a mentor of mine gave me long ago was to treat all lawyers with respect whether they deserve it or not. Incivility does not advance our client's causes. In my opinion, it tends to cost our clients more in the long run.

Thank you to the State Bar for giving an old president the opportunity to get on the soap box to once again pontificate on an issue that is of great concern to me and many others.

Robert J. Sullivan *was president in 2003-2004*

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