MONTANA LAWYER
State Bar of Montana
March 2013 | Vol. 38, No. 5

Bar Awards and elections

> Do you know of a peer who deserves recognition? It's time to work on nominations. Forms are inside and online.

> It's also State Bar elections season. Three trustee positions, president-elect, and secretary-treasurer will be on the ballot. Nomination petition inside and online.

Also inside

The official magazine of the State Bar of Montana published every month except January and July by the State Bar of Montana, 7 W. Sixth Ave., Suite 2B, P.O. Box 577, Helena MT 59624. (406) 442-7660; Fax (406) 442-7763.
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Why do attorneys become successful financial advisors?

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President's Message | Pam Bailey

Nation's law schools are facing an enrollment crisis

There is a nationwide crisis at the law schools in our Country. Enrollment is down dramatically and there is no indication that this will change in the near future. The New York Times reports that in 2004, 100,000 people applied to law school. In 2013, the number of applications expected is between 53,000 and 54,000. The causes are obvious – high tuition and fewer jobs. How this will impact law schools is also obvious – faculty layoffs and closures.

Is this another nationwide problem that we in Montana can say does not affect us? The answer is NO! The University of Montana School of Law is also seeing a significant drop in applications. Law school applications are down about 36% from this time in 2010. In early January 2013, less than 60 applications had been received. Typically, over 100 applications would be received by that time. In the past two months, applications are up over last year, but still not at a desired level.

The University of Montana School of Law has low tuition compared to other law schools, good job placement statistics, and a very high bar passage rate. So what is the problem? Competition is one factor. Out-of-state law schools are "poaching" our top students. They are offering better scholarships and making earlier offers. Sadly, the huge debt these students will incur at out-of-state schools, even with scholarships, will make their return to Montana unlikely.

Marie Connolly, the State Bar admissions coordinator, reports that many applicants for the 2013 bar exam have $150,000 or more in student loan debt. Many jobs right out of law school in Montana are offering salaries in the $40,000 - $50,000 range. It is mind blowing to imagine repaying this debt, especially the first few years out of law school, let alone buying a new car, a home, starting a family, etc...

The University of Wyoming School of Law is facing the prospect of reducing their class size this year due to a reduction in applications. The University of Montana School of Law plans to admit a class that is substantially similar in terms of qualifications; however, the number of students enrolled may be lower than last year if necessary to maintain the qualifications. So far, the quality of students has been maintained. The concern is quantity.

Many of you may say that we have too many attorneys not only nationwide, but in Montana. As I have informed you in an earlier President's message – over 50% of the Montana bar is over 50 years of age. When we baby boomers start to retire in large numbers, will there be enough lawyers to take our place?

What about eastern Montana? There is already a serious shortage of attorneys in that area. The Bakken boom has significantly impacted the 7th and 15th Judicial Districts. Guess how many attorneys practice in those areas? In the 7th Judicial District there are 30 active attorneys and in the 15th Judicial District there are 16 active attorneys. Not enough to meet the present legal needs, let alone in the upcoming years when the population will explode. How do we attract new attorneys to move to rural eastern Montana? The lack of affordable housing in that area is enough of a deterrent in and of itself.

What are the solutions? This is not just the law school's problem, this is our problem. Members of the Executive Committee of the State Bar have met with Dean Irma Russell, Lori Freeman (Director of Admissions and Career Services), and John Mudd (Director of Development and Alumni Relations). They are doing their best to reach out to prospective students in Montana and nationwide; however, they need our help. Members of the State Bar can encourage bright young students to stay in Montana for their legal education. We can also reach out to our local high schools and colleges and educate students about the opportunities in the law. Scholarship money is always needed. The University of Montana Law School has never offered full ride scholarships. Funding is needed for ad campaigns and to pay for travel to bring prospective students to Montana. What solutions can you offer? The law school and State Bar want to hear from you.

"What about eastern Montana? There is already a serious shortage of attorneys in that area. The Bakken boom has significantly impacted the 7th and 15th Judicial Districts. Guess how many attorneys practice in those areas? In the 7th Judicial District there are 30 active attorneys and in the 15th Judicial District there are 16 active attorneys. Not enough to meet the present legal needs ..."

Wilson a new shareholder in Brown Law Firm


Wilson

Brown Law Firm, P.C., Billings, Montana, is proud to announce that Jon A. Wilson has become a shareholder in the firm. Jon graduated from the University of Montana School of Law with high honors in 2005. He served as a law clerk for Justice John Warner of the Montana Supreme Court before joining Brown Law Firm in September 2006. His principal areas of practice are insurance coverage and civil defense litigation. He is admitted to practice in the state and federal courts of Montana and the Ninth Circuit Court of Appeals. Mr. Wilson is a member of DRI and the Montana Defense Trial Lawyers Association.

Taylor the new coordinator at Missoula Family Law Self-Help Center


Taylor

The Missoula Family Law Self-Help Center welcomes Sheri Taylor as its new coordinator. Sheri was heavily involved in the Self-Help Law Program (formerly known as the Family Law Advice Clinic) at Montana Legal Services Association. In large part, Sheri's work at the Missoula Family Law Self-Help Center will be much the same as in her prior position where she helped pro se litigants draft family law documents and coordinated volunteer attorneys to provide legal advice to those individuals. At the time the program was cut in 2011 when Montana Legal Services Association lost funding, Sheri was assisting 284 pro se litigants across the state. Sheri is passionate about helping people in difficult situations and brings to the position her education in paralegal studies and non-profit management, in particular, as well as her experience recruiting, training, and managing over 100 disaster service volunteers at the American Red Cross.

Hall & Evans welcomes Taylor to Billings office


Taylor

Brian Taylor is a litigation attorney with a historically diverse practice. His practice primarily focuses on civil defense where he has represented clients in a wide variety of cases including bad faith and product liability. He also represents a number of insurance carriers in traditional insurance defense matters. Brian's experience in the product liability field has covered a wide spectrum of self-insured automobile manufacturers and component part manufacturers.

A graduate of Gonzaga University, Brian has participated in numerous trials in both state and federal courts throughout Montana. His practice focus is in the field of transportation defense, insurance defense, and product liability defense.

Before joining Hall & Evans in 2013, Brian was a partner at Jardine Stephenson, Blewett & Weaver in Great Falls, Montana.

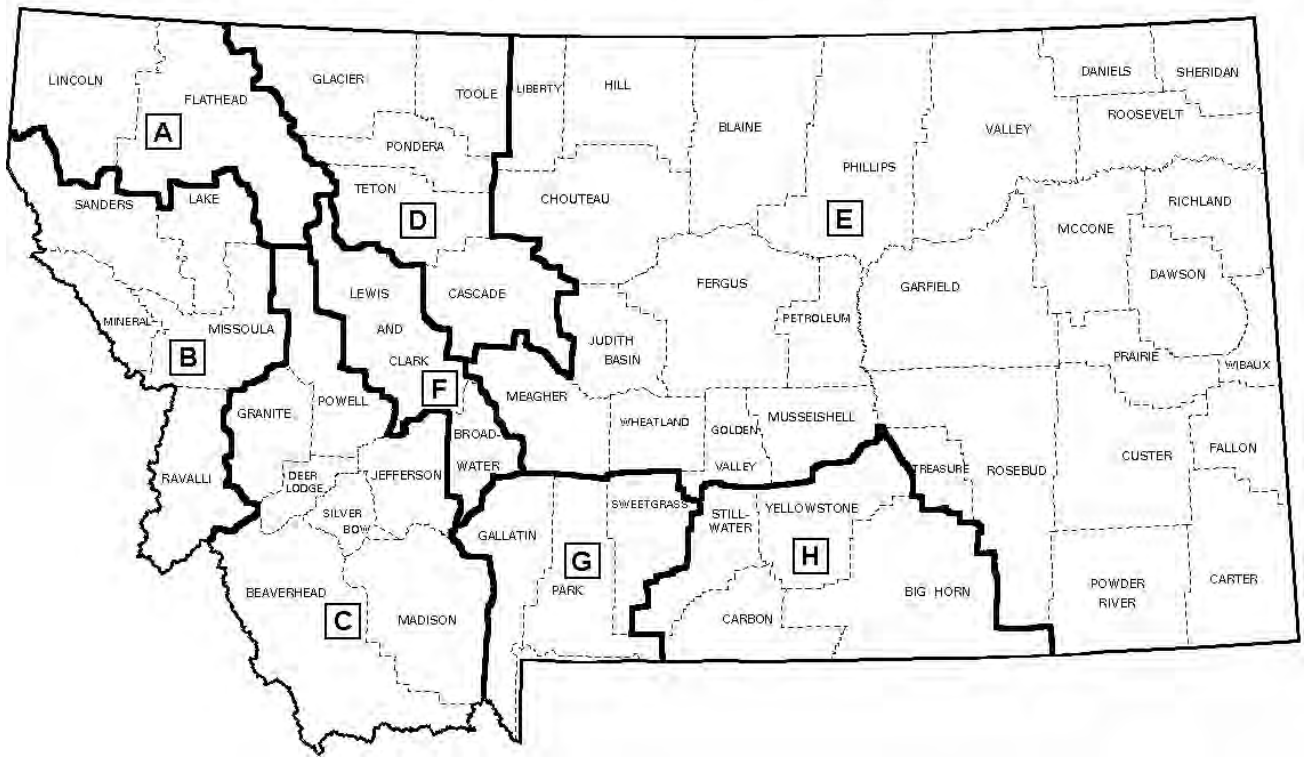
Hall & Evans is a Rocky Mountain regional law firm established in 1932 which focuses on tort and commercial litigation. Hall & Evans has offices in Billings, MT, Cheyenne, WY and Denver, CO. Contact Taylor at taylorb@hallevans.com

Orr reopens Missoula Law office


Orr

Thomas C. Orr is proud to announce the re-opening of his law office in Missoula, MT at 523 South Orange. Tom has practiced law for over 22 years in the areas of Family Law, Real Estate Transactions, Landlord/Tenant, Personal Injury and Criminal Defense. He spent 8 years with the City Attorney's office in Missoula before opening his own office in 2000. Before reopening his office, he was with the P. Mars Scott Law Firm since 2010. Tom is looking forward to serving the legal needs of businesses and families in the Missoula area and can be reached at (406) 543-0999 or tom@tcorrlaw.com.

State Bar Trustee Areas



State Bar of Montana elections begin

Election season is under way for State Bar positions. Letters have been sent to those whose terms are expiring. A copy of the nominating petition is on page 11, and at *www.montanabar.org*. The deadline for original nominating petitions is April 8. Ballots will be mailed on May 5. Ballots need to be postmarked or hand delivered by May 28. Ballots will be counted on June 7. The following positions are up for election: Area E, Area F, Area H, Secretary-Treasurer, President-Elect.

Bar seeks award nominations

Print nomination forms for the William J. Jameson Award and George L. Bousliman Professionalism Award are on pages 8-9. The deadline for these two awards is May 15. The Karla M. Gray Equal Justice, and the Neil Haight Pro Bono awards forms will be printed in the April Montana Lawyer. Copies of the nomination forms for all awards are available online at *montanabar.org*. Information and criteria are listed on the individual awards.

Dues mailed March 1

The State Bar of Montana mailed annual dues statements to attorneys on March 1. Payments for all fees are due April 1 and can be made by check or online with a credit card. CLE affidavits will be mailed separately in April with a filing deadline of May 15.

Meet your ethics requirement

Most Montana attorneys will be required to obtain 5 Ethics credits, including 1 SAMI credit, by March 31, 2013. The SAMI (Substance Abuse/Mental Impairment) requirement is part of the 3-year Ethics cycle. If you were admitted to the Bar after 2001, you might have a different reporting cycle. Check the upper-right portion of your previous-year CLE affidavit to determine the end of your individual reporting cycle. Check the CLE section of www.montanabar.org for more information.

Legislature bill watch list update

This is the most current list (as of print time) of the bills that the State Bar is actively following in the Legislature. The State Bar Executive Committee meets weekly to go over the list and may oppose or support bills. The committee will also discuss which bills to monitor.

- **HB 2** General Appropriations Act; *Support (judiciary budget)*
- **HB 172** Allow Montana state bar attorney member to serve as a judge pro tem. *Discussed: monitor*
- **HB 186** Require losing party in litigation to pay litigation costs in certain lawsuits. *Discussed: monitor. Bill tabled in committee.*
- **HB 206** Increase justice court filing fees. *Discussed: monitor*
- **HB 252** Revise notary public journal storage to secretary of

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In RE adding to the Montana Rules of Appellate Procedure a rule on judicial waiver appeals

Summarized from a Jan. 30 order (No. AF 07-0016)

In November of 20 12, 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 parental notification requirement.

The Office of the Appellate Defender (OAD) has proposed a rule to be added to the Montana Rules of Appellate Procedure to address expedited confidential appeals in such matters.

IT IS ORDERED that, for 60 days following the date of this Order, public comments will be accepted on the attached proposed rule on judicial waiver appeals. 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. Read the attachment in full at *supremecourtdocket.mt.gov* and search for case No. AF 07-0016.

In RE petition to adopt amended rules for admission to the State Bar of Montana

Summarized from a Jan. 30 order (No. AF 11-0244)

Pursuant to Article VII, section 2 of the Montana Constitution, the Montana Supreme Court holds the authority to establish rules for admission to the Bar of the State of Montana. To fully implement the Uniform Bar Examination (UBE) as adopted by the Court in its Order dated July 3, 2012, two sets of rules require modification-- the Rules for Admission to the Bar of Montana and the Montana Board of Bar Examiners' Rules.

At the Court's request, the Board of Bar Examiners has submitted proposed changes to both of those sets of rules.

The changes proposed to the Rules for Admission to the Bar of Montana relate principally to the creation and implementation of a Montana law educational component as part of the Montana bar examination, elimination of four Montana essay questions, and the increased passing score. The Board's proposed amended rules also include some clean-up of language in existing provisions.

The Court having reviewed the changes to the Rules for Admission to the Bar of Montana as proposed by the Board,

IT IS HEREBY ORDERED that the rule changes proposed by the Board are ADOPTED. The Rules for Admission to the Bar of Montana are amended to read as shown in the attachment to this order. Read the attachment in full at *supremecourtdocket.mt.gov* and search for case No. AF11-0244.

In RE petition to adopt amended Board of Bar Examiners' Rules

Summarized from a Jan. 30 order (No. AF 11-0244)

Pursuant to Article VII, section 2 of the Montana Constitution, the Montana Supreme Court holds the authority to establish rules for admission to the State Bar of Montana. To fully implement the Uniform Bar Examination (UBE) as adopted by the Court in its Order dated July 3, 2012, two sets of rules require modification -- the Rules for Admission to the Bar of Montana and the Montana Board of Bar Examiners' Rules.

At the Court's request, the Montana Board of Bar Examiners has filed proposed amendments to both of those sets of rules.

The proposed amendments to the Board of Bar Examiners' Rules relate principally to the creation and implementation of a Montana law educational component as part of the Montana Bar Examination, elimination of four Montana essay questions, and the increased passing score. They also include some clean-up of language in existing rules.

In addition, the Board has proposed new provisions regarding cheating, necessitated by recent advances in electronic devices. The Court having reviewed the changes to the Montana Board of Bar Examiners' Rules as proposed by the Board,

IT IS HEREBY ORDERED that the rule changes proposed by the Board are ADOPTED. The Montana Board of Bar Examiners' Rules are amended to read as shown in the attachment to this order. Read the attachment in full at *supremecourtdocket.mt.gov* and search for case No. AF11-0244.

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state's office. *Oppose*

- **HB 290** Provide that jury may judge facts and application of law to the facts. *Oppose. Bill not passed on second reading.*
- **HB 330** Limit the collection of personal identification information in Montana courts. *Discussed: monitor*
- **HB 352** Revise justice court laws. *Discussed: monitor*
- **HB 369** Revise laws for courts of limited jurisdiction. *Discussed: monitor*
- **HB 374** Authorize individual legislator standing to intervene in certain civil actions. *Discussed: monitor*
- **HB 400** Revise laws related to personal information privacy. *Discussed: monitor. Bill tabled in committee.*
- **HB 403** Revising fees collected by district court clerks. *Discussed: monitor*
- **HB 432** Generally revise laws related to child abuse and neglect cases; *Oppose. Bill tabled in committee*
- **HB 467** Require qualifications when justice of the peace is the court of record. *Discussed: monitor. Bill tabled in committee.*
- **SB 50** Eliminate report on expenditures of attorney license tax. *Discussed: monitor*
- **SB 85** Revise laws related to judge disqualification. *Oppose. Bill tabled in committee.*
- **SB 119** Establish a cabinet-level position for veteran and intergovernmental issues. *Discussed: monitor. Bill tabled in committee.*
- **SB 152** Constitutional amendment revising qualifications for Supreme Court justices. *Oppose. Bill tabled in committee.*

George L. Bousliman Professionalism Award

The award will recognize lawyers or law firms who have:

1 | Established a reputation for and a tradition of professionalism as defined by Dean Roscoe Pound: pursuit of a learned art as a common calling in the spirit of public service; and

2 | Within two years prior to the nomination, demonstrated extraordinary professionalism in a least one of the following ways:

- Contributing time and resources to public service, public education, charitable or pro bono activities.
- Encouraging respect for the law and our legal system, especially by making the legal system more accessible and responsive, resolving matters expeditiously and without unnecessary expense, and being courteous to the court, clients, opposing counsel, and other parties.
- Maintaining and developing, and encouraging other lawyers to maintain and develop, their knowledge of the law and proficiency in their practice.
- Subordinating business concerns to professional concerns.

Nominee/individual or firm _____

Address _____

On a separate sheet of paper, please describe the nominee's activity in your community or in the state, which you believe brings great credit to the legal profession. Please attach additional pages as needed, and other supporting documents.

Your signature _____Print your name _____

Your address _____Phone _____

Nominations and supporting documents will not be returned. Send them no later than May 15 to:

Bousliman Professionalism Award
P.O. Box 577
Helena MT 59624
or e-mail to *mailbox@montanabar org*

William J. Jameson Award

This is the highest honor bestowed by the State Bar of Montana. The Past Presidents Committee will be guided in its selection by the extent to which, in its judgment, the candidate:

1 | *Shows ethical and personal conduct, commitment and activities that exemplify the essence of professionalism.*

2 | *Works in the profession without losing sight of the essential element of public service and the devotion to the public good.*

3 | *Possesses an unwavering regard for the Rules of Professional Conduct, the Creed of Professionalism, the State Bar's Guidelines for Relations Between and Among Lawyers, and the State Bar's Guidelines for Relations Between Lawyers and Clients.*

4 | *Assists other attorneys and judges in facing practical and ethical issues.*

5 | *Participates in programs designed to promote and ensure competence of lawyers and judges.*

6 | *Supports programs designed to improve the discipline process for judges and attorneys.*

7 | *Participates in programs that aid the courts in ensuring that the legal system works properly, and continually strives for improvements in the administration of justice.*

8 | *Is actively involved with public and governmental entities to promote and support activities in the public interest.*

9 | *Actively participates in pro bono activities and other programs to simplify and make less expensive the rendering of legal services.*

10 | *Actively participates in programs designed to educate the public about the legal system.*

On a separate sheet of paper, please describe activities you believe qualify your nominee for the Jameson Award. Please attach additional pages as needed, and other supporting documents. Also, attach the nominee's resume. Note: Awards will not be made posthumously and may be given to more than one person.

Nominee: _____

Address: _____

Your signature:_____ Print your name:_____

Your address:_____ Phone:_____

Nominations must be postmarked no later than May 15. Send them to:

Jameson Award
State Bar Past Presidents Committee
P.O. Box 577
Helena MT 59624
or e-mail *mailbox@montanabar.org*

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2013 Nomination Petition

State Bar Officer, Secretary-Treasurer, and Trustee Election

I, _____, residing at _____,
am a candidate for the office of ( ) President-Elect; ( ) Area E Trustee; ( ) Area F Trustee; ( ) Area H Trustee;
( ) Secretary-Tresurer at the election to be held on June 7, 2013. I am a resident of Montana and an active member of the State Bar of Montana. I request my name be placed on the ballot. The term of office of the President-Elect is one year. The term of office of the Secretary/Tresurer and of Trustee is two years.

Signature _____

The following are signatures of active members of the State Bar of Montana supporting my candidacy. Trustee candidates include the area of residence. No fewer than 10 signatures must be provided for a Trustee; and no fewer than 25 signatures for a President-Elect candidate or Secretery Treasurer.

NAME ADDRESS

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Return this petition to State Bar of Montana, PO Box 577, Helena MT 59624, postmarked no later than April 8, 2013.
Ballots will be mailed to Bar members on May 8, 2013 and must be returned to the Bar by May 28, 2013.

Selected court cases from Dec. 2012-Feb. 2013

Editor's note: *The stats for December cases are in the February Montana Lawyer. Because of space limitations, the print version only runs through Jan. 15. To read the full version through February 15, check the Montana Lawyer section at www.montanabar.org.*

By Beth Brennan

The Montana Supreme Court issued 26 published decisions between Jan. 1, 2013 and Feb. 15, 2013 – 16 in January, and 10 in the first two weeks of February.

Justice McKinnon wrote her first opinion on Feb. 12, 2013, a 5-0 decision in *In the Matter of JSW*.

For the rest of the Court:
Chief Justice McGrath wrote four majority opinions and one concurrence/dissent (*Green v. Gerber*).
Justice Cotter wrote five majority opinions and one dissent (*Simpson v. Simpson*).
Justice Rice wrote four majority opinions, one concurrence, and one dissent (*Steichen v. Talcott Properties, LLC*).
Justice Morris wrote three majority opinions.
Justice Wheat wrote four majority opinions.
Justice Baker wrote five majority opinions.

The beginning of the year presented fewer issues that split the Court than did the end of 2012; almost all were decided by five-judge panels. Two decisions were 4-1, one was 6-1, and the remaining 23 were 5-0.

The issues that caused justices to dissent or write separately were:
A property owner's duty of care to an independent contractor who works for the lessee (*Steichen v. Talcott Properties, LLC*) (4-1) (McGrath, C.J. for the majority; Rice, J., dissenting)
The proof needed to modify a child support order (*Simpson v. Simpson*) (4-1) (Wheat, J., for the majority; Cotter, J, concurring and dissenting)
The proper standard for setting aside a default judgment (*Green v. Gerber*) (6-1) (Cotter, J., for the majority; McGrath, C.J. concurring and dissenting)

The Court also issued 11 unpublished decisions during this period: 6 in January, and 5 in the first two weeks of February.

***Estate of Afrank*, 2012 MT 289 (Dec. 18, 2012) (7-0) (McGrath, C.J.)**

Issue: Whether the district court properly allowed a claim by the decedent's wife against the estate for one half of the debt on a motor home owned with the decedent as joint tenants with rights of survivorship.
Short Answer: No.

Facts: Dennis Afrank died suddenly, and is survived by his spouse, Deborah, and his three sons from a prior marriage, one of whom is the PR. The will divided the estate among Deborah and the sons, directing the PR to pay his debts, and leaving to Deborah their jointly owned property.

Deborah and Dennis owned a motor home as joint tenants with rights of survivorship, with an outstanding purchase money security interest of $124,000. Dennis and Deborah both signed the loan, which provided that each was independently obligated for the full debt. Deborah filed a claim with the estate for $62,000 or half of the motor home debt, and the PR denied her claim.

Procedural Posture & Holding: Finding no Montana authority, the district court applied the common law rule that the decedent's estate has an equitable duty to pay its share of debts on jointly held property, and allowed Deborah's claim against the estate. The PR appeals, the Supreme Court reverses.

Reasoning: Deborah acquired sole interest in the motor home immediately upon Dennis's death, and not through any devise in his will. If it had passed through his will, it would have passed with the entire security debt. § 72-2-617, MCA. The nonexoneration statute evidences the public policy adopted by the legislature.

***In the Matter of HR and DR*, 2012 MT 290 (Dec. 18, 2012) (5-0) (McGrath, C.J.)**

Issue: Whether the district court erred in terminating TR's parental rights.
Short Answer: No.

Facts: TR has been diagnosed with schizoaffective disorder, bipolar type. Without medication, the schizophrenia causes her to have delusions, and the bipolar disease causes mania. She has received treatment from a number of facilities, and takes three medications to control her symptoms. At the time of the termination hearing, she was in a lock-down in-patient treatment program in Missouri. Her

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court-appointed guardian testified it was unlikely she would be discharged within a year. After discharge, she will be placed in a residential care facility with 24-hour staff. If successful, she will move to a semi-independent apartment, and eventually, a private apartment.

In May 2010, the state petitioned to adjudicate HR, who was 3, and DR, who was 4, as youths in need of care. The petition sought emergency protective services and temporary legal custody of the children. The court approved a treatment plan for TR in Sept. 2010 and served it on her. TR did not object. A year later, the state petitioned to terminate TR's parental rights. The district court held a termination hearing in February 2012, at which the child protection specialist testified that TR had failed to keep in contact with her or the children, and that she did not complete an anger assessment. She also reported that TR had threatened to kill her, which led to TR being told she had to communicate via letters. TR did not send any letters. Although she sent a few cards and letters to the children, TR testified via phone that she stopped sending them because she wasn't sure what was appropriate.

Procedural Posture & Holding: The district court found an appropriate treatment plan had been prepared and approved, and TR had not complied with it. The court also found that TR's ongoing mental health issues made it unlikely she would be fit to parent in a reasonable time. After concluding termination was in the children's best interests, the court terminated birth mother TR's parental rights to her two children, HR and DR. TR appeals, and the Supreme Court affirms.

Reasoning: Because TR did not object to the treatment plan when it was served on her or at the district court, her argument that it was not appropriate is waived. Nonetheless, it was appropriate for TR. The district court's finding that she had not complied with the plan was supported by substantial evidence.

***Musselshell County v. Yellowstone County*, 2012 MT 292 (Dec. 18, 2012) (5-0) (McGrath, C.J.)**

Issue: (1) Whether the coal tax proceeds were properly split between two counties, or whether all of the proceeds should have gone to the county where the coal is brought to the surface and prepared for shipment; and (2) whether the Dept. of Revenue was required to make rules for allocating coal tax proceeds.
Short Answer: (1) The proceeds were properly split, and (2) no.

Facts: Bull Mountains Mine is the only underground coal mine in Montana. Its surface facilities are in Musselshell County. In 2009, the mine extracted coal from Yellowstone County as well as Musselshell County. The Dept. of Revenue split the coal tax proceeds, giving Musselshell $328,617 and Yellowstone $126,909.

Procedural Posture & Holding: Musselshell County sued Yellowstone County and the DOR, seeking a declaratory judgment that the department wrongfully allocated proceeds to Yellowstone County. All parties moved for summary judgment, and the district court granted judgment to Yellowstone County and the DOR. Musselshell County appeals, and the Supreme Court affirms.

Reasoning: (1) The district court held that the statutes and regulations applicable to the coal tax require the tax to be apportioned among counties where the coal is located and severed from the underground vein. The Court reviews several statutes and concludes the district court was correct based on the plain statutory language. (2) Musselshell argues the DOR must adopt rules prior to apportionment, as the statute says the department "may adopt such other method or basis of apportionment as may be just or proper." § 15-23-105, MCA. The district court properly held apportionment was just and proper because it followed the plain language of the statutes, and administrative rules are not required when the statute is clear.

***Siebken v. Voderberg*, 2012 MT 291 (Dec. 18, 2012) (6-0) (Cotter, J.)**

Issue: Whether the district court properly granted summary judgment to the defendant on the grounds that the statute of limitations had run.
Short Answer: No.

Facts: In December 2004, Henry Voderberg trespassed on Federal Reserve Bank property in Helena while intoxicated. He got into an altercation with Richard Siebken, an on-duty law enforcement officer at the bank. Siebken had a mild headache that night, but did not know he'd suffered a neck injury. For more than a year, Siebken sought treatment for neck and back pain, thinking it was caused by his 12-lb. gun belt. Eventually, his doctors and he realized the injury was caused by his altercation with Voderberg.

Procedural Posture & Holding: On March 18, 2009, Siebken sued Voderberg for negligence. Voderberg moved for summary judgment on the grounds that the 3-year statute of limitations had run. The district court found that Siebken discovered his injury was caused by Voderberg in September 2005 and granted judgment for Voderberg. Siebken appeals, and the Supreme Court reverses and remands for trial.

Reasoning: (1) According to the discovery rule, the period of limitation does not begin to run until the facts constituting the claim have been discovered or should have been discovered if the facts are concealed or self-concealing. § 27-2-102(3), MCA. The parties agree Siebken's injury was self-concealing for a period of time. Siebken argues he discovered Voderberg was the cause of his injury on May 26, 2006. Because genuine issues of material fact exist regarding the date Siebken made this discovery, summary judgment was improper.

***State v. McCoy*, 2012 MT 293 (Dec. 18, 2012) (5-0) (Wheat, J.)**

Issue: Whether the district court properly admitted fingerprint cards into evidence when the defendant raised questions about the chain of custody.
Short Answer: Yes.

Facts: Officer Johnson lifted a latent fingerprint from a safe that someone tried to steal from the St. Regis Travel Center. He dated one of the cards Aug. 6, 2010, which he testified was a mistake, as he lifted the print on Aug. 4. He then placed the cards in his briefcase, which stayed in his patrol car for several weeks. He testified he is "pretty religious" about locking the car. He logged the cards into evidence on Aug. 20, 2010, then immediately logged them out

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to send to the crime lab. He placed them on a shelf in his office, the door to which automatically locks, and eventually took them to the crime lab on Sept. 22 or 23. He testified the cards were in the same condition when he delivered them as when he collected them on Aug. 4. The lab matched the prints to the defendant's.

Procedural Posture & Holding: The state charged McCoy with attempted theft. McCoy objected to the admission of the prints, arguing the state had failed to establish a secure chain of custody for the print cards. The district court found sufficient foundation and admitted the print cards into evidence. McCoy was convicted and sentenced to ten years in prison. He appeals, and the Supreme Court affirms.

Reasoning: The state has the burden of showing a continuous chain of possession, and no substantial change to the evidence while in its possession. The state need not show that it was impossible to tamper with the evidence, only that there was no substantial change. Once the state makes that prima facie showing, the burden shifts to the defendant to show the evidence has been tampered with. The state met its prima facie burden, which shifted the burden to McCoy, who failed to offer any proof the cards had been tampered with.

***Murray v. Whitcraft*, 2012 MT 298 (Dec. 19, 2012) (4-1) (Baker J., for the majority; Cotter, J. dissenting)**

Issue: Whether the district court properly denied the plaintiff's motion for a new trial after the jury found the defendant negligent but awarded only $27,000 in damages.
Short Answer: Yes.

Facts: Murray and Whitcraft were driving back to college when Whitcraft lost control of the car, sliding into the guardrail several times and totaling Whitcraft's car. Murray was diagnosed with neck and shoulder strain or contusion, and released from the ER. He withdrew from college a few months later, unable to play baseball, for which he had a small scholarship. He was discharged from medical care 18 months later. Nine months after that, Murray went bow hunting and the pain in his shoulder returned. He filed a complaint against Whitcraft a year later.

Procedural Posture & Holding: The jury found that Whitcraft was liable for Murray's damages, awarding him $27,000 when he had asked for $250,000. Murray appeals, and the Supreme Court affirms.

Reasoning: Whitcraft raised doubts about whether the Murray's shoulder problems were caused solely by the accident. The verdict form did not ask the jury to itemize the damages they awarded. The Court distinguishes three cases in which a new trial was granted due to the jury's failure to award damages and finds that in this case, substantial evidence supports the jury's conclusion.

Justice Cotter's Dissent: The jury was instructed that, provided the evidence shows they exist, it should award damages for past and future medical expenses, past and future pain and suffering, past and future emotional distress, and alteration of established course of life. The evidence showed that Murray had no prior injury to his shoulder, and that the accident likely caused his injury. The uncontroverted evidence was that Murray has gone to more than 150 medical and therapy appointments, and has constant pain. He testified to his pain and suffering, and Whitcraft did not impeach this testimony. Even though the verdict form does not itemize damages, it is clear the jury did not award uncontested medical expenses *and* damages for pain, suffering, emotional distress, and loss of established course of life. *Renville* is not distinguishable, and compels a new trial.

***Alexander v. Bozeman Motors, Inc.*, 2012 MT 301 (Dec. 20, 2012) (5-0) (Cotter, J.)**

Issue: (1) Whether § 39-71-413 is unconstitutional as applied to deliberately injured employees of corporations, and (2) whether the district court properly allowed evidence of Alexander's cause of death.
Short Answer: (1) This issue is moot because the jury found Alexander was not deliberately injured, and (2) yes.

Facts: Alexander and Ostermiller worked at Bozeman Motors' Four Corners office in 2003 and 2004. Both became sick, allegedly from a leaking propane stove.

Alexander and Ostermiller filed suit against Bozeman Motors in 2005, alleging negligence, battery, and infliction of emotional distress. Alexander died in 2006, and his daughter joined as PR of his estate. His mother also joined as a party after her son's death. In 2007, Bozeman Motors moved for summary judgment on work comp exclusivity. Plaintiffs responded they had been intentionally injured, and so their claims fell outside the exclusive remedy provision. They also argued that § 39-171-413's exclusion of vicarious liability for the intentional acts of an employee violates the equal protection guarantee of the Montana Constitution, unconstitutionally grants special privileges and immunities, and is special legislation. The district court granted summary judgment to Bozeman Motors, holding the conduct of Bozeman Motors and its employees did not rise to the level of deliberate intent to cause specific harm, and the statute does not violate the constitution. Plaintiffs appealed, and this Court affirmed as to Ostermiller, but reversed as to Alexander, holding that actual knowledge of the earlier harm to Ostermiller created a genuine issue of material fact for Alexander. *Alexander I*, 2010 MT 135. The Court also affirmed summary judgment on the constitutional claims.

Procedural Posture & Holding: On remand, after a 10-day trial, the jury returned a verdict for all defendants on all claims. Alexanders appeal, and the Supreme Court affirms.

Reasoning: (1) Alexander had to prove at trial that he was intentionally injured by an intentional and deliberate act of Bozeman Motors or its employees. Section 39-71-413, MCA was amended in 2001 to provide that "[a]n employer is not vicariously liable under this section for the intentional and deliberate acts of an employee." Alexander argues this statute violates his right to equal protection by creating two classes of employees – those who work for sole proprietorships and partnerships, and those who work for corporations. The only way to hold a corporation liable for the intentional acts of its employees is through vicarious liability. Bozeman Motors and the state of Montana counter that this issue is moot, and governed by the law of the case. The Court agrees that once the jury found that defendants did not intentionally injure Alexander, the constitutional question became

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moot. Similarly, plaintiffs' challenges to jury instructions are also moot.

(2) Plaintiffs also appeal the lower court's denial of their motion in limine, prohibiting evidence of Alexander's cause of death. Defendants contended Alexander's symptoms were related to alcoholism rather than carbon monoxide poisoning. Several medical experts testified about Alexander's prolonged drinking problem and extensive liver damage, which ultimately caused his death. The Court holds that evidence of Alexander's cause of death and health problems was highly probative and not substantially outweighed by its prejudicial effect.

***State v. Fitzpatrick*, 2012 MT 300 (Dec. 20, 2012) (7-0) (Rice, J.)**

Issue: Whether the district court properly granted defendants' motion to dismiss for outrageous government conduct.
Short Answer: No.

Facts: Several informants independently told a drug task force agent that the Fitzpatrick sisters were using their medical marijuana business as a front to sell more marijuana than allowed by law. Agent Federspiel obtained a search warrant to set up undercover marijuana buys and electronically monitor and record the transactions. An agent with a fictitious Montana driver's license attended a medical marijuana seminar in Missoula, and completed a form indicating he needed medical marijuana for a debilitating medical condition. He went to a Missoula doctor without advising the doctor he was applying for a patient card as an undercover agent. He applied to the state for a medical marijuana card without indicating he was acting in his undercover capacity. The Department issued the agent a card in his fictitious name.

The agent then contacted the Fitzpatricks, who sold him a small amount of marijuana after seeing his ID and patient card. Over the next two weeks, the Fitzpatricks sold the agent 8 oz. of marijuana, and arranged a meeting to sell him more. The Fitzpatricks were arrested on their way to this meeting. Search warrants led to the seizure of 211.5 oz. of marijuana, four times more than allowed under the medical marijuana law.

Delaine was charged with two counts of criminal distribution of dangerous drugs and one count of possession with intent to distribute. Malisa was charged with two counts of criminal distribution of dangerous drugs, one count of distribution by accountability, and one count of possession with intent to distribute. The sisters stipulated to consolidating their cases.

Procedural Posture & Holding: The Fitzpatricks filed a joint motion to suppress and dismiss, arguing that the state engaged in outrageous government conduct by lying to the physician, providing a fake driver's license, lying about the agent's need for medical marijuana, and lying to the state in his application for a patient card. Because these acts would be illegal if committed by an ordinary citizen, the Fitzpatricks argued it was outrageous and violated their federal due process rights. The district court held a hearing and granted the defendants' motion. The state appeals, and the Supreme Court reverses.

Reasoning: Outrageous government conduct is analogous to entrapment; the defenses are often discussed together in case law. After reviewing the case law, the Court looks to the Ninth Circuit for the requirement that the government conduct be either *malum in se* or "amount to the engineering and direction of the criminal enterprise from start to finish." ¶ 21. *Malum in se* is an act that is inherently amoral, such as murder, arson, or rape. *Malum prohibitum* is act that is a crime because it prohibited by statute. Here, the agent's acts were *malum prohibitum*; thus, the outrageous government conduct defense is not implicated. His illegal conduct was necessary to infiltrate the criminal enterprise. The agent did not engineer and direct the criminal enterprise.

***Williamson v. PSC*, 2012 MT 299 (Dec. 20, 2012) (5-0) (Baker, J.)**

Issue: (1) Whether the district court properly denied Petitioners their costs for their initial proceeding and first appeal, and (2) whether the district court properly denied Petitioners' request for a temporary rate decrease.
Short Answer: (1) Yes, and (2) yes.

Facts: Petitioners filed a complaint with the PSC, alleging Northwestern Energy was overcharging for street lighting.. The PSC dismissed on the grounds that Petitioners lacked standing and were procedurally barred from amending their complaint. Petitioners sought judicial review, and their complaint was dismissed. They appealed to this Court, which affirmed as to four Petitioners but remanded for a redetermination by the PSC of whether to allow the complaint to be amended.

Procedural Posture & Holding: Upon remand, Petitioners immediately filed a motion for costs and renewed their motion for a rate reduction. The PSC and Northwestern Energy opposed the motions. The district court denied the motions and remanded to the PSC. Petitioners appeal, and the Supreme Court affirms.

Reasoning: (1) The Court first determines that the order being appealed constitutes a final, appealable order. It then affirms that Petitioners must have a judgment in their favor before costs will be allowed. A remand to the PSC is not a judgment in their favor. The district court is entitled to decide which party prevailed on appeal. Here, the district court did not abuse its discretion in effectively determining that Petitioners were not the prevailing party, although the court did not apply the correct rule. (2) The district court denied Petitioners' motion for a temporary rate reduction because it was premature. The Supreme Court agrees. Petitioners argue § 69-3-304 allows judicial review of PSC rulings on temporary rate increases or reductions; however, the PSC has not yet considered the merits of Petitioners' claim. Thus, there is nothing for the district court to judicially review.

***Gatlin-Johnson c. Miles City*, 2012 MT 302 (Dec. 21, 2012) (5-0) (McGrath, C.J.)**

Issue: Whether the district court properly applied the public duty doctrine to grant summary judgment to the city.
Short Answer: No.

Facts: In 2002, Tiffany Gatlin brought her 8-year-old daughter to play in Miles City's Riverside Park. The child fell from a slide and suffered a severe head injury. Gatlin sued the city for failing to maintain a safe depth of

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impact-absorbing material under the slide.

Procedural Posture & Holding: The district court granted summary judgment to the city on the grounds that under the public duty doctrine, the city owed no duty to the child other than a duty owed to the public at large. The district court also determined that the recreational use statute did not apply. Gatlin appeals, and the Supreme Court reverses.

Reasoning: The Court reviews its public-duty-doctrine jurisprudence, and holds it is error to conclude that the public duty doctrine applies to all tort claims against a public body. When the government has a specific duty, such as premises liability, rather than a general duty to the entire community, it can be held liable for breaching that duty. It is not necessary that the city have a special relationship with the plaintiff. Children who fall from playground equipment are foreseeable plaintiffs. The city was aware of the need for a "fall zone," and expressly adopted standards for safe fall zones. When the city chose to establish a playground and install the equipment, it assumed the duty of acting with reasonable care. The Court looks at additional factors and concludes it is reasonable and proper to hold that the city had a duty of reasonable care in maintaining its parks, and that the public duty doctrine does not apply.

Additionally, both parties agree the recreational use statute applies. § 70-16-302(1), MCA. The Court therefore assumes without deciding that an 8-year-old girl playing in a park is a recreational use under the statute. Gatlin must prove at trial that the city's misconduct was willful and wanton.

Justice Rice's Concurrence: In several cases mentioned by the Court as not involving the public duty doctrine, the doctrine was not raised by the parties. Had it been, the results could have been different. It will be necessary to further refine the kinds of cases in which the public duty doctrine applies; it could even be applied in cases involving premises liability.

***State v. Lozon*, 2012 MT 303 (Dec. 21, 2012) (5-0) (Rice, J.)**

Issue: Whether the video of the PAST, shown without sound, required testimony by the state to establish reliability and accuracy.
Short Answer: Yes.

Facts: Stuart Lozon, Jr. was stopped after failing to stop at a stop sign in Hamilton. The officer noticed labored movements, and glassy, bloodshot eyes. He asked Lozon if he had been drinking, and Lozon said he had a few beers. The officer performed several field sobriety tests, including the horizontal gaze nystagmus, which Lozon failed. Lozon agreed to the Preliminary Alcohol Screening Test (PAST), and registered a blood alcohol of .153. Lozon was arrested and taken to jail, where he refused additional field sobriety tests and would not provide an Intoxilyzer 8000 breath sample.

Procedural Posture & Holding: Lozon was charged with DUI. A city court jury found him guilty, and he appealed to the district court. He filed a motion in limine seeking redaction of all portions of the in-car or field video in which the PAST or horizontal nystagmus test were administered or discussed, and a portion of the jail video in which Lozon referred to his PAST results. The district court granted the motion except for video footage of the officer administering the PAST, shown without sound. During deliberations, the jury asked if they could know the results of the PAST. The court responded that the Supreme Court generally limits the use of PAST to establishing probable cause. The jury convicted Lozon, and he appeals. The Supreme Court reverses.

Reasoning: PAST results are not admissible as substantive evidence unless the state's testimony establishes the reliability and accuracy of the PAST. Lozon argues that the video of the PAST without sound was used as substantive evidence, because it proved that Lozon was under the influence and allowed the jury to infer that Lozon was above the legal limit when he was arrested. Because the state did not establish PAST reliability and accuracy, Lozon argues the district court erred in admitting the video. The Supreme Court agrees. The video raised a "compelling inference" that Lozon was over the legal blood alcohol limit, and was therefore used as substantive evidence of his intoxication. The potential for prejudice outweighed its probative value. The Court then concludes the error was not harmless.

Justice Cotter's Concurrence: Justice Cotter objects to the introduction of PAST results as substantive evidence of guilt under any circumstances.

***Fink v. Williams*, 2012 MT 304 (Dec. 24, 2012) (5-0) (Cotter, J.)**

Issue: Whether the district court erred in denying Williams' request for reimbursement of mortgage and tax payments she made on property allegedly conveyed to her via quitclaim deed once the district court ruled the quitclaim deed was void.
Short Answer: No, as she failed to present any evidence in support of reimbursement.

Facts: David Schraudner was the uncle of Dana Fink and her brother, Dustin Badgett. In 2000, Schraudner executed a will devising his estate to Fink and Badgett. In April 2009, about seven weeks before his death, Schraudner aigned a quitclaim deed conveying 3,000 acres of real property to himself and Roberta Williams as joint tenants with right of survivorship.

Procedural Posture & Holding: After Schraudner's death, Fink challenged the validity of the quitclaim deed, arguing her uncle was not competent to execute it, and Williams exercised undue influence over him. The district court held a bench trial, at the end of which it concluded the quitclaim deed was void and had no legal effect. The court also denied Williams' request for reimbursement for the mortgage and tax payments she had made on the subject property for the two years she held the property under the voided deed, determining she had presented no evidence to support her claim, and the payments should be treated as rent. Williams appeals the reimbursement ruling, and the Supreme Court affirms.

Reasoning: Although Williams did not raise a counterclaim, the Pretrial Order included a contention that she should be reimbursed almost $45,000 in mortgage payments and about $1700 in taxes if the court ruled that the quitclaim deed was void. Because it was in the PT Order, this presented a legitimate issue for trial. Williams did not present any exhibits or witness testimony to support her reimbursement claim. She argues she was unable to because the district court refused to extend the two-day trial. The

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Court holds this decision was within the district court's broad discretion in trial administration. The parties were notified in the PT Order that the trial was calendared for two days. Williams twice declined to present evidence, opting to reserve her testimony for later in the trial. Her strategic choice cannot be used to put the district court in error. Because the district court had no evidence upon which to award reimbursement, it did not err in denying Williams' request.

***State v. Geren*, 2012 MT 307 (Dec. 26, 2012) (5-0) (Nelson, J.)**

Issue: (1) Whether Geren was subject to double jeopardy when he was convicted of incest and attempted incest, and (2) whether Geren had to be arraigned on the amended information after the state moved to change one count of sexual intercourse without consent to a count of attempted sexual intercourse without consent.
Short Answer: (1) No, because the convictions were based on different transactions, and (2) no, because the amendment was only as to form, not substance.

Facts: Geren sexually abused his teenage daughter, stepdaughter, and sister-in-law over a period of time by forcing them to have oral sex, intercourse, and kissing and touching them. The sister of Geren's wife told her parents and her twin sister what had happened, and the twin sister convinced the daughter to talk with the school counselor. After the counselor heard the stories from the girls, a detective from the sheriff's department interviewed Geren. Geren eventually admitted having sexual contact with all three girls, although testified at trial that his admission resulted from fear and a desire to end the interview.

Procedural Posture & Holding: The jury convicted Geren of five counts of incest, one count of sexual intercourse without consent, one count of attempted sexual intercourse without consent, two counts of sexual assault, and one count of attempted incest. Geren moved for a new trial, arguing that his convictions for incest and attempted incest violated his right against double jeopardy because attempted incest is a lesser included offense of incest. He also argued a new trial was necessary because several jurors may have been sleeping during critical portions of the trial testimony. The district court denied his motion, noting it had not noticed any sleeping jurors, and holding that the convictions for attempted incest and incest did not violate double jeopardy. Geren was sentenced to 15 years, with five suspended, for each count, with the sentences to run consecutively. Geren appeals, and the Supreme Court affirms.

Reasoning: On the contention that several jurors were sleeping, Geren fails to show that the district court acted arbitrarily without conscientious judgment, or exceeded the bounds of reason, or that the court's abuse of discretion prejudiced Geren.

Geren asserts that his convictions for incest and attempted incest arise from a single transaction, and therefore subject him to double jeopardy. Geren's convictions were not based on the same transaction. He views the hunting trip he and his daughter went on as one transaction; however, the incest count was based on his fondling her breast while they were in the truck, while the attempted incest count was based on his repeated grabbing of her, kissing her, and attempting to have oral and vaginal intercourse with her. Separate transactions can arise from criminal conduct occurring at the same place with the same victim.

Finally, Geren argues that he had to have been arraigned after the state amended the information during trial to change one count of incest to a count of attempted incest. A defendant must be arraigned on any substantive amendment to the information, but not on an amendment as to form. Here, the amendment was as to form. The essential elements were the same, and the offenses carry the same sentence.

***Labair v. Carey*, 2012 MT 312 (Dec. 27, 2012) (7-0) (Cotter, J., for the majority; Nelson, J.; Rice, J., concurring; Baker, J., concurring in the judgment but dissenting to part of the reasoning)**

Issue: Whether the district court properly granted summary judgment to Carey on Labairs' legal malpractice claim.
Short Answer: No.

Facts: Labairs' newborn son died after an early delivery by C-Section on Oct. 3, 2003. Labairs signed a retainer with Carey in January 2004, and Carey associated Curt Drake as co-counsel. On Sept. 14, 2006 Carey filed a complaint against the OB/GYN and the hospital, alleging negligence and negligent infliction of emotional distress. Carey did not file an application with the Montana Medical Legal Panel. In May 2008, the district court dismissed Labairs' medical malpractice claims with prejudice because they were time-barred.

In March 2010, Labairs filed a complaint for legal malpractice against Carey and Drake. Labairs' new counsel filed an untimely panel application, attempting to build evidence of the viability of the underlying med mal claims. The panel heard the claims and issued a decision. The Labairs moved to allow the decision to be introduced a trial, but the district court did not rule on the motion.

In July 2011, Labairs moved for partial summary judgment on liability, on the grounds that Carey admitted missing the statute of limitations. Labairs' legal expert opined that missing the statute damaged Labairs by causing the loss of their med mal claims. Carey responded that Labairs' claim must fail for lack of expert testimony on causation and damages in both the underlying med mal case and the current legal malpractice action. Carey then moved for summary judgment. He admitted his failure to file the panel application before the statute ran was a breach of the standard of care, but argued his breach did not cause damages to Labairs. Carey's expert, an experienced plaintiffs' med mal attorney, opined that Labairs' underlying medical malpractice claims could not be established because Carey could not develop the necessary expert testimony to prove the claims.

Labairs settled with Drake in September 2011; the settlement agreement was filed under seal.

Procedural Posture & Holding: The district court denied Labairs' motion for partial summary judgment and granted Carey's motion, concluding Labairs failed to establish a prima facie case of legal malpractice by failing to provide admissible expert evidence on medical causation and damages. The court found that Carey's expert testimony established that the underlying med mal claim would have failed, and that Carey's breach therefore did not cause the Labairs any damages. Labairs appeal,

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and the Supreme Court reverses.

Reasoning: The Court clarifies its legal malpractice jurisprudence and reconciles the causation analysis with *Busta v. Columbus Hosp.*, 276 Mont. 342 (1996), which held that in cases not involving intervening cause, causation is proved by showing a party's conduct was a cause-in-fact of the alleged damage. Proximate cause is not an element of negligence unless there are multiple causes, or an intervening cause. The Court holds that an attorney's negligence is the cause of a plaintiff's injury if there is an uninterrupted chain of events from the negligent act to the injury; proximate cause becomes part of the analysis only when the attorney alleges that the chain of causation has been severed.

Here, there is no issue of proximate cause. The district court erred in considering a legal expert's opinion on the merits of a med mal claim; failing to consider Labairs' expert medical and legal testimony; defining Labairs' injury too narrowly; concluding Carey was not the cause in fact of Labairs' injury; and requiring Labairs to prove the success of their med mal claim at the summary judgment stage. The Court remands for trial, where Labairs must prove by a preponderance that they would have recovered a settlement or judgment in their med mal case but for Carey's negligence, and the value of the lost settlement or judgment.

The Court disagrees with the dissent's suggestion that Carey, whose actions caused the loss of Labair's med mal claims in the first place, should be allowed to argue that Labairs' failure to invoke the savings statute, § 27-2-407, MCA, is a failure to mitigate damages.

Justice Nelson's Concurrence: Justice Nelson first questions whether the "suit within a suit" approach should ever be imposed on a legal malpractice plaintiff, as it allows the attorney to benefit from his own wrongdoing. Having botched the underlying case, the attorney should not be able to avoid paying damages by aligning himself with the opposing party in the underlying case and arguing that his client's case would not have been successful.

Justice Nelson believes the Court should jettison the doctrine of proximate cause and the concept of superseding intervening cause, as both unnecessarily complicate the law of negligence. Foreseeability is properly analyzed as a part of duty; duty and proximate cause should be conflated, as both limit a defendant's liability to foreseeable plaintiffs and foreseeable harms.

Justice Rice's concurrence: Carey's breach caused the loss of the opportunity to timely file and proceed with the med mal action, which then would have been subject to testing at the summary judgment stage. Until so tested, the claim may have been valueless. Justice Rice therefore would not conclude that the breach alone established causation as a matter of law. However, Labairs' experts have sufficiently established that they would have survived summary judgment in their med mal case, and simultaneously established causation in their legal malpractice case by showing they lost the opportunity to try their med mal case to a verdict.

Justice Baker's Concurrence and Dissent: Justice Baker concurs in the judgment reversing summary judgment for Carey, but disagrees with the Court's comments about Carey's expert affidavit. She would defer to the district court to consider and decide on expert testimony for trial. Second, she disagrees with the Court's failure to address Carey's argument that the Labairs are responsible for their own damages because they failed to refile their complaint after receiving a decision from the med mal panel. The savings statute, § 27-2-407, allows plaintiffs in certain circumstances to have their cases decided on the merits in spite of the statute of limitations having run. Justice Baker would allow this argument to be presented as a failure to mitigate damages.

***Mattson v. Montana Power Co.*, 2012 MT 318 (Dec. 27, 2012) (5-2) (Nelson, J., for the majority; Baker, J., dissenting)**

Issue: Whether the district court properly denied class certification.
Short Answer: No.

Facts: Plaintiffs are landowners or former landowners with property on the shores of Flathead Lake or part of the upper Flathead River. In 1930, the Federal Power Commission issued Rocky Mountain Power Co., a subsidiary of Montana Power Co., a 50-year license to build and operate Kerr Dam. RMPC transferred the license to MPC in 1938. The dam was completed in 1938, and regulates the lake's water level and generates electrical power for Montana customers. The new license was issued in 1985 to MPC and the Confederated Salish and Kootenai Tribes jointly, with MPC operating the dam until 2015, after which the Tribes have the option of taking it over. PPLM took over the dam operation in 1999.

Landowners claim that MPC's and PPLM's practice of keeping the lake at full pool in the fall has caused and will continue to cause substantial damage to their properties due to the more frequent storms in the fall, which erode the shoreline and damage landowners' properties. Before 2007, the average lake level on Nov. 1 was 2,892 feet. In 2007, PPLM voluntarily lowered the level by one foot to reduce shoreline erosion.

Landowners' properties are subject to flood easements, obtained by MPC and RMPC when the dam was first built. Landowners contend MPC and PPLM have exceeded the scope of those easements, resulting in trespass, nuisance, takings, and breach of the easements.

This action was filed in 1999 against MPC and PPLM. In *Mattson I*, the Court upheld the district court's denial of PPLM's motion to substitute the district judge. In *Mattson II*, the Court reversed part of the district court's summary judgment for defendants, vacated the class certification as to PPLM (the MPC class was not appealed) and remanded. This is the third appeal.

Procedural Posture & Holding: On remand, the district court held an evidentiary hearing, denied the landowners' renewed motion for class certification, and decertified the MPC class. Landowners appeal, and the Supreme Court reverses.

Reasoning: In *Mattson II*, the Court held that Rule 23 does not require a district court to accept all of the complaint's allegations as true in deciding class certification. Landowners seek certification under Rule 23(b)(3), and must meet Rule 23(a) as well as 23(b)(3). MPC and PPLM dispute commonality, predominance, and superiority. The district court held that landowners failed to meet these requirements because damage will vary

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considerably from property to property, thereby basing its class certification decision on a factually and legally incorrect premise. *Mattson II* interpreted the flood easements as allowing reasonable damages to properties through reasonable operation of the dam and creating a duty on the part of the dam operator to avoid unreasonable damage to properties or unreasonable interference with their enjoyment. The key issues, then, are whether the erosion caused has been reasonably necessary and whether MPC and PPLM have cause unreasonable damage to, or unreasonably interfered with the enjoyment of, shoreline properties. The Court did not say these questions had to be answered on a property-by-property basis. The dam operator can select only one water level at the dam, which then applies to the entire lake. Although the easements were obtained property by property, their purpose is the same: to enable the dam operator to regulate the lake up to 2,893 feet at the dam, and flood or affect all shoreline properties simultaneously. Reasonableness cannot be determined on a property-by-property basis. Landowners therefore satisfy the commonality requirement. They also establish predominance and superiority, as MPC or PPLM's liability must be determined on a lakewide basis; if the dam operation is reasonable, some property owners' damage may not be compensable. Individual damages to not negate class certification as to liability.

Justice Baker's Dissent, joined by Rice, J.: The district court did exactly what this Court directed it to do in *Mattson II.* Defendants' liability turns on the fact-based evaluation of reasonableness with respect to each property. Moreover, adjudicating the reasonableness of the dam does not necessarily dispose of Defendants' liability, as under *Mattson II*, even if a jury rules in favor of MPC and PPLM, Plaintiffs could still bring individual actions challenging the effect of the lake level on their properties. The Court also disregards its application in *Chipman* of the heightened commonality standard from *Wal-Mart*, making it unclear what prospective class plaintiffs must prove to establish commonality. The Court does not give proper deference to the district court's determination that class certification will complicate rather than economize resolution of the issues.

***State v. Nixon*, 2012 MT 316 (Dec. 27, 2012) (5-0) (Wheat, J.)**

Issue: Whether the district court properly determined that Nixon did not meet his burden of proof in establishing that his earlier conviction was constitutionally infirm.
Short Answer: Yes.

Facts: Nixon was charged with DUI, fourth or subsequent offense. The information stated that Nixon had previously been convicted of DUI in March 2009, April 1999, and December 1992.

Procedural Posture & Holding: Nixon moved to dismiss due to invalidity of his prior DUI convictions. He challenged the 1992 conviction on constitutional grounds, asserting the court failed to obtain a valid and express waiver of the right to counsel prior to taking Nixon's plea. The district court held an evidentiary hearing at which the current justice court judge testified, and denied Nixon's motion. Nixon appeals, and the Supreme Court affirms.

Reasoning: The state cannot use a constitutionally infirm conviction to support an enhanced punishment. A rebuttable presumption of regularity attaches to the prior conviction, and the defendant has the burden to overcome the presumption. A defendant cannot merely point to a silent or ambiguous record to meet his burden. A defendant's unequivocal, sworn statement that he did not waive his right to counsel rebuts the presumption, and the burden shifts to the state to rebut the defendant's evidence. Here, Nixon's affidavit was undermined by his testimony that he did not remember what the judge said to him during the 1992 proceedings, and that he does not believe he waived his right to counsel. The docket statement says that Nixon was advised of his rights, but does not specifically state that he was advised of his right to counsel, or that he waived that right. The district court's factual finding is not clearly erroneous.

***State v. Claasen*, 2012 MT 313 (Dec. 27, 2012) (5-0) (Wheat, J.)**

Issue: Whether the district court exceeded its authority when it increased Claasen's sexual offender level designation upon revocation of his suspended sentence.
Short Answer: No.

Facts: In 2004, Claasen was charged with sexual abuse of children and pled guilty. Prior to sentencing, the district court ordered a psychosexual evaluation and a presentence investigation report (PSI). Dr. Scolatti completed the psychosexual evaluation and determined Claasen was a Level 1 sex offender with low risk to re-offend. The PSI indicated Claasen was an appropriate candidate for outpatient treatment and recommended that Claasen follow all of Dr. Scolatti's recommendations, engage in sexual offender treatment, and refrain from using or possessing pornography. Claasen was sentenced to the DOC for seven years, with two suspended, subject to terms and conditions. The court orally pronounced sentence, and designated Claasen a Level 1 offender. The court did not include the level designation in its written judgment.

Claasen was discharged to serve his two–year suspended sentence in July 2010. In December 2010, his probation officers conducted a routine home visit and found child pornography. Shortly after, Claasen was terminated from his community-based sexual offender treatment, and the treatment provider stated that Claasen was a "danger" and "should be incarcerated." The provider recommended that Claasen be designated a Level 3 sex offender.

Procedural Posture & Holding: The state petitioned to revoke Claasen's suspended sentence. Before any hearings, the federal government charged Claasen with receipt of child pornography. Claasen pled guilty and was sentenced in December 2011 to a 20-year term in federal prison. The state court held a hearing and found Claasen violated the conditions of his sentence. The court revoked Claasen's suspended sentence and committed him to the DOC for two years, to run consecutively to his federal sentence. It also ordered that Claasen be designated a Level 3 sex offender. Claasen appeals the increase of his sexual offender designation, and the Supreme Court affirms.

Reasoning: The court's oral pronouncement of Classen's sentence is the valid, final judgment. Claasen claims the district court exceeded its statutory authority by elevating him from a

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Level 1 to a Level 3 offender without first ordering a new PSI and psychosexual evaluation. The state argues that Claasen did not preserve this issue for appeal, but the Court finds that he did. The Court next determines that the revocation statutes apply, not the sentencing statutes. The statute provides that if an offender violates the terms of a suspended sentence, the judge can revoke and impose a sentence "that does not include a longer imprisonment or commitment term than the original sentence." § 46-18-203(7)(a)(iii), MCA. A sexual offender designation implicates a liberty interest, but an increase in level designation does not increase the imprisonment or commitment term.

***Tonner v. Cirian*, 2012 MT 314 (De. 27, 2012) (5-0) (Baker, J.)**

Issue: Whether a driver who did not have the right of way in an uncontrolled intersection collision can raise a genuine issue of material fact about the favored driver's failure to maintain a proper lookout.
Short Answer: Yes.

Facts: Tonner and Cirian collided in an uncontrolled intersection, damaging both vehicles and injuring Tonner. Tonner sued Cirian, alleging Cirian failed to maintain a proper lookout and failed to operate her vehicle in a reasonable and prudent manner.

Each driver testified she was driving at or under the speed limit, unimpaired, and that neither saw the other's car prior to entering the intersection. Tonner stated she slowed and looked to her right before entering the intersection but did not see Cirian's car. Cirian testified she did not look to her left before entering the intersection, and that even if she had, bushes and a fence obstructed her view. Tonner submitted photos showing that Cirian's view was not obstructed.

Procedural Posture & Holding: Cirian moved for summary judgment on the undisputed fact that the approached the intersection to the right of Tonner and therefore had the right of way. Tonner opposed the motion, arguing that the right of way does not absolve a driver from her duty to maintain a proper lookout. The district court granted summary judgment to Cirian, and Tonner appeals. The Supreme Court reverses.

Reasoning: Even if Cirian had the right of way, she still had the duty to drive in a careful manner and maintain a proper lookout. If the disputed facts suggest each party could have been negligent, summary judgment is inappropriate. Judgment as a matter of law is affirmed only when the undisputed facts support but one conclusion. Cirian has not presented any evidence demonstrating that her vehicle posed an immediate hazard to Tonner as Tonner entered the intersection; thus, the issue of whether Cirian maintained an adequate lookout is material.

***Marsden v. Blue Cross and Blue Shield of Montana*, 2012 MT 306 (Dec. 28, 2012) (5-0) (Morris, J.)**

Issue: Whether the determination of Marsden's status as a term or at-will employee implicates the arbitration provision of her employment contract.
Short Answer: Yes.

Facts: In 2010, BCBSMT and Marsden signed an employment agreement that contained a clause to compel arbitration for any disputes over the agreement. The term of the agreement was from Nov. 8, 2010 – Dec. 31, 2012. Marsden worked for about one year before BCBSMT terminated her employment in Dec. 2011. BCBSMT paid Marsden $328,478, the compensation BCBSMT believed it owed Marsden for the remainder of her contract.

BCBSMT contends it terminated Marsden for failing to submit a timely bid to a state request for proposals. Marsden contends BCBSMT terminated her in retaliation for reported allegedly illegal practices related to rebates of insurance commissions.

Procedural Posture & Holding: Marsden filed suit alleging wrongful discharge under the WDEA. She concedes her claim is dependent on her not having had a contract of employment for a specific term. She argued that the provision allowing BCBSMT to terminate her nullified the term and made her an employee at will. BCSMT argued that whether the contract was for a term should be resolved through arbitration. BCBS sought to compel arbitration, and the district court granted its motion. Marsden appeals, and the Supreme Court affirms.

Reasoning: Marsden's contract allowed BCBSMT to terminate her employment if the president and CEO believed it was in the company's best interest, or for cause. The parties agree BCBSMT terminated Marsden under the best interest clause. Marsden argues this cause creates a "without cause" termination provision, rendering her an employee at will and allowing her to pursue a WDEA claim. Marsden agreed to arbitrate any disputes arising out of the employment contract. The dispute over whether Marsden was a set-term or at-will employee implicates the provisions of the contract, and should be decided by an arbitrator.

***Big Sky Colony, Inc. v. Montana Dept. of Labor*, 2012 MT 320 (Dec. 31, 2012) (4-3) (Morris, J. for the majority (joined by McGrath, C.J., Wheat, J., and Baker, J.); Rice, J., dissenting (joined by Nelson, J. (writing separately) and Cotter, J.))**

Issue: Whether HB 199, which amended the work comp definitions of employer and employee to include religious organizations whose members work in exchange for food, clothing, shelter and medical care, violates the Free Exercise or Establishment Clauses of the federal constitution, or the Equal Protection guarantee of the federal and state constitutions.
Short Answer: No.

Facts: Big Sky Colony, Inc. is a Hutterite community, organized as a religious corporation under Montana law. All members must belong to the church and must agree to follow the teaching and tenets of the church society. Members who work in commercial activities for the colony receive food, clothing, shelter, and medical care, but are not paid wages. The department initially determined that the work comp act did not apply to the colony because it did not pay wages, it was not an "employer," and its members were not "employees."

The 2009 Legislature enacted HB 119, which amended the definition of employer to include religious organizations "receiving remuneration from nonmembers for agricultural production, manufacturing, or a construction project conducted by its members on or off the property." § 39-71-117(1)(d), MCA. The

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definition of employee was amended to include a member of a religious organization performing services described in 117(1)(d).

Procedural Posture & Holding: The colony brought an action against the department in 2010, arguing the amendments violated their constitutional rights. The parties filed cross-motions for summary judgment. The district court granted the colony's motion, concluding the statutes violated the free exercise and establishment clauses of the federal constitution, and the equal protection guarantee of the Montana and U.S. Constitutions. The state appeals, and the Supreme Court reverses.

Reasoning: (1) The district court found that the Hutterite faith demands that its members engage in commercial activities with nonmembers for remuneration, and applying strict scrutiny, found that HB 199 violated the free exercise clause. The Supreme Court finds that the work comp requirement does not prohibit colony members from engaging in commercial activity; it simply means the colony will make less money because it will have to pay work comp premiums. Nor does it place the colony in a discriminatory position compared to other religious groups. The Court therefore rejects strict scrutiny, and finds that HB 119 is facially neutral, serves a secular purpose, and imposes only an incidental burden on religious conduct. (2) Applying the *Lemon* test, the Court finds that HB 119 has a secular purpose, does not have as its principal or primary effect the inhibition of religion, and does not foster excessive entanglement with religion, and therefore does not violate the establishment clause. (3) The Court concludes that the work comp act as amended through HB 119, does not treat religious employers differently than non-religious employers. Because the colony fails to make a threshold showing of a classification creating two similarly situated groups that are treated unequally, its equal protection claim must fail.

Justice Rice's Dissent: Justice Rice would affirm the district court's holding that the colony's right to free exercise was violated. The legislative record shows that the objective intent of the legislators was to target the Hutterites. Other religious employers do not satisfy HB 119's definition of employer, as the text was narrowly written to apply to the Hutterites. HB 119 is not a generally applicable statute; it is a religious gerrymander that singles out one religion, and must sustain strict scrutiny review. The law is not justified by a compelling state interest, and the burden on the colony is not incidental.

***Kluver v. PPL Montana, Inc.*, 2012 MT 321 (Dec. 31, 2012) (5-2) (Wheat, J., for the majority; Nelson, J., and Cotter, J., dissenting)**

Issue: (1) Whether the district court properly admitted evidence of the mediation leading to the settlement agreement, and (2) properly granted the motion to enforce the settlement agreement.
Short Answer: (1) No, but the error was harmless, and (2) yes.

Facts: The Kluvers and McRaes are neighbors and ranchers in Rosebud County. In 2007, the filed suit against the power companies alleging that Colstrip, which borders their land, contaminated groundwater under their property. All parties were represented. In 2010, the parties met in a settlement conference. The McRaes did not attend, but authorized their counsel to proceed with the mediation and agree to a settlement on their behalf. The mediation lasted all day, and ended with a Memorandum of Understanding emailed from plaintiffs' counsel to defense counsel, with all other counsel copied. That evening, one of the plaintiffs' lawyers called McRaes to tell them a settlement had been reached. A few days later, Karson Kluver went to McRaes' and expressed relief that the case was over, and sadness that he would have to give up part of his land in settlement. A few weeks later, Kluvers told Doug McRae that they'd met with their tax attorney and learned the settlement proceeds would not be as great as they'd thought, and they were having reservations about settling.

Two months after the mediation, at the insistence of Kluvers, plaintiffs' counsel filed a notice with the court saying that the settlement had failed. The power companies moved to enforce the settlement, and attached affidavits from their attorneys testifying to the mediation negotiations. Kluvers objected and moved to strike the affidavits, arguing the power companies could not rely on confidential and privileged settlement negotiations. McRaes agreed with the power companies that the agreement was enforceable; three plaintiffs' attorneys filed affidavits describing the settlement negotiations.

Procedural Posture & Holding: The district court held that Kluvers waived any right to confidentiality of the fact of a settlement, and admitted the affidavits describing the negotiations. It ordered the mediator to submit a report to the court indicating whether a settlement had been reached, and held an evidentiary hearing at which plaintiffs' and defendants' attorneys testified, and the McRaes, but not the Kluvers, testified. The testimony revealed details about the mediation process, including how the MOU was created and transmitted between the parties. The court issued FOF/COLs and granted the power companies' and McRaes' motion to enforce the agreement. Kluvers appeal, and the Supreme Court affirms.

Reasoning: (1) Kluvers argue that because neither they nor their counsel signed the MOU, it does not satisfy the statute of frauds. The district court relied on the Uniform Electronic Transactions Act, enacted in 2001 to allow more business to be done electronically, and concludes the parties here agreed to memorialize the terms of their settlement by electronic means. Moreover, counsel Ruggiero provided the requisite electronic signature, and was an agent for Kluvers and McRaes. Although Ruggiero did not have written authorization to act on Kluvers' behalf, he was in their physical presence during the mediation. When an agent and principal are in physical proximity, the principal can authorize the agent to sign a contract involving realty on the principal's behalf without written authorization. Finally, because Karson Kluver acknowledged the settlement when he spoke with McRaes, he cannot now invoke the statute of frauds to deny the existence of the agreement.

Kluvers maintain the MOU lacks consent and contains illegal objects. Although the lower court considered testimony as well as the MOU and map, the Supreme Court finds that the Kluvers assented to the terms of the agreement based solely on the MOU and map. The fact that there was not absolute certainty and completeness inn every detail does not render the MOU

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unenforceable. The use of the terms "draft" and "tentative settlement" in post-MOU communications is "inartful" but does not change the Court's conclusion.

Kluvers argue that parties failed to perform their duties within 60 days as required by the MOU. The Court concludes that the implied finding of the District Court was that the 60-day period was not met because Kluvers were firing counsel and attempting to rescind the agreement.

(2) Kluvers contend the district court rewrote the MOU and converted an option to purchase into a right of first refusal. In the context of the MOU, the district court's interpretation evidences the parties' intent. Although the district court relied on testimony to come to this conclusion, the MOU alone supports this conclusion.

(3) Kluvers argue the district court violated the mediation statute and attorney-client privilege by admitting evidence about the mediation. The statute prohibits disclosure of "all mediation-related communications, verbal or written," absent consent or a statutory exception. § 26-1-813(3), MCA. The district court concluded that Kluvers waived their right to mediation confidentiality by acknowledging the existence of the settlement to McRaes after the mediation. Because the statute requires a written waiver, Kluvers did not waive the confidentiality provided by the mediation statute.

A written agreement created during mediation is admissible. § 26-1-813(3). Although the statute protects conversations that took place during the mediation, it does not protect conversations that took place afterwards. Mediators' reports are confidential, however, and the lower court erred in requiring the mediator to file a report.

All evidence of conversations and conduct at mediation are confidential other than information as to who was present, when it began and ended, and any other nonverbal conduct not intended as an assertion.

Here, the admission of evidence from the mediation was error, but it was harmless error. The MOU and map as well as post-mediation conversations between Kluver and McRaes are sufficient to find the parties entered into a binding agreement. Kluvers also assert the mediation-related communications violated attorney-client privilege, but even if that were true, it too would be harmless error.

Justice Nelson's Dissent: Justice Nelson agrees that admitting the mediator's report and testimony of conversations and conduct at the mediation was confidential, but disagrees that the error was harmless. Ruggiero's email fails to satisfy the statute of frauds. The MOU lacked essential terms, and the parties failed to perform within 60 days.

Justice Nelson disagrees with the court's determination that pre- and post-mediation communications are not confidential. "The Court's Opinion here does a serious disservice and damage to the mediation process."

Justice Cotter's Dissent: The proceedings before the district court violated the express provisions of the § 26-1-813, MCA, and the error was not harmless. As Justice Nelson observes, the Court has built a house of cards. "It is simply impossible to reach the decision the Court reaches here without first assuming as true matters the admission of which was error in the first place." ¶ 121.

***McEwen v. MCR, LLC*, 2012 MT 319 (Dec. 31, 2012) (7-0) (Morris, J.; Nelson, J., and Cotter, J., concurring)**

Issue: (1) Whether a compressor station required for a natural gas pipeline is a public use for which a private party can condemn private property, and (2) whether landowners were entitled to restoration and punitive damages.
Short Answer: (1) Yes, although the Court remands for a determination of necessity, and (2) yes.

Facts: McEwens purchased their ranch near the Sweet Grass Hills in 1992, subject to a lease of two acres by Fulton Fuel Co., on which sat a compressor station. MCR bought Fulton's interest in the compressor station in 2004, and entered into a five-year lease with McEwens to continue operating the compressor station. MCR operated natural gas wells on McEwens' property under its mineral rights. It needed a place to dump produced water form one of its well, and entered into a contract with McEwens to allow it to dump the water from one well into a pond on McEwens' property. The contract required MCR to provide McEwens with water tests of the produced water every six weeks, as McEwens believed produced water from a different well had killed some of their sheep in 1996. MCR failed to test the water as required. McEwens alleged that MCR dumped produced water from two other wells, including the well that may have killed their sheep. MCR employees defecated and littered on McEwens' property, disturbed McEwens' property and did not reclaim it.

McEwens and MCR could not reach agreement on renewing the lease for the two-acre parcel. MCR filed suit to condemn the property. McEwens counterclaimed for breach of contract, trespass, nuisance, and violation of the Surface Damages Act, seeking restoration costs and punitive damages.

Procedural Posture & Holding: The district court denied MCR's motion for a preliminary condemnation order, finding compressor stations are not an enumerated public use, granted McEwens' motion for summary judgment for liability and the case proceeded to trail on damages. The jury awarded restoration costs and punitive damages to McEwens. MCR appeals, and the Supreme Court affirms in part, reverses in part, and remands.

Reasoning: (1) Gas pipelines are an enumerated public use. § 70-30-102(4), MCA. The Court holds it would be absurd to allow a private party to exercise eminent domain to construct and operate a pipeline but not to construct and operate a compressor station necessary to make the pipeline work properly. Thus, the compressor station is a public use. However, MCR must also show that the taking of McEwens' property is necessary to the public use. McEwens' evidence that other property may be available raises a genuine issue of material fact precluding summary judgment. The district court may also address on remand whether MCR seeks to sue the land for ancillary purposes exceeding the scope of the public use, such as holding field meetings, parking contractor equipment, and storing a diesel and gas tank above ground.

(2) To state a claim for restoration costs rather than

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diminution in property value, a party must establish that the injury is temporary, i.e., that it can be restored. A party must also establish personal reasons for wanting restoration only when the restoration costs are disproportionately greater than diminution in value damages. Here, the McEwens' contaminated property had an estimated value of $850-$2400. Restoring the property was estimated to cost $138,000-$2.2 million. Thus, McEwens must establish personal reasons for the restoration. Whether McEwens presented sufficient personal reasons is a question of fact; however, this case went to trial before the Court clarified this rule in *Lampi v. Speed*, 2011 MT 231. The Court determines that the district court's decision that McEwens were entitled to restoration damages as a matter of law did not substantially prejudice MCR, and is harmless error.

The Court declines to adopt an "objectively reasonable" requirement as a separate element of proof of entitlement to restoration damages. It also clarifies that a property owner who satisfies the personal reasons requirement may nonetheless seek restoration costs for a commercial family ranch from which the family earns its living. Each case must be decided on its own facts.

(3) The contract between MCR and McEwens for dumping produced water in McEwens' pond reflects the parties' understanding that MCR's failure to abide by the contract terms could contaminate the pond. Consequential damages for breach of contract are to make the injured party whole, but not to allow the party to realize a profit. In contract, as in tort, diminution in value may not always correspond with the extent of plaintiff's injury. McEwens were entitled to restoration costs as damages for their breach of contract claim.

(4) MCR argues that evidence that it jumped McEwens' bid on trust lands was irrelevant. The Court disagrees, as this evidence is relevant toward showing MCR acted with malice toward McEwens, and supporting McEwens' claim for punitives.

Justice Nelson's Concurrence (joined by Cotter, J.): Justice Nelson concurs in most of the majority's decision, but disagrees that the lower court erred in ruling as a matter of law that restoration costs were the appropriate measure of damages. The proper measure of damages is a question of law, unless a genuine issue of material fact is raised. In deciding whether a party is entitled to restoration costs, the factual questions are whether the injury is temporary, and whether the party has personal reasons for restoring the property. Justice Nelson suggests particular procedures where the plaintiff seeks restoration costs, and would hold the district court did not err in deciding that McEwens were entitled to restoration damages.

***Boyne USA, Inc. v. Spanish Peaks Development, LLC*, 2013 MT 1 (Jan. 2, 2013) (5-0) (Morris, J.)**

Facts: In the late 90s, the U.S. Forest Service entered into a land-exchange agreement with Blixseth and two entities owned by the McDougal brothers (the Blixseth Group). Part of the exchange included 15 acres of federal land at the top of Lone Peak. In 1998, the Blixseth Group contracted to sell this 15 acres to Boyne USA, which owns and operates Big Sky Resort. In consideration of this agreement (the Peak Agreement), Boyne had to exchange 25 acres of its property to the McDougal brothers for half of the Lone Peak property pursuant to the Southfork Agreement. The McDougal brothers owned 900 acres south of Boyne's property, which they planned to develop into Spanish Peaks Resort. They wanted ski in/ski out access to Big Sky, and Boyne owned the property connecting Spanish Peaks to Big Sky's chairlifts. McDougal and Boyne finalized the Southfork Agreement in 1998.

Issue: (1) Whether the district court properly awarded specific performance of the Peak Agreement to Boyne USA; (2) whether the jury's finding that defendants abused the legal process and deceived Boyne, and its award of $300,000 each from SPD and LMH, was supported by the evidence; and (3) whether Boyne was properly awarded attorneys' fees.
Short Answer: (1) Yes; (2) yes; and (3) yes, including attorneys' fees on appeal.

In 2000, Spanish Peaks Development, LLC (SPD), managed by Tim Blixseth and James Dolan, bought the Spanish Peaks property from McDougals, who assigned their rights under the Peak and Southfork Agreements to SPD. Blixseth Group also assigned its rights to SPD, leaving SPD as the sole beneficiary of the Peak and Southfork Agreements. Dolan and Blixseth then formed Spanish Peaks Holding (SPH) in 2002. SPD sold the Spanish Peaks property to SPH, and assigned its interest in the Southfork Agreement to SPH, but kept its interest in the Peak Agreement.

In 2002, SPH, Boyne, and Blue Sky Ridge, LLC entered into a buy-sell under which SPH and Blue Sky Ridge bought about 1,700 acres from Boyne for $7 million. The buy-sell modified the Southfork Agreement and transferred the 25 acres from Boyne for ski in/ski out access to Spanish Peaks; the simultaneous transfer allowed SPH to evade subdivision review.

The U.S. issued a patent to Blixseth Group for the 15-acre Lone Peak property on August 23, 2004. Blixseth conveyed the property to Yellowstone Mountain Club on Dec. 21, 2004. On Jan. 1, 2005, Blixseth told Boyne it would not transfer the property as agreed to in the Peak Agreement, saying Boyne had breached the Southfork Agreement. Blixseth also said that Boyne's sale of the 25 acres to SPH in 2002 was a breach of the Southfork Agreement, saying Boyne should have transferred the property to SPD. Both SPD and SPH are owned and managed by Dolan and Blixseth. Blixseth demanded Boyne transfer 25 more acres to SPD before it would receive the Lone Peak property.

Procedural Posture & Holding: In January 2008, Boyne sued Blixseth and Yellowstone Mountain Club, LLC, for breach of contract, seeking specific performance. A week later, Yellowstone conveyed the Lone Peak property to SPD. Boyne added SPD as a party. Nine months later, SPD conveyed the Lone Peak property to a new entity created by Dolan and his family, LMH; Boyne added LMH as a party, and sought damages for Defendants' abuse of legal process.

The district court dismissed Blixseth Group and Yellowstone Mountain Club in January 2010 due to Yellowstone Mountain Club's bankruptcy. After a five-day trial in November 2010, the jury found SPD breached the Peak Agreement, and SPD and LMH abused legal process. It awarded Boyne $300,000 from each defendant, and $1 in punitives. The district court awarded Boyne specific performance of the Peak Agreement and attorney

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fees under the contract. SPD and LMH appeal, and the Supreme Court affirms with one minor modification.

Reasoning: (1) Appellants argue Boyne did not perform two obligations under the Peak Agreement, and is therefore not entitled to specific performance. The Court examines the contractual language as well as the record and affirms the verdict, finding that Boyne's transfer of the 25 acres in 2002 to SPH instead of SPD was proper, and fulfilled Boyne's obligation under the Peak Agreement. Appellants also argue Boyne is not entitled to specific performance because it has not paid for the property as required by the Peak Agreement. The district court found that Boyne did not have to pay before seeking specific performance because SPD anticipatorily breached when it added a demand that Boyne transfer an additional 25 acres. The Court affirms on the basis that paying would have been a useless act. Moreover, LMH may be ordered to convey the Lone Peak property, even though it was not a party to the Peak Agreement, because the record supports the district court's finding that LMH was not a good faith buyer.

(2) The Court reviews the evidence supporting the jury's award of $300,000 each from SPD and LMH for abuse of the legal process and deceit under its tort jurisprudence. It finds substantial evidence in the record and refuses to disturb the award. The district court offset Boyne's damages award by $6,188 – the value of the Lone Peak property under the Peak Agreement – and the Supreme Court affirms, but agrees that the money should be paid only to SPD, not split between LMH and SPD.

(3) The district court awarded $176,834 in attorney fees to Boyne under a provision in the Peak Agreement. Appellants' argument that Boyne did not file a separate motion for fees "borders on the frivolous." ¶ 106. Appellants waived their right to object to the amount because they failed to object or request a hearing within 10 days of Boyne's proposed FOF/COLs and statement of fees. The agreement also entitles Boyne to attorney fees on appeal, and the case is remanded to the district court for determination of those fees.

***Steichen v. Talcott Properties, LLC*, 2013 MT 2 (Jan. 8, 2013) (4-1) (McGrath, C.J., for the majority: Rice, J., dissenting)**

Facts: Talcott owned a building in which it leased space to Bresnan Communications. Steichen worked as an independent contractor for Bresnan, cleaning the offices three nights a week. Steichen slipped on water on a rest room floor one night while he was working, and was injured. The lease required Talcott to maintain the building structurally, including roof, water, gas, sewage, electrical, heating and cooling systems, and the interior and exterior surfaces of the building. Bresnan was responsible for routine painting, cleaning and care of the interior premises, including interior lights. Bresnan periodically called Talcott to report a chronic problem with water leaking from the plumbing onto the rest room floor. Steichen also alleged a chronic problem with lighting in the men's rest room, and alleges that when he fell, the lighting in the rest room was dim and there was a puddle of water on the floor.

Issue: Whether a property owner owes a duty of care to an independent contractor working for the lessee of the building.
Short Answer: Yes.

Procedural Posture & Holding: Steichen sued Bresnan and Talcott, and settled with Bresnan. The district court granted summary judgment to Talcott, and Steichen appeals. The Supreme Court reverses and remands for trial.

Reasoning: The district court correctly determined Talcott owed a duty of care to maintain the building in a reasonably safe condition. It erred in applying the construction industry standard and in concluding that Talcott did not owe Steichen a duty because he was an independent contractor. Independent contractor status is irrelevant to premises liability. The lower court also erred by concluding that the danger was open and obvious, and Talcott had responded to each of Bresnan's repair requests. A landowner is absolved from liability for open and obvious dangers only if he should not have anticipated the harm would occur. *Richardson*, 286 Mont. at 321. Whether Talcott should have anticipated harm is a jury question, as it depends on the degree of ordinary care a reasonable person would use under the circumstances.

Justice Rice's Dissent: Justice Rice would affirm and hold that landowners do not have a duty to protect independent contractors from dangers inherent in the job they were hired to perform.

***State v. EMR*, 2013 MT 3 (Jan. 8, 2013) (5-0) (Baker, J.)**

Facts: EMR's mother died in Nov. 2010, when EMR was 17. The mother was a hoarder. Over the next six months, neighbors complained about the treatment of horses, dogs, and other animals at the property. Eventually, EMR was cited for cruelty to animals and referred to the youth court. The county attorney charged EMR with being a delinquent youth for having committed two counts of animal cruelty, a misdemeanor, as well as two counts of aggravated animal cruelty, a felony, and five "dog at large" offenses, a misdemeanor. The petition mistakenly said the dog-at-large charges were violations of 4-2006-13, MCA, rather than Lewis & Clark County ordinance § 4-2006-13.

Issue: (1) Whether the district court's instruction on the legislative purpose of the Youth Court Act, given to a deadlocked jury, was reversible error; whether the Youth Court's refusal to dismiss five dog-at-large under "4-2006-13, MCA" instead of county ordinance 4-2006-13 charges was error.
Short Answer: (1) Yes, and (2) no.

Procedural Posture & Holding: The youth court held a jury trial in August 2011. At the close of the state' case, EMR moved for dismissal of the dog-at-large counts because they were improperly charged. The district court denied the motion. The jury became deadlocked on the felony animal cruelty charges. The parties agreed to read an *Allen* instruction, and the state suggested reading its proposed instruction on the legislative purpose of the youth court. Although the court previously refused the instruction, it agreed to do so after the deadlock, over EMR's objection. The jury continued deliberating for several hours, ultimately finding EMR guilty of the five dog-at-large offenses and one felony of aggravated animal cruelty. It found EMR had not committed one count of animal cruelty and was unable to reach a verdict on the remaining two. EMR appeals. The Supreme Court reverses the conviction for aggravated animal cruelty and affirms the dog-at-large convictions.

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Reasoning: (1) Instructing a jury on sentencing possibilities is error, as it invites the jury to consider matters beyond the facts as proved by the evidence. Error is reversible if it prejudices a defendant. Here, the error was prejudicial because the jury was deadlocked until it received this instruction, after which it convicted EMR of a felony. (2) The state filed an affidavit with its amended petition correctly citing to the county ordinance. EMR cannot claim she was surprised or prejudiced by the mistaken citation.

***In re the Marriage of Perry*, 2013 MT 6 (Jan. 15, 2013) (5-0) (Rice, J.)**

Issue: Whether the district court properly denied wife's motion to disqualify husband's attorney.
Short Answer: Yes.

Facts: Terance Perry, a Missoula lawyer, filed for dissolution of his marriage to Karen Perry in December 2009. He was represented by three different attorneys before naming himself counsel of record. A month later, he filed a substitution of counsel naming Gail Goheen his counsel.

In January 2008, Karen had contacted Goheen's office about the potential filing of a dissolution. Karen spoke with Goheen's assistant, and later with Goheen. Karen testified that she discussed domestic abuse (which Terance denies), and that having Goheen represent Terance discredits Karen and is a betrayal of her trust in Goheen.

Goheen testified that she had one conversation of less than 12 minutes with Karen. She testified that she will not represent someone against an attorney in Ravalli or Missoula County if the attorney is from a firm she regularly faces. Her records indicate she made a short call to refuse the case and refer Karen to someone else.

Procedural Posture & Holding: Karen moved to disqualify Goheen. Terance filed documents from Goheen regarding her conversations with Karen as part of his response. The court held a hearing, prior to which Karen moved to strike the documents because they would be harmful to her. The district court granted the parties' motion to seal the documents, limited Goheen's testimony, and did not permit Karen to cross-examine Goheen about the documents. The district court denied Karen's motion to disqualify after finding no attorney-client relationship existed between Karen and Goheen. The court reasoned that Karen's motion was designed to delay resolution of the case and force hardship and increased expenses on Terance. Karen appeals, and the Supreme Court affirms.

Reasoning: (1) The existence of an attorney-client relationship is a question of fact. MRPC 1.20 prohibits representation of a party whose interests are materially adverse to a prospective client if the prospective client divulged information that could be significantly harmful to the client in the matter. Karen is a prospective client under Rule 1.20(a); thus, the issue is whether she conveyed information to Goheen that could be significantly harmful to Karen in this dissolution. The district court found she did not, and did not abuse its discretion in denying Karen's motion to disqualify. (2) Karen claims Goheen violated her duty of loyalty under Rule 1.9; however, Karen did not establish an attorney- client relationship with Goheen, so Rule 1.9 does not apply. However, Rule 1.20 incorporates the duty in 1.9(c), and Rule 1.6 also governs lawyers' use of client information. The district court properly limited Goheen's testimony to protect Karen's confidences, and Goheen's limited use of Karen's information was permissible under Rule 1.6(b)(3). (3) The district court properly allowed Goheen to testify under Rule 3.7(a)(2), permitting a lawyer to testify about the nature of legal services rendered. (4) Karen argues that Goheen's office memo, as well as her and her assistant's handwritten notes about their conversations with Karen, are privileged documents for which Karen did not waive privilege. Karen's motion to disqualify Goheen waived the evidentiary privilege.

***Total Industrial Plant Services, Inc. v. Turner Industries Group, LLC*, 2013 MT 5 (Jan. 15, 2013) (5-0) (Wheat, J.)**

Issue: (1) Whether subcontractor TIPS was entitled to additional compensation for work performed under a fixed-price contract; (2) whether Turner wrongly withheld almost $375k from TIPS; (3) whether TIPS was entitled to prejudgment interest on the wrongly withheld money; and (4) whether Turner's bill of costs was untimely filed.
Short Answer: (1) No; (2) yes; (3) yes; and (4) yes.

Facts: Turner entered into a written subcontract with TIPS to install insulation at a coker unit at a Laurel refinery owned by Cenex. Turner was the general contractor for the coker project. The TIPS-Turner contract was initially fixed-price, but after weather and other delays, the parties renegotiated to a time-and-materials contract. The scope and value of the work increased steadily from $2.3 million to $13.25 million. The parties agree that TIPS was paid that amount, as well as all time and material claims from February 2008 forward. The dispute arises from work TIPS performed in the first months of the contract.

Procedural Posture & Holding: TIPS filed a construction lien in September 2008. It sued Turner in December 2009 for breach of contract, quantum meruit, breach of the covenant of good faith and fair dealing, and sought foreclosure of the lien. The district court granted TIPS' motion for partial summary judgment, ordering Turner to return $374,226 it had withheld, and denied Turner's motion to dismiss. After a bench trial it found for Turner on all of TIPS's claims. TIPS appeals, and the Supreme Court affirms.

Reasoning: (1) The Court first affirms the dismissal of TIPS's quantum meruit claim, as all work TIPS did was pursuant to an express contract. It next affirms the lower court's findings that all of TIPS' contract claims were refuted by the language of the contract. (2) The contract allowed Turner to withhold 10% of payments as retainage until TIPS provided a final release of lien. Turner filed a substitution bond that was 1.5x the lien amount, which released the lien. Once it filed a substitution bond, Turner had no right to keep the retainage. (3) TIPS is entitled to interest from the date the bond was filed until the date of the final order. The Court reverses this part of the ruling and remands for determination of the interest owed to TIPS. (4) The contract allowed costs but did not specify any procedure; thus, the statutory procedure applies. A bill of costs must be filed and served within five days of the verdict or notice of decision of the court. § 25-10-501, MCA. The court entered judgment on Nov. 22, 2011; Turner filed notice of entry of judgment on Nov. 29, 2011; and Turner filed a bill of costs on Dec. 2, 2011. The bill of costs was untimely.

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

Lions, tigers, and bears — OH MY!

Montana attorney recalls adventurous trip to South Africa

By Lynn Baker

At the end of September, 2000, I retired from practicing law in Great Falls with my all-time favorite legal munchkin, Channing Hartelius and flew to Capetown, South Africa with a group of 11 American lawyers and judges. We had been commissioned through the ABA to work for one month with the South African Ministry of Justice to determine whether the majority black population understood and agreed with the changes in human rights that had been instituted by the Mandela government since 1994.

The nine of us first met in Capetown where we were briefed by staff members of the Ministry of Justice. Our assignment was to interview black South Africans in as many walks of life as possible, to determine how they viewed the human rights changes which had been made since the fall of Apartheid and to elicit their opinions on whether such changes had been beneficial to black South Africans. Americans had been chosen for this task since black South Africans had a positive view of Americans, both black and white. My colleagues were an inspiring and adventurous lot, a Superior Court Judge from New York, two corporate lawyers from California and an assortment of white and black big law firm types who were obviously enjoying the prospects of taking time off from ninety-hour work-weeks. Apart from the Californians, I was the only lawyer from west of the Mississippi. How I was chosen still baffles me.

Our assignment was to interview black South Africans in as many walks of life as possible, to determine how they viewed the human rights changes which had been made since the fall of Apartheid and to elicit their opinions on whether such changes had been beneficial to black South Africans.

After our day-long meeting with our hosts, we quickly set to the task of dividing up the work, identifying target populations and determining who would work with which groups. Several of my colleagues chose to work with civil servants while others chose small business owners, university students and domestic workers. Since we had been provided several guides (or were they guards?), making contact didn't seem too difficult.

"But what about the townships," I volunteered. We've just finished an hour-long discussion on township residents but we're not going to get their opinions?" Townships had been established during the Apartheid era as a means of controlling blacks by keeping them in "shanty towns" outside of major urban areas. Residents could work in the adjoining cities during the day but generally had to return to the townships before dark. Conditions in the townships were appalling with little sanitation, water or electricity and most dwellings were just shacks. The largest township near Capetown is New Home or Khayelitsha and it had about 400,000 residents in 1999.

Now, this is where the fun part begins. On the flight from Johannesburg to Capetown, I sat next to a black lady dressed traditionally in an orange African outfit. I'm not known as a "shrinking violet" so I struck up a conversation about how colorful she looked. Once she determined I was a "yank" she proceeded to tell me about the wonderful conference she had just attended in "JoBurg" where women had met to explore business opportunities. She told me that she wanted to start a Bed and Breakfast where she lived, in the Khayelitsha Township, just outside of Capetown. Of course, at that point, I didn't know anything about the Khayelitsha Township but she seemed very friendly and determined to start this business in what she described as her modest "two- bedroom" home. As we landed in Capetown, she handed me a piece of paper that would eventually become her business card, with her name, Thope Lekau and telephone number. She invited me to stay with her and her family as her first customer. I thanked her, put the paper in my wallet, took a photo of her group and joined my colleges,

Back to the division of work meeting. Aha, I thought to myself. None of these American lawyers wants to work in the townships and I already have a contact! I immediately volunteered to work with residents of the townships in Capetown and Johannesburg. One of our "guides," a South African who looked like he had recently been employed by Seal Team Six, took me aside and mentioned politely that I might want to choose another target group since it might not be safe for me to be wandering around in the townships. It is true, he said, that enterprising souls are starting tours of the townships but those tours are in the daylight and accompanied by "guides."

Well, as it happens, I had worked with Channing for twenty years and therefore was pretty much immune to danger. Besides, I thought, that Thope was very nice and besides, she did invite me to stay with her and her family and I could probably get her to help me find subjects to interview.

Later that night, after I figured out how to use the South

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The group with officers of the South African Bar after a dinner in Johannesburg. Lynn Baker is in the back row, on the left.

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African telephone system, I called Thope. The telephone number she had given me turned out to be to a nearby store of some kind but the gentleman who answered promised to get a message to her. Half an hour later I received a return phone call and Thope and I worked out the details. She wanted one day to get her house in order since she had never actually hosted anyone before.

The next afternoon Thope's husband picked me up in a car that might best be described as "well used." Actually, it had no interior door panels, no back seat and a generous pile of blankets over the tattered passenger seat. Hummm, I thought, "I hope this vehicle gets us there." On the way to Khayelitsha we stopped briefly for about $2.00 worth of gas.

We arrived in Khayelitsha about 5:00 p.m. and after driving down several miles of very dusty streets, we arrived at Thope's house. I was quite surprised because it was made of mud and quite large given the surrounding shacks. It had a dirt floor which was covered by bright rugs. My bedroom was small but clean. It had obviously been recently vacated by Thope's daughter.

My stay at Thope's B&B was wonderful! First, we discussed the reason for my stay and she and her husband assured me that I would have no difficulty obtaining information since it was very rare for a white American to be wandering the streets wanting to talk to residents. They also assured me that safety would not be an issue since the Township had its own "informal" justice system and anyone bothering me knew he would be severely punished by the other residents. In fact, during my two days there, I met only friendly and kind residents who were anxious to help. Even when I wandered the dirt streets in the dark (street lights were non-existent) I felt no fear. Overall, I was able to talk to thirty residents.

I don't have the space to discuss Thope's B&B in greater length but suffice it to say that I enjoyed everything from her sumptuous African meals to the interesting discussions about human rights, plans for her B&B, life in America and just about everything else you can imagine. Her B&B has changed locations and expanded and you can view her website at: www.kopanong-township.co.za.

After the deeply moving visit to Robben Island, where Nelson Mandela was imprisoned for twenty-seven years, our group moved on to Johannesburg. In Johannesburg, the largest township is Soweto with a then population of about one million. Joburg was a dangerous city at the time and I personally witnessed a bank robbery involving machine guns and two car jackings. On the other hand, in Joburg we met with the president and officers of the Bar Association of South Africa who hosted an exceptional dinner for us.

After interviewing Soweto residents for several days, I ran into one fellow who told me about the growth of the "black Mafia" since the fall of Apartheid. He told me that he knew a man who would know lots about human rights changes and could hook me up with a large group of new "entrepreneurs" who might be able to provide a unique perspective on human rights changes under the black government.

Needless to say, I jumped at the opportunity and was told to expect a message at the front desk of my hotel setting forth the arrangements. After a couple of days of no message I had pretty much forgotten about my conversation. In fact, on the fifth night I had gone to bed and was watching the 11:00 news when my telephone rang. A strange voice asked me if I was still interested in meeting a "boss" in Soweto and if I was, I needed to be outside the rear of the hotel in fifteen minutes where a car would be waiting for me.

Now, I've watched all the Godfather movies and even known a nice Italian boy named Guido but this phone call

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made me a bit more than nervous. Here I was in one of the most dangerous cities of the world, and someone I didn't know wanted me to go to the rear of the hotel, alone and in the dark and get into a car! Was this really a good idea?

Hell, yes! I quickly dressed and found the rear entrance to the hotel. In a few minutes a very nice black Mercedes E-Class Sedan pulled up and a well-dressed black gentleman stepped out and asked for identification. After examining my passport, which I always carried, he invited me to take a seat in the rear "with the other gentleman."

The "other gentleman" proceeded to place a blindfold-like hood over my head. When I asked him what he was doing, he told me that the "boss" did not want me to know exactly where he lived and this was just a precaution.

OK, I'm game. Besides, it was a bit late for me to do anything about either the hood or the trip since if felt like our driver had just passed the speed of sound in less than a block.

In what seemed like half an hour, the car stopped and my new friends helped me out of the car, up several stairs and in through a door. Once inside, my hood was removed and I was escorted to a very fancy living room, furnished with expensive looking leather furniture, lots of dark paneling, crystal chandeliers and two of the most attractive and stylish young ladies I had seen on my trip. The ladies offered me a brandy while my two friends left the room.

As I sipped my drink, a tall, well-built black gentleman entered the room. Even though it was now after midnight, he was impeccably dressed with a black suit, starched white shirt and a beautiful red and blue silk elephant-design tie. He sat down, introduced himself as James and asked me what I wanted to discuss. I told him about my mission and what I had done so far. He wanted to know where I was from in the states and, oddly enough, told me about what a good time he had in Whitefish a few years earlier.

When we finally got down to discussing the changes in human rights, a few comments will stay with me forever. James agreed that human rights in South had made great progress. When I asked him for examples, he laughed and said that gangsters now steal from blacks as well as whites. Apparently James had a business in which specific types of cars were ordered by wealthy clients in the Middle East. James would get the orders and contract out with third parties who would obtain the cars. In Joburg, that could well mean by car jacking.

James assured me, however that he personally had nothing to do with any illegal activities. He merely took the orders, gave them to third parties and ultimately received the vehicles that were shipped, within five hours of receipt, to specific locations in the Middle East. Buyers usually paid between one half and two-thirds of the retail price and all vehicles were two years old at maximum. If anyone was injured while the vehicles were being "obtained," the vehicle was immediately dismantled and shipped overseas for parts. Hummm, I thought to myself...I wonder if he could locate a C-Class Roadster in Red?

At six a.m. breakfast was served in the small dining room. As I followed my host down the hall, I saw what looked like maids polishing the rich, dark woodwork. This was definitely not the type of house I had seen before in Soweto or Khayelitsha and frankly I had no idea where I was. Breakfast was surprisingly American style with both bacon and "bangers" as well as waffles and fruit.

After breakfast I was again hooded and returned to my hotel where I arrived just in time to meet my colleges on their way to breakfast. Since our "guides" were in tow, I thought it might not be prudent to mention my outing, at least until I had everything sorted out in my head.

South Africa is a wonderful, beautiful county. From Joburg we ventured on to Pretoria where we met with members of the South African Supreme Court and Ministry of Justice.

I will never forget the smells and sight of the purple leaves on the Jacaranda trees when coming down the mountain into Pretoria, South Africa's capital. I will also never forget the intimate Supreme Court Chambers which greatly reminded me of our own small court in Helena. While in Pretoria we worked on our findings and ultimately presented them to officials in the Ministry of Justice.

What an adventure! This article could be titled "Small town boy barely escapes death in darkest Africa." When I finally told my comrades about my adventures in the townships, they thought I was nuts to take such risks. But, to me, it was the most fun I had experienced in years and I would do it all again in a heartbeat.

I returned to Great Falls and repacked my bags. My wife, who had resigned from her teaching job at the business school at MSU, and I were off to teach for a semester at the University of the Americas in Puebla, Mexico, in the mountains south of Mexico City. The one semester turned out to be 5 semesters. But, that is another story.

ATRA brings permanence to transfer tax system

(Give Sen. Baucus credit where credit is due)

By John T. Jones

The American Taxpayer Relief Act (the "2012 Act") became law on January 2, 2013, and with its passage came much needed planning certainty for practitioners in the transfer tax arena. For these purposes, we define "transfer taxes" as those imposed by Congress and state governments on the privilege of giving away one's real, personal and intangible property during life (gift tax), at death (estate and inheritance tax) or by skipping at least one generation, either directly or in trust (generation-skipping tax). All three federal transfer taxes apply to individuals owning property in the U.S., and some or all three of these taxes have been adopted by the states, including Montana.

Transfer tax planning in 2012 was perilous, with drastic changes looming in virtually all key areas of the applicable tax rules. Practitioners had to expect the worst and advise accordingly. It was clear there would be no Congressional action until after the November election, and that left less than sixty days for relief that all expected, but none could guarantee. Montana's senior Senator, Max Baucus, as Chair of the Senate Finance Committee, never relented on the position that the transfer tax system, together with its available exclusions and rates, must progress, not regress.

Let us review some basics of the transfer tax system, how it generally works, who is affected, how one complies, where it has been the last few years, and where it is now based on the 2012 Act.

Gift Tax

The Department of the Treasury (through the IRS) imposes a tax on an individual when one gives away, during life, one's real, personal and intangible property. The tax is imposed if the exclusions and exemptions do not apply. Under current law (IRC § 2503(b)), there is an "annual exclusion" for "present interest gifts" of $14,000 per year, per person, regardless of whether the donee is related to the donor. "Present interest gifts" are those that allow the donee immediate use and enjoyment of the property. Joint gifts from spouses are doubled to $28,000 per person, per year in 2013. Gifts that are valued at or under the annual exclusion amount need not be reported to the IRS. Gifts in excess of the annual exclusion amount, otherwise known as "excess" or "taxable gifts", must be reported on U.S. Treasury Form 709. This return is due on April 15th of the year following the year in which the taxable gift was made, with extensions available.

Does the donor pay a tax with Form 709? Generally not. The gift and estate tax systems are unified, each sharing the total credit available to individuals that can be used to give property away during life, at death or both. The amount of the taxable gift reported on Form 709 is first applied to the donor's lifetime "unified credit", also known as the "basic exclusion amount", and the unified credit is reduced by that amount. Example: if two spouses give $100,000 to their son in one year, they report a taxable gift of $72,000 ($100,000 - $28,000) on Form 709 and each of the spouse's unified credit is reduced by $36,000. The IRS runs a tab and keeps track of each individual's unified credit using the Social Security Numbers of the donors.

Does the donee pay income tax on the gift? No, gifts and inheritances are excluded from "gross income" under IRC § 102, and only donors are subject to gift tax. Does a spouse have to report gifts from a spouse? No, spouses can transfer any property to one another, in any amount, without reporting requirements or tax implications. This is called the "unlimited marital deduction" for gift tax purposes under IRC § 2523.

Estate Tax

All assets owned or controlled by decedent, including joint property, must be valued as of the decedent's date of death, and the fair market value of the assets becomes the "gross estate" of the decedent for estate tax purposes (IRC § 2001). If the gross estate of the decedent exceeds the "basic exclusion amount" available to that decedent, the personal representative of the estate must file a U.S. Estate and Generation-Skipping Tax Return, Form 706. The Form 706 is due nine months after death, with extensions to file available. In order to obtain IRS approval to extend the filing date for Form 706, IRS Form 4768 must be filed within the nine month period. Any tax due must be paid within nine months or interest will accrue and tax liens arise. The "basic exclusion amount" available to the decedent is equal to the "basic exclusion amount" available to all decedents for that calendar year less any taxable gifts that the decedent has made, whether or not reported on Form 709 during life.

For 706 filing purposes, the "gross estate" controls whether it must be filed. For imposition of federal tax purposes, the net taxable estate subject to tax controls. The allowable deductions for an estate to reduce or eliminate federal estate tax are set forth in the Internal Revenue Code starting at § 2051. Does the decedent's estate pay tax on property given to the surviving spouse? No, as long as the surviving spouse is a U.S. citizen and there are no disallowed restrictions on the transfer, such as transferring a life estate only. This is the "unlimited marital deduction for estate tax purposes" under IRC § 2056. Only

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transfers to the surviving spouse and a qualified charity are deductible transfers at death for estate tax purposes; all others are subject to tax if the value exceeds the available exclusion amount to that decedent. The estate is liable for the tax, not the decedent's heirs. The personal representative has the option to value the decedent's property at death or six months later, known as the "alternate valuation date" under IRC § 2032. The election under IRC § 2032 is available if that election will reduce the tax.

Generation-Skipping Tax

The generation-skipping tax is a transfer tax imposed on a transfer that skips at least one generation younger than the donor or decedent. The tax is reported and paid on Form 706. A generation skip can be "direct" (an inter vivos or testamentary direct gift to a grandchild, for example) or "indirect" (a skipping distribution from a trust that terminated upon a designated death). The generation-skipping tax is in addition to the estate tax, and therefore is to be avoided if possible. The "basic exclusion amount" for generation-skipping tax purposes is the same as for the state and gift taxes -- $5.250 million for calendar year 2013, indexed for inflation.

Where We Are Now With Transfer-Tax and How We Got There

Permanent estate, gift and generation-skipping transfer tax relief. The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) phased out the estate and generation-skipping transfer taxes so that they were fully repealed in 2010 (that is the year all tax lawyers advised their wealthy clients to die!) and lowered the gift tax rate to thirty-five percent (35%) and increased the gift tax exemption to $1 million for 2010. In 2010, the Tax Relief, Unemployment Insurance Reauthorization and Jobs Creation Act of 2010 (the "2010 Act") set the basic exclusion amount at $5 million per person with a top tax rate of thirty-five percent (35%) for the estate, gift and generation skipping transfer taxes for two years through 2012, meaning the 2010 Act had a short two-year life. The exemption amount was indexed beginning in 2012. The 2012 Act makes permanent the indexed exclusion amount in the 2010 Act and indexes that amount for inflation going forward, but sets the top tax rate to forty percent (40%) for estates of decedents dying after December 31, 2012, up from thirty-five percent (35%). In Rev. Proc. 2013-15, the IRS announced that the "basic exclusion amount" for 2013 is $5.250 million per person, indexed for inflation.

Unification. Prior to EGTRRA, the estate and gift taxes were unified, creating a single graduated rate schedule for both. That single lifetime exemption could be used for gifts and/or bequests, and created a reliable and stable estate planning platform. EGTRRA decoupled these systems, much to the chagrin of tax advisors. The 2012 Act reunified the estate and gift taxes, permanently extended unification, and is effective for gifts made after December 31, 2012. Perhaps the greatest feature of the 2012 Act is the permanency it mandates: permanency of the basic exclusion amount, the top rates of tax, the unification of all three transfer tax areas, and the inflation indexes for the exclusion amounts. The passage of the 2012 Act also averted the draconian regression to a $1 million per person basic exclusion amount, and averted top rates of fifty-five percent (55%), both of which would have been devastating for closely-held business owners and the entire farm and ranch sectors in Montana and elsewhere.

Portability of Unused Exemption. Another key transfer tax break preserved by the 2012 Act is what tax practitioners refer to as the "portability of the credit" of a decedent. The 2010 Act allowed the personal representative of a deceased spouse's estate to transfer any unused exemption to the surviving spouse for estates of decedents dying after December 31, 2010 and before December 31, 2012. The 2012 Act makes permanent this provision and is effective for estates of decedents dying after December 31, 2012. This portability feature effectively creates a 'family exclusion' of $10.5 million for 2013, indexed for inflation. Practice Tip: The portability is available only if the personal representative of the estate of the decedent spouse timely files a Form 706 and identifies the transferred amount to the surviving spouse. The transferred amount of the exclusion is available to the surviving spouse for inter vivos gifts and transfers at death. The transferred amount is in addition to the surviving spouse's own basic exclusion amount during life and at death.

The 2012 Act and the Decedent Estate's "Stepped-Up" Basis

Income tax basis is a big deal. The 2012 Act preserved the full "stepped-up" basis rules for decedents dying after December 31, 2012. As stated above, a decedent's assets are valued at death and the fair market value of the assets becomes the new income tax basis for the decedent's heirs, regardless of whether a Form 706 is filed. "Marital property" enjoys a complete "step-up" even though one spouse survives. The personal representative of the estate for the decedent may elect to value decedent's assets as of the date of death or as of an "alternate valuation date", which under IRC § 2032 is "six months" after the date of death. Practitioners should also review IRC § 2032(A) regarding "special valuation" rules for certain closely-held business property. The "stepped-up basis" (codified at IRC § 1014) is to be contrasted with the "carry-over basis" (codified at IRC § 1015) which applies to inter vivos gifts. The income tax basis of the donor during life "carries over" to the donee, in theory preserving to the U.S. Treasury any built-in gain in the capital asset. If the donee sells the asset after receiving it during life as a gift, the donee must use the "carry-over basis" of the donor to calculate capital gain, if any. Practice Tip: Large gifts by client donors who are not expected to incur estate tax liability under then-current federal estate tax rules should be considered carefully under the basis rules. It may well make more sense to advise the client to retain all assets until death, receive a full step-up, then transfer the assets to the heirs through the estate.

Montana's Transfer Tax Laws

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Montana has no gift tax, but Montana does have an "estate tax" and a "generation-skipping tax". Montana's estate tax is codified at MCA § 72-16-901, et seq. The estate tax is commonly known as a "sponge tax", as the amount of the tax is the amount of the state death tax credit allowed to the decedent on Federal Form 706. The legislative intent is that since the federal government assumes there will be a state death tax imposed by the decedent's domicile, and the IRS therefore includes an interpolated credit amount into the Form 706 estate tax liability calculation, the state might as well take that credit as its tax. The personal representative of the estate of a decedent files Form 706 with the Montana Department of Revenue to comply with the estate tax filing and payment requirement (MCA § 72-16-906). The Montana estate tax return is due eighteen (18) months after the death (MCA § 72-16-909).

The generation-skipping tax rules in Montana are codified at MCA § 72-16-1001, et seq. The key distinction between the federal generation-skipping tax statutes and rules and that of Montana is that Montana excludes a generation-skipping tax on "direct skips" and applies only when generation-skipping taxes arise as a result of the death of the decedent. The Montana generation-skipping tax is also calculated as a "sponge tax" whereby the amount of the tax is the credit afforded to the estate on Form 706.

Conclusion

The American Taxpayer Relief Act signed by the President on January 2, 2013 brought relief not only to the American taxpayer, but also to the American tax advisor. It truly launched a new era of wealth transfer tax planning, bringing with it clarity, inflation indexing rationality, and best of all, permanence. Having worked directly with Senator Baucus on a consistent basis over the last several years on these issues, this writer can attest to his role and that of his staff in providing this relief in the midst of the fiscal cliff, deficit reduction and other complexities. His role in providing this relief to Montana taxpayers cannot be underestimated.

John Jones *joined Moulton Bellingham PC in 1985 and is currently the firm's senior tax shareholder. John focuses his practice on wealth transfer planning, tax, real estate and healthcare law.*

It was late; the printer was down

How to complete a mediation, clarified: Kluver v. PPL Montana (December 31, 2012)

IT WAS LATE, THE PRINTER WAS DOWN
How to Complete a Mediation, Clarified:
Kluver v. PPL Montana (December 31, 2012)

PREFACE: This month's "Evidence Corner" is not about trial evidence, but about the evidence necessary to avoid a trial. In Kluver v. PPL, experienced lawyers thought they had settled an acrimonious case in a marathon mediation session and circulated the Memorandum of Understanding by email that night. One client's second thoughts resulted in almost three years of litigation and appeal about the validity of that agreement, before the Montana Supreme Court ruled on New Year's Eve 2012.

It was dark (but not stormy) at 9:56 p.m. on July 14, 2010 in Billings. The sun had set, there was only a sliver of moon, the wind had dropped to just a whisper, and the temperature was a pleasant 71 degrees.[1] The ranchers and the power company had been fighting in court for more than 3 years, and they had spent about 14 hours in that day's mediation session. It appeared that they had settled the dispute and could end the case without trial, to everyone's satisfaction. The lawyers were tired, and both they and their clients were ready to go home. It was a good day's work; the nasty[2] war seemed to finally be over. Both sides had agreed that the whole deal would be put to bed, with the exchange of cash, deeds and leases completed, within 60 days.

The lawyers who had congregated on behalf of the ranchers and their opponent, PPL, were not rookies. Some were from highly esteemed Montana firms; others were from well-known big city firms outside Big Sky. They all knew the size of the dispute, the acrimony between the parties, and the large amount of money and property involved in the settlement. That night, they concurred about how to memorialize and preserve the agreement before they left the hotel which had hosted the mediation session.

One of the lawyers for the Kluvers and other plaintiffs "took a crack" at typing out the terms of the agreement on his laptop computer. He did this in his party's conference room, working with his client to be sure the document on the screen accurately reflected their understanding of the agreement. Once the plaintiffs' lawyers and their clients were satisfied, the drafter intended to print the "Memorandum of Understanding" (MOU) in the hotel's business center. Unfortunately, the printer was not working and because it was so late, there was no one around to fix it. Instead, the drafter took his laptop into the defendant's conference room and all of the lawyers looked at the MOU on his screen. When all the lawyers approved the MOU, the drafter emailed the document to all the lawyers and everyone went home thinking the war was over.

In fact, the armistice lasted only a few weeks. One of the ranch families, the Kluvers, quickly regretted the night's work, and refused to go forward with the documents necessary to complete it. They instructed their lawyer to file a formal "Notice of Failure of Settlement Discussions." In response, PPL moved to enforce the settlement, joined by the other family, the McRaes[3]. The war raged on for two and half more years, with battles at both the trial court and Montana Supreme Court levels. The Court issued its decision on the very last day of 2012, as Kluver v. PPL Montana, LLC, 2012 Mont. 321, 368 Mont. 101.[4]

In the end, the settlement stood and the parties were ordered to execute it, but Justices Nelson[5] and Cotter, in separate opinions, vehemently disagreed with the majority[6] and would have found no settlement. Even if the opinion is finally released without modification, it should stand as a very strong warning to all lawyers involved in mediation of civil disputes: beware of the dragons at the end of the day! The lawyers who were left to complete the paperwork at the end of the mediation followed standard protocol, but it wasn't enough when, in the hot light of the next few days, one party got cold feet. Kluver's best use may be as a primer in how to use that final hour before dawn[7], to make the midnight agreement stick.

1. Make sure your agreement covers all the material details; leave as little as possible to be "decided later."

The Kluver majority reiterated the basic requirements for an enforceable settlement agreement:

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1 http://weather.philly.com/auto/philly/history/airport/KBIL/2010/7/14/DailyHistory.html

2 "¶ 110 In closing, I would note that anyone reading the briefs and record in this case will recognize that the litigation and settlement attempt were nasty for any number of reasons."
Kluver v. PPL Montana, LLC, 2012 MT 321, Nelson, J. dissenting.

3 These are the lead families in each camp; the unraveling of the settlement divided the community, with several ranchers on each side of the "get 'er done" vs. "need better deal" divide.

4 According to WestlawNext, this case has not yet been released for publication, and may be revised or withdrawn until then; however, the Montana Supreme Court itself cited Kluver repeatedly in a released opinion on February 5. See, Olsen v. Johnston, 2013 MT 25.

5 This is Justice Nelson's very last dissent before retirement, capping a career which spanned almost two decades on the Supreme Court.

6 Justice Wheat wrote the majority opinion, joined by Chief Justice McGrath and Justices Rice, Baker and Morris.

7 My colleague, Prof. Eduardo Capulong, teaches the mediation courses at the law school. I am grateful to him for his review of this article, and have incorporated several of his suggestions. His biggest observation is that marathon mediation sessions like that in Kluver may be fundamentally flawed: the longer the process, and the later the hour, the less "voluntary" the agreement may be, and the more likely one party or the other may be to regret it the next day or week.

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> ¶ 31 Settlement agreements are contracts, subject to the provisions of contract law. *Murphy v. Home Depot,* 2012 MT 23, ¶ 8, 364 Mont. 27, 270 P.3d 72. A contract requires (1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration. *Hurly,* ¶ 17 (citing § 28–2–102, MCA). **A contract must contain all its essential terms in order to be binding.** *Hurly,* ¶ 17.

Kluver v. PPL Montana, LLC, 2012 MT 321. You don't need to write up the formal deed or lease[8], but you should leave as little as possible to translate between those documents and your settlement agreement. If your opponent wants to weasel out, you can bet she will argue that an essential term is missing, and then you throw yourself on the mercy of the court to decide whether you have met the vague standard of "reasonable certainty."

> ¶ 36…This Court has held that where parties intend to form a binding agreement, the fact that they plan to incorporate it into a more formal contract in the future does not render it unenforceable. *Steen v. Rustad,* 132 Mont. 96, 104, 313 P.2d 1014, 1019 (1957). "[A]bsolute certainty and completeness in every detail is not a prerequisite of specific performance, only reasonable certainty and completeness being required. Those matters which are merely subsidiary, collateral, or which go to the performance of the contract are not essential, and therefore need not be expressed in the informal agreement." *Steen,* 132 Mont. at 106, 313 P.2d at 1020 (internal citations omitted).

Kluver v. PPL Montana, LLC, 2012 MT 321. Justice Nelson's dissent concludes that the Kluver MOU did not contain all of essential elements of the contract, and cites email correspondence between counsel the following day about "tweaks" as evidence that the deal was not complete:

> The Ruggiero email [the MOU written that night] did not include many of the practical details and terms needed for its execution. As noted, Ruggiero himself characterized his email as a "tentative" settlement agreement, and defense counsel likewise characterized it as a "draft." Rogers stated in an email to Ruggiero the next day: "We have made a few modifications to the Settlement Memorandum of Understanding after you emailed us the draft late last night."

Kluver v. PPL Montana, LLC, 2012 MT 321. It may be late, and you may be tired, but it isn't going to get any easier to figure out a detail in the morning, or next week, and postponement may become fatal.

2. Use, consistently, the phrase "Final Settlement Agreement."

One of the Kluvers' arguments was that in fact there was no agreement, and one of the arrows in that quiver was the fact that, later, various parties described the M.O.U. as "tentative" and a "draft."

> ¶ 39 The Kluvers also put much weight on the fact that the parties described the MOU as a "draft" and a "tentative settlement" in post-MOU communications, arguing this indicates there was no binding agreement. The District Court found that while the use of the word "tentative" in the Notice was "inartful and, in hindsight, imprecise, none of it constitutes an admission or supports an inference that the MOU and the map did not express a final, agreed-upon settlement, nor do any of these post-mediation statements constitute an agreement by the parties to, in any fashion, amend or change the material terms of settlement described in the map and the MOU." We agree.

Kluver v. PPL Montana, LLC, 2012 MT 321. Justice Nelson did not agree on this point, and found counsel's description to be evidence that no agreement had actually occurred:

> [T]he terms "tentative" and "draft" constitute objective evidence that Ruggiero's July 14 email was *not* the parties' final agreement. Indeed, Rogers testified that "I used the word draft because we did it after 14 hours of mediation and we all got tired." He admitted that "[w]e knew we had it to tweak, elaborate on a few issues...." In light of this testimony, it seems to me that the Ruggiero email was not the parties' "signed, written agreement" but, rather, was a "mediation-related communication" made in the process of reaching a final "signed, written agreement." Section 26–1–813(3), MCA.

Kluver v. PPL Montana, LLC, 2012 MT 321.

The majority of the Court sided with the enforcers but again, why run this risk? From the get-go, label the document "Final" and then use that adjective, not any lesser form, in every written and oral communication. Don't let yourself, or your opponent, deviate. If your opponent starts to use "draft" or "tentative," immediately correct her in writing: "This is a final settlement agreement, to which all parties are bound. This is neither a draft nor tentative."

3. Have the actual parties physically sign an actual written agreement before the session ends, if at all possible.

Some oral contracts may be enforceable, but without a writing, the parties may have very different accounts of whether they actually had an agreement and/or the terms they agreed to. Furthermore, the Montana Code requires several kinds of contracts, not just real estate transactions, to be in writing to be enforceable.[9] In Kluver, the statute of frauds applied because the Kluvers agreed to deed a fee simple interest and PPL agreed to execute a renewable 99-year lease of the surface of the same land back to the Kluvers. Both factions of the Supreme Court

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8 Indeed, those of us who are litigators and thus most likely to be present at the mediation sessions may not be competent to prepare formal real estate documents.

9 See, e.g., M.C.A. 40-4-201 (family law settlement agreements must be in writing); M.C.A. 72-3-915 (probate distribution agreements must be in writing).

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held that for this agreement to be enforceable, M.C.A. 28-2-903[10] and 70-20-101 required a writing, "subscribed by the party to be charged…" Both statutes allow a party's agent to sign for the party, but expressly state that the agent's authority to do so must be in writing.

A substantial part of Kluver centered on these requirements. The Kluvers did not physically sign the MOU that night, or ever.[11] The majority sidestepped this fact, holding that the Kluvers' lawyer's email transmission was sufficient:

> We conclude that because Ruggiero attended the entire mediation with the Kluvers as their attorney, the MOU explicitly states that the parties reviewed and approved it, and Karson Kluver later told the McRaes that a settlement had been reached, there is no clear error in the District Court's finding that the Kluvers authorized Ruggiero to agree to the MOU.

Kluver v. PPL Montana, LLC, 2012 MT 321, ¶ 29. Justice Nelson strongly disagreed, and would therefore have held the MOU unenforceable:

> Yet, since the email was not sent from the email account of the party sought to be charged here (i.e., the Kluvers), the question arises whether Ruggiero had legal authority to bind the Kluvers to the terms of an email that they themselves did not draft, did not sign, and did not transmit. As will be seen, there is no admissible evidence that the Kluvers authorized Ruggiero to contractually bind them to the terms stated in his email.

Kluver v. PPL Montana, LLC, 2012 MT 321, §67 (Nelson, J.).

The best way to avoid this potential problem is to have all parties, not just their lawyers, actually sign a physical written document which reflects all the essential terms of the agreement. This will require the tired and perhaps unhappy[12] parties to remain on the scene a little bit longer, while the attorneys actually draft the document, print it, and have all parties sign it. The reward for this extra time is that the statute of frauds argument will be a non-starter.

The lawyers in Kluver did intend to print the document that night, but were stymied by a common problem: the hotel printer was down. One way to surmount this obstacle is to carry your own printer with you, which you have tested and know will work. Even if the mediation occurs in your own office, you may have trouble with one printer, so be sure there is a backup AND someone who knows how to use them, if you do not. This may require you to keep a staff person late, but "a stitch in time saves nine."

If printing is absolutely impossible, there are some other electronic options—see below—but the very best solution is old-school: pack a pad of paper and a pen, and handwrite the document. (This solution obviously works best when the transaction is fairly simple, and when the drafter has decent handwriting). Then have each party read that handwritten paper and sign it. This may be a great time to break out that fountain pen your parents gave you for law school graduation, but a simple BIC will do just fine. (As long as we are being this detailed, I prefer blue ink for signatures, so that it is clear that this is the "original" per the Best Evidence Rule.) The physical act of signing should bring home to your client and your opponent that this is a serious, binding agreement and there is no turning back. Either the case will be resolved finally or everyone would know that it isn't.

4. Have the lawyers sign the agreement too.

There is no legal authority requiring this, nor was it mentioned in Kluver. However, the lawyers' signatures evidence the fact that the parties had legal counsel prior to the parties' signatures, and that the writing reflects the attorneys' understanding of the terms of the agreement. Note, however, Justice Nelson was right: the plain language of the statute of frauds doesn't allow the kind of bootstrapping the Kluver majority used to hold that the Kluvers' attorney's "signature" bound the Kluvers. In this respect, Kluver should not be read as any kind of assurance that it is normally all right to dispense with the client's signature if the lawyer is willing to sign on her behalf. The attorneys' signatures should be in addition to, not instead of, the clients' signatures.

5. If it is absolutely necessary to allow a lawyer to sign for a client, obtain a separate document expressly granting the lawyer that authority to do so.

If it is imperative that the clients leave before the written agreement is signed, at least have them sign a written authorization for their attorney to act as their agent in signing the settlement agreement. The statute of frauds[13] does allow a

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10 Mont. Code Ann.28-2-903. What contracts must be in writing.
(1) The following agreements are invalid unless the agreement or some note or memorandum of the agreement is in writing and subscribed by the party to be charged or the party's agent:
(a) an agreement that by its terms is not to be performed within a year from the making of the agreement; …
(d) an agreement for the leasing for a longer period than 1 year or for the sale of real property or of an interest in real property. The agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing and subscribed by the party sought to be charged.
(2) Evidence of an agreement described in subsections (1)(a) through (1)(d) is not admissible without the writing or secondary evidence of the writing's contents….

70-20-101. Transfer to be in writing--statute of frauds
An estate or interest in real property, other than an estate at will or for a term not exceeding 1 year, may not be created, granted, assigned, surrendered, or declared otherwise than by operation of law or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring it or by the party's lawful agent authorized by writing.

11 Actually, neither did the McRaes, but they joined PPL in moving for enforcement of the agreement, so the fact that their lawyer signed the agreement without specific written authority never became an issue. The McRaes were willing to perform the agreement and sign the necessary deeds.

12 In my view, a perfect settlement is one where each side feels it has given up a little too much and the other side has gotten too much.

13 The other statutes requiring a party to sign certain agreements in writing do not have any corollary allowing an authorized agent's signature to suffice. See also, MCA 37-61-401
37-61-401: "Authority of attorney. (1) An attorney has authority to:
(a) bind the attorney's client in any steps of an action or proceeding by **agreement filed with the clerk or entered upon the minutes of the court and not otherwise**…" (Emphasis added).

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seller or lessor to authorize an agent to sign transfer documents in her stead, but requires that authority itself to be in writing: "The agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing and subscribed by the party sought to be charged." M.C.A. 28-2-903(1)(d).

The Kluvers did not sign any such authorizing document. The majority of the Court forgave this omission, holding that the fact the Kluvers were in the mediation all day with the attorney who "signed" (see below) the email reciting the terms of the settlement, and Mr. Kluver's later statement to his neighbor that the case had settled, was enough. Justice Nelson criticized the Court for this sleight of hand:

> I find it utterly implausible that a person's (Karson's) offhand expression of relief that a case seemingly has settled is enough to remedy (1) the absence of an agreement to conduct transactions by electronic means, § 30–18–104(2), MCA, and (2) the absence of written authorization for an agent to enter into an agreement to sell real property on behalf of his principal, § 28–2–903(1)(d), MCA. If the sorts of remarks Karson made are enough to satisfy these statutory writing requirements, then these requirements are utterly meaningless.

Kluver v. PPL Montana, LLC, 2012 MT 321, ¶91.

If your case involves any hint of real estate, or an agreement to be performed over more than one year, or any other type of agreement statutorily required to be in writing, it is not hard to avoid Justice Nelson's criticism, and to comply with the statute. The simple solution is to have the settlement document either signed by the client himself, or to have the client sign a written authorization document prior to leaving the venue, so that the lawyer's later signature on the settlement agreement meets the statutory requirement. This authorization should contain language acknowledging the requirements of the statute and explicitly deputize the attorney to enter into the settlement agreement on behalf of the client.

The following language should do the trick:

> I, _____, am a party to [identify case]. I am a participant in mediation proceedings in that case, and have retained attorney _____ to represent me in those proceedings. I understand that resolution of this case may entail agreements which the law requires to be written and signed by me. I hereby expressly authorize my attorney _____ to act as my agent, and authorize her/him to sign on my behalf any documents which are necessary to reflect and accomplish the agreement reached in this case. I intend that this authorization satisfy the provisions of Montana law requiring a writing, including but not limited to the statute of frauds relating to transfer and leasing of real property interests.

This makes clear that the client has to choose either to stay and sign off on the settlement agreement, or to entrust that responsibility to the attorney and to live with the consequences. Having a departing client sign something like this protects both her own lawyer and the opponent, and prevents a 14-hour mediation from becoming a years-long debacle.

6. You can combine electronic transmission with a single physical signature page, with strict precautions.

When the hotel's printer refused to spit out a document which the parties could sign, the Kluvers' lawyer's solution was email, and all the other lawyers present agreed with this format. "The mediation lasted the entire day, concluding at approximately 10:00 p.m. with the transmission of a Memorandum of Understanding (MOU) as an email from Ruggiero to Rogers and copied to other counsel." Kluver v. PPL Montana, LLC, 2012 MT 321, ¶ 3.

Email has become so ubiquitous in the practice of law, as in every aspect of our lives, that it is understandable that no one seemed to give this choice a second thought. That road, as Robert Frost said so famously, "made all the difference"[14] and literally nearly cost PPL the farm. It is possible to use email to avoid having to hand-write a complex document, but the details of how you do this are critical.

Ideally, the electronic version of the document should be emailed to the parties themselves as well as to their lawyers while everyone is still present[15] so you can gather actual signatures on a physical signature page. I recommend that you include the actual document in the body of the email, as well as attachments in common formats such as pdf and Word (see Justice Nelson's comment in the next section), to avoid any problem with the recipient opening the document. You should show all the addressees in the "to" field, so it is clear everyone received the same version. As suggested above, the subject should be something like "Final Memorandum of Understanding" without any weaker adjectives like "draft" or "tentative." Now you revert to pen-and-ink handwriting, but of a single signature page rather than the entire complex document. You can hand-write something like

> I hereby acknowledge that I received an electronic version of the settlement agreement via email, sent to all parties at (date/time). My signature below indicates that I have reviewed the email, and that I intend to be bound by the terms it reflects.
>
> Signed: _____
> Date/Place: _____

Each party should sign this page, and for additional security, each lawyer as well. Now you have achieved both detail in the

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14 Robert Frost, "The Road Not Taken."

15 This means that you will have to collect everyone's email addresses. You usually will have all of the lawyers', but are unlikely to have the address for any client other than your own.

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agreement, best done through typing, and the physical signature which will bind the party who develops buyers' remorse. Everyone can leave with assurance that the case is settled for good.

7. Before the mediation begins, circulate and obtain signatures on a physical agreement to electronic preparation and signature of any settlement agreement in accordance with the Uniform Electronic Transactions Act.

The Kluver trial court and the majority of the Supreme Court held that the email sent by the Kluvers' lawyer constituted the Kluvers' electronic signature on the MOU, relying on the Uniform Electronic Transactions Act ("UETA"), enacted in Montana in 2001. M.C.A. § 30-18-106 provides:

> Legal recognition of electronic records, electronic signatures, and electronic contracts.
>
> (1) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
>
> (2) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
>
> (3) If a law requires a record to be in writing, an electronic record satisfies the law.
>
> (4) If a law requires a signature, an electronic signature satisfies the law.

The Kluver majority observed that the legislature meant to accommodate the transaction of business electronically, and to expand the definition of "writing" to electronic forms of memorialization; §30-18-105 explicitly states that the Act is to be applied to: "(1) to facilitate electronic transactions consistent with other applicable law; [and] (2) to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices…"

The catch is that the Act only applies to a transaction where both parties have agreed to the electronic format:

(2) This part applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

Mont. Code Ann. § 30-18-104. The Kluver factions disagreed on whether the parties had so agreed, and Justice Nelson also questioned, without resolving, whether the mediation there was a "transaction" within the definition provided in M.C.A. 30-18-102(18).[16] The opinion does not show any express agreement by the Kluvers to conduct this settlement by electronic means, but the majority used the last phrase of 30-18-104 to hold that the context and circumstances demonstrated the Kluvers' agreement to electronically approve the MOU.

Justice Nelson spent some ink on the problems he saw with the Kluver MOU process:

> ¶ 65 Lest there be any confusion about what the "Memorandum of Understanding" actually is, it is not a tangible document detailing terms and conditions of a contractual agreement and containing pen-and-ink signatures at the bottom. Nor is it the record of an electronic transaction where a purchaser entered her credit card information into a merchant's website and hit the "Submit Order" button. What we are dealing with here is an email—not a document *attached* to an email; rather, just an email. Naturally, this email does not contain a traditional pen-on-paper signature; the email itself is simply bytes retained in computer memory. **That fact is not necessarily fatal, however, because the Uniform Electronic Transactions Act (Title 30, chapter 18, part 1, MCA)** may give legal validity to an "electronic record" of this nature—provided that certain conditions are met. The problem is that there is no admissible evidence showing that the conditions were, in fact, met here.
>
> ¶ 66 For starters, the email purports to be "From" Jory Ruggiero, "To" Guy Rogers, with "Cc" to "breting engel; Thomas Stoever; McDowell, Heather A." As we now know through parol evidence, Ruggiero drafted the email on his computer at the mediation site after a daylong mediation. According to the time stamp appearing on the printout of the email, the email was sent at 9:56 p.m. on July 14, 2010. Yet, **since the email was not sent from the email account of the party sought to be charged here** (i.e., the Kluvers), the question arises whether Ruggiero had legal authority to bind the Kluvers to the terms of an email that **they themselves did not draft, did not sign, and did not transmit**. As will be seen, there is no admissible evidence that the Kluvers authorized Ruggiero to contractually bind them to the terms stated in his email. [Emphasis supplied]

Kluver v. PPL Montana, LLC, 2012 MT 321.

A. Each party must expressly agree to conduct the settlement by electronic means.

It is easy to avoid this problem and to comply with the UETA. At the outset of the mediation, if not before, the parties should sign a pen-and-ink document expressly referencing the UETA and stating that they intend to transact some or all of the conclusion of the mediation electronically, including electronic transmission and signature of any settlement agreement which results from the mediation. In fact, this small procedural agreement may serve as an auspicious beginning to a process when little else may seem agreeable. I recommend that each party (again, the clients themselves rather than the attorneys) sign and exchange a printed hard copy of a document entitled "Agreement to Conduct Settlement by Electronic Means." Its text can be fairly simple:

Agreement to Conduct Settlement by Electronic Means

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16 "(18) "transaction" means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs."

I, _____, am a party to [identify case]. I am a participant in mediation proceedings in that case. I understand that resolution of this case may entail agreements which the law requires to be written and signed by me. I consider such agreements to be "transactions" within the meaning of M.C.A. 30-18-102(18), and I hereby expressly consent that any such agreements may be accomplished by electronic means as follows:

1. Any draft of a settlement agreement shall be sent to me electronically (as well as to my counsel)

___ via email to my email address, which is: _____ OR

___ via text message to my text number, which is: _____ OR

___ via [identify other electronic means].

2. That draft shall contain the following instructions: "Please read this electronically-prepared settlement agreement to be sure that it incorporates the terms to which you have agreed. If you do so agree, please 'reply all' with the message: "I hereby sign this agreement electronically."

3. When I have received an agreement electronically, and "reply all" with the message "I hereby sign this agreement electronically," I will be legally bound to the settlement agreement as if I had signed it in writing, and I agree that my reply transmission constitutes my electronic signature, per the Montana Uniform Electronic Transactions Act, in accordance with all provisions of Montana law requiring a writing signed by me."

B**. Include in the final version of the agreement language acknowledging that all parties previously have agreed to the electronic transmission and signature of the agreement, and that each intends his or her reply to serve as the electronic signature.**

The final step, of course, is to actually be sure that the above language is in the electronic transmission. I suggest that when the agreement is written, it first be sent electronically to the accounts of all of the lawyers in the case for approval. Once the lawyers all agree to the wording in the settlement agreement, the final version of the agreement should be sent on to the clients for their electronic signatures. This can be done by each lawyer individually sending the agreement to his client, ccing all the other lawyers, so that all the lawyers receive the clients' replies.[17] The electronic message should be entitled "Settlement Agreement: Clients' Electronic Signatures Required." It should clearly instruct the lawyers to forward the electronic documents to their clients as designated in the initial form, and clearly instruct clients how to accomplish the electronic signature. "Please have your client review the agreement, and sign it electronically by replying to this email as follows: 'I agree with the terms of the agreement as written and this transmission constitutes my electronic signature, per the Montana Uniform Electronic Transactions Act, satisfying all provisions of Montana law requiring a writing signed by me. Agreed to by _____, on [date].'"

If all this is in place, everyone can head home except the scrivener, a modern-day Bob Cratchit bent over his screen in the wee hours. The others can read and sign on their individual devices, wherever they are when the final document is produced. Once every party and every lawyer has replied to the initial transmission that he or she agrees and has signed electronically, you will have the functional equivalent of the written document.

C. As an alternative to the "sign by reply" email process above, investigate apps such as "DocuSign" which allow tablet and computer users to scan documents, physically sign them, and send their signatures back electronically.

I found 44 such programs on the Apple App Store today, designed for the iPad, and 34 for the iPhone. Many are free; the highest price is $7.99. I am sure there are more out there for other devices. I am currently using "DocuSign" because it allows me to email a document to several people, with each of them signing and returning an electronic version of that signature. An app like this obviates the need for the cumbersome email process I described above. Note, though, that the actual signature is still being returned electronically, so I think that the UETA still applies and the party should have executed an express consent to transact business electronically.

8. The bottom line, per Kluver: Keep going until you have crossed the finish line.

Mediations can be like a marathon. After hours of hard work, you've finally given all you think you can give and gotten all you think you can get. You can see the end: everyone in the room has said that he or she will accept the deal. If the world were a perfect place, you could all adjourn for a well-deserved refreshment and finish up in the morning, when you are rested. Sadly, "buyer's remorse" lurks in the heart of every settler, and allowing it any time to flourish may doom the entire enterprise. You still have to dig deeper and cross the finish line, which in our profession means getting the terms into a permanent form (written or electronic), signed by the parties themselves. The act of either putting pen to paper, or at least hitting the "reply" button from their own devices, is legally significant to both the parties and the courts who may be called on to decide whether a deal actually occurred. If you use Kluver as a guide, you may be able to avoid the pain, not to mention the time and expense, those parties suffered.[18]

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17 Alternatively, the drafting lawyer should be sure to get the permission of all the other lawyers to send the completed document directly to their clients. MT Rules of Prof.Conduct Rule 4.2 (a): "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer."

See, M.R.Prof.Conduct 4.2: "first global document authorizing electronic transmissions should contain an additional provision allowing the drafting attorney to make a single contact with opposing represented parties.

18 The suffering may not even be at an end as I write. The Kluvers have moved the Supreme Court for reconsideration, which I predict they will not get. Unhappily compelled to deed over their property to PPL in exchange for the 99-year lease and option to purchase, they may look for some recourse from their original lawyer, which will again embroil all who participated in the original mediation.

Medicaid for long-term care: The basics

Sol Lovas, CELA

Many of our elderly clients fear the nursing home. They fear the loss of mental and physical function which creates the need for long-term care. They fear the loss of quality of life while living in an institution. They fear being kept alive longer than they want to live. And they fear what the cost of their long-term care will do to their family's finances.

According to Montana's Department of Health and Human Services, the average cost of basic care in a skilled nursing facility in Montana is now $5,947.50 per month (2013). That is about $72,000 a year. Health insurance doesn't pay for it. Medicare doesn't pay for it (except for maybe part of the first 100 days). Only long-term care insurance will pay for it, and that is a separate policy that many people cannot afford. So most people have to pay for it themselves – until they qualify for Medicaid.

But very few people - and very few attorneys – understand what is required to qualify for Medicaid. As a result, many people who could qualify for Medicaid don't know it. Others may apply for eligibility, but don't know enough about it to become eligible as quickly as they could. Both can end up spending far more of their savings than they have to. Attorneys, especially estate planning attorneys, need to learn enough about Medicaid so they can recognize people in this situation, and help them get the assistance they need.

Medicaid is also widely misunderstood. What is generally "known" may not in fact be true. Why? First, because Medicaid is governed by both federal and state law. It is mostly federally funded, but it is always state administered. Second, federal law sets certain rules, but outside those rules, there is broad leeway for state interpretation. The various states all have very different interpretive rules. Third, it changes. There have been only two major federal changes in recent years - OBRA 1983 and DRA 2005. But there are little changes all the time in the state rules. Fourth, there are many exceptions to the general rules, and most are very fact-specific. One family's experience with the Medicaid system may therefore be very different from another's, because the law has changed, or the facts are different.

So what are the current Montana rules?

The Very Basics of Medicaid Eligibility

There are two Medicaid long-term care programs , and four basic requirements:

Long-Term Care Programs: Institutional (or Nursing Home) Medicaid pays for long-term care provided to residents of skilled nursing facilities. Waiver (or Home and Community Based Services) Medicaid pays for in-home care in private homes and assisted living facilities, if that care is what is keeping you out of a nursing home. Institutional Medicaid is available as soon as you financially qualify. There is a waiting list for Waiver Medicaid.

Requirements: The four requirements are citizenship, medical need, limited income, and limited resources.

(1) Citizenship: You must be a US citizen or a legally resident alien. You must also be a Montana resident for Montana Medicaid.

(2) Medical Need: A medical report must verify that you need a nursing home level of care.

(3) Income: Montana is a "spenddown" state. There is no specific income limit, except that for Institutional Medicaid, income cannot exceed the institution's Medicaid pay rate. Your income above a specified amount (which varies depending on the program and the facts), must be spent on your care. However, for married couples, the income of the non-institutionalized spouse (the "community spouse" or "CS") never has to be used for the care of the institutionalized spouse (the "IS"). Also, if the CS's income is below a certain limit, he or she may be able to keep some of the IS's income for the CS's own use.

(4) Resources (Assets): *Single Individuals:* An unmarried individual may retain certain assets and still be eligible for Medicaid. These are called "exempt" or "non-countable" assets. There are about 17 different categories of exempt assets, but the ones most commonly claimed are a car, prepaid funeral plans, household and personal property, and term life insurance. The home is usually exempt for Waiver Medicaid (but see below re trusts). The home is usually not exempt for Institutional Medicaid, since you no longer live there. All assets - other than those specified as exempt - are "countable", and you are eligible for Medicaid when all you have left is exempt assets and $2,000 of countable assets.

Married Couples: Married couples may retain the same "exempt" or "non-countable" assets as single individuals. In addition, as long as the CS is still living in the home, it will be deemed "exempt". It is important to know that the "home" consists not only of the house you live in, but also all contiguous property (i.e. the entire ranch). If the CS is self-employed, the CS may also keep his or her self-employment business assets. However, neither exemption is available if the home or business is in a trust, corporation, partnership, or LLC. If the CS is employed, the CS's non-accessible retirement accounts are also exempt.

The IS may keep the same $2,000 in countable assets as a single person.

For Institutional Medicaid, the CS may retain an amount of countable assets known as the "community spouse resource maintenance allowance" ("CSRMA"). This is basically half of all the countable assets the couple owned when the IS

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became institutionalized, but there is a minimum allowance of $23,184, and the allowance cannot exceed a maximum of $115,920 (2013 figures). For Waiver Medicaid, the same rule applies, but due to timing issues, the full CSRMA is almost impossible to retain. Therefore the effective CSRMA for Waiver Medicaid is the minimum $23,184.

The couple is eligible when all they have left is exempt assets, the CS's CSRMA, and the IS's $2,000 of countable assets.

Conditional Assistance: If your assets in excess of the allowable amount are non-liquid and will take time to sell, Medicaid can provide "Conditional Assistance": If you agree to sell the property, Medicaid will pay for your care pending the sale. Upon sale, Medicaid is paid back, and if there is anything left, you start over.

The Medicaid Application Process

For a single person, you file a Medicaid Application once you have spent down to your allowable assets (exempt + $2000 countable). What can you spend your excess assets on? Allowable expenses fall into four very broad categories:

1. Pay your living costs and care expenses. Basically, use your funds for whatever you want, as long as it is for your own use or benefit.
2. Pay off your debt.
3. Convert non-exempt assets into exempt assets. Take the home out of trust, buy a car, dissolve the LLC, do work on the home or buy a new one, buy pre-paid funeral plans, or transfer the family business to the CS who will continue to run it.
4. Buy certain types of annuities which are treated as income, not as a resource.

What can't you do? Give it away or use it for someone else (unless you have a plan for covering the penalty period, as discussed below).

For a married couple, there is a two-step process. When the IS enters the institution, a "snapshot" is taken of the value of the couple's resources as of the first day of the month during which the IS enters the institution. This "snapshot" is called the Resource Assessment, and this is the figure on which the CS's CSRMA is based. The couple files a Medicaid Application once they have spent down to their allowable assets (exempt + CS's CSRMA + IS's $2000 countable).

In both cases, it is your responsibility to prove to Medicaid that you fit within their eligibility criteria. The application is signed under penalty of perjury, and Medicaid makes no assumptions. The existence and value of every asset you own has to be proven by written documentation from a third party. Although they don't often do it, Medicaid has the authority to ask for all of your financial information for the last five years.

A common misconception is that Medicaid comes in and takes over your affairs when you apply for assistance. It doesn't. All Medicaid does is look at your application and determine whether or not you fit their criteria. If you do, they pay the nursing home. If you don't, that's your problem. Until you satisfy their rules, they just don't pay.

The Very Basics of Medicaid Asset Preservation Planning

Given all of these rules, an increasingly common question is "What can we legally do with our excess assets other than just spend them down?" This is the field of Medicaid Asset Preservation Planning. The follow-up question often is "Is it legal to do this?" Yes, as long as you follow the rules, and the basic rules are:

The Basic Rule: The government cannot prevent you from giving away your property. However, Medicaid is a government benefit, and the government writes the eligibility rules for its benefits. For Medicaid, the basic rule is that if you give your property away too soon before you apply for Medicaid, you will simply be ineligible for Medicaid for a period of time. There are some transfers that are exempt from this rule, but they deal with very specific factual situations, such as gifts to a caretaker or disabled child, to a sibling under certain circumstances, or to a Medicaid payback special needs trust or pooled fund.

Exempt transfers may be made at any time, without penalty. For non-exempt transfers, there are two time periods involved: The lookback period, and the penalty period.

Lookback Period: When you apply for Medicaid, the application will ask if you have made any transfers of your property within the last five years. This is the 5-year "lookback period". They "look back" for any gifts made within 5 years before your FIRST application for Medicaid. For planning purposes, this is a waiting period - a non-exempt transfer is not "safe" until 5 years have passed since the date of the gift.

Penalty Period: If there were any non-exempt transfers within the lookback period, then the government calculates the penalty period, which is the period of time during which you are simply ineligible for Medicaid no matter how little you have left. The penalty period is calculated by dividing the total value of the non-exempt transfers within the lookback period by $5,954.67 (the average monthly cost of nursing home care in Montana in 2013 - this figure is adjusted annually). This gives you the number of months you are ineligible. A non-exempt gift of $100,000 yields a penalty period of 16.8 months, which begins to run when you are in the nursing home and down to your allowable assets. This is called being "otherwise" eligible. How you pay for your care during the penalty period is your problem.

Basic Planning Principles: Planning for Medicaid eligibility always involves asset discovery and disclosure, asset valuation, and a spenddown plan. It may also include gifting. Exempt gifts may be made at any time without penalty. Non-exempt gifts must be carefully planned, and fall into two categories:

Pre-Planning: If you have enough other assets (or enough long-term care insurance, or an annuity, or helpful family members) to maintain yourself either outside or inside a nursing home for at least five years, you can make non-exempt transfers of excess assets, and plan on outlasting the five year lookback/waiting period. If you cannot last the five years, you

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may need to get the property back and do crisis planning (see below). Therefore the gifted property needs to be kept safe in the meantime. Common gifting techniques include outright gifts, gifts with retained interests, and gifts to Medicaid-planned irrevocable trusts. Expert assistance is advised.

Crisis Planning: If you need nursing home care now, but you have excess assets, there are still some gifting techniques available, but they are complicated, and expert assistance is essential. They involve ways to make a gift of part of your excess assets, while using the other part of your excess assets to cover the cost of your care during the penalty period caused by the gift. This also requires two sequential Medicaid applications.

In both types of planning, you have to be very careful WHEN you file the application for Medicaid, since the lookback period is triggered by the FIRST application ever filed, even if it was filed mistakenly, never completed, or denied.

Conclusion

The costs of nursing home care can destroy a family's finances. While there is significant protection for the spouse of a nursing home resident, there is no protection for the next generation. The family home, the family recreational cabin, and the family business (including the ranch), are all vulnerable to being liquidated to pay for the long-term care costs of the parent owners. And the vulnerability does not end with the death of the parent, since Medicaid has a right of recovery against the parent's estate under some circumstances.

Medicaid eligibility is possible for more families than most people realize. Asset preservation planning opportunities do exist, but many people who could be taking advantage of them don't know about them. Attorneys – especially estate planning attorneys – are the gate-keepers of this knowledge. The more attorneys know of these rules and options, the more likely it is that families that could be eligible for Medicaid assistance will have the opportunity to pursue it.

Sol Lovas has been practicing Family Wealth Law in the Billings area since 1980. After practicing with a general law firm for several years, she opened her own solo practice in 1992, in order to specialize in Family Wealth Law.

***Sol Lovas** has been practicing Family Wealth Law in the Billings area since 1980. After practicing with a general law firm for several years, she opened her own solo practice in 1992, in order to specialize in Family Wealth Law. She is a VA-accredited veterans benefits counselor, and is the first and only Certified Elder Law Attorney (CELA)* in the state of Montana.*

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March

March 8 — Secrets to a Successful Trial. Holiday Inn Grand Hotel, Billings. Sponsored by the Paralegal Section. 6.5 credits/1 ethics.

March 15 — All Ethics, Nothing But Ethics CLE. Fairmont Hot Springs Resort. Annual St. Patrick's CLE (formerly in Butte), sponsored by the CLE Institute. —6 Ethics/1 SAMI CLE credits.

March 19 — Divorce Coaching: What is it and how can it help your clients? Sponsored by the Family Law Section. 1 credit/hour noon teleconference.

March 22 — Natural Resource CLE. Great Northern Town Center, Helena. Sponsored by CLE Institute. At least 6 CLE credits (additional pending).

April

April 19 — Annual Bench-Bar Conference. Holiday Inn, Bozeman. Sponsored by the Judicial Relations Committee and CLE Institute.

April 23 — Child Abuse & Neglect Issues. Sponsored by Family Law Section. 1 credit/hour noon teleconference.

April 26 — Bankruptcy 101. Hampton Inn, Great Falls. Sponsored by the CLE Institute. 7 CLE/1 Ethics.

May

May 3 — Family Law Update. Holiday Inn, Missoula. Sponsored by the Family Law Section and CLE Institute. 6 CLE/1 Ethics.

May 10 — Cybersleuth's Guide to the Internet. Bozeman. Back by popular demand, nationally recognized authors and speakers on internet legal research, Carole Levitt and Mark Rosch, return to Montana. This CLE, with updates, includes Strategies for Discovery, Trial Preparation and how to Successfully Complete Transactions, including Investigative Research Strategies for the Legal Professional. 6.00 CLE credits.

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September

Sept. 19-20 — State Bar's Annual Meeting. Colonial Red Lion Hotel, Helena. Sponsored by the State Bar's Professionalism Committee. Approximately 10 CLE credits.

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Oct. 4 — Women's Law Section CLE. Chico Hot Springs Spa & Resort. Credits pending.
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Ethics credits info: Most MT attorneys will be required to obtain 5 Ethics credits, including 1 SAMI, by March 31, 2013. The SAMI (Substance Abuse/Mental Impairment) requirement is part of the 3-year Ethics cycle. If you were admitted to the Bar after 2001, you might have a different reporting cycle. For more information check the CLE section at *www.montanabar.org*.

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2010, 192 pages annotated
CD $35

Gary L. Day

Gary L. Day, age 62, passed away due to a massive heart attack on February 12, 2013. He was born on January 3, 1951, in Park Rapids, Minnesota, to Alva Pearl Knowles Day and Leslie John Day. Gary graduated from Menahga High School, MN, and earned a Bachelor of Science degree in 1974 from Moorhead State College. He earned a Masters of Science degree in wildlife biology from the University of Montana School of Forestry and in 1981 a juris doctorate degree from the University of Montana School of Law.

To members of the Montana Bench and Bar:

Thank you for the outpouring of love, support and sympathy so generously given us when Gary passed away.

— The Family of Gary Day, Feb. 27, 2013

Gary served as a Montana district court judge for the Sixteenth Judicial District from 1997 to the date of his death. Prior to serving as a judge, he joined the law firm of Lucas and Monaghan in Miles City, Montana, from 1981-1997.

He also served as president of the Southeastern Montana Bar Association from 1981-1988, as trustee of the State Bar of Montana from 1987-1997 and as president of the State Bar of Montana from 1995-1996. He served on numerous Montana Supreme Court commissions, including the Judicial Standards Commission. He had just begun serving as treasurer of the Montana Judges Association.

The greatest joy in Gary's life were his three children, Justin, Catharine and Cole and his grandson William McIntosh Houstoun. He has a new grandson born the day he died, Carter Houstoun. He would have given anything to hold that little guy in his arms. The love of his life was his wife, Jo Ridgeway. Gary and Jo had a special closeness and enjoyed their days together in the field hunting birds behind their German Shorthaired Pointers, running Ridgeday Kennels of Montana, riding road bikes, reading, traveling in their EarthRoamer to field trials with their dogs and to Arizona to hunt quail. Life without you, my dear strong man, will never be the same. We love you and we cannot believe you have left us.

Gary touched many lives during his time on Earth. He had a keen sense of humor, a zest for living large, an immense strength of character and body, boundless kindness and a striking intellect. He had an intense interest in wildlife biology, hunting dogs, philosophy, history, sports, and the wellness of our Earth. Those who appeared in his court found a compassionate individual who cared about justice and who believed justice delayed is justice denied; therefore, he was prepared before entering the courtroom and most often ruled from the bench.

Gary was predeceased by his father, Leslie John Day and his son Cole John Mickelson. He is survived by his wife, Mary Jo Ridgeway of Miles City, MT; mother, Alva Day of Park Rapids, MN; son Justin John-Allen Day of Denver, CO; daughter Catharine Day Houstoun (Justin) of Scottsbluff, NE; grandsons William and Carter Houstoun; sisters Sandra Etter (Robert) of Side Lake, MN and Susie Renner (Jim) of Molalla, OR; nephews Terry Etter (Peggy), Jason Etter (Camille), Carson and Eric Renner; and many friends and colleagues around the state.

Condolences may be sent to the family by visiting: www.stevensonandsons.com.

Should friends desire, memorials may be made to Montana Mental Health Trust, 2601 Broadway, Helena, MT 59601 or to the National Alliance of Mental Illness (NAMI), 616 Helena Ave. Suite 218, Helena, MT 59601.

Douglas P. Beighle

Douglas Paul Beighle died peacefully on February 3, 2013 while traveling with his wife Kathleen Pierce in Burma-Myanmar. He was 80 years old.

Doug was born in Deer Lodge, MT in 1932. Doug's interest in business and law developed early. After his father died when Doug was eleven, he helped his mother run multiple family businesses while raising three rambunctious sons. After graduating from the University of Montana in 1954 with a B.S. in business administration, Doug married Gwendolen Dickson and entered the Air Force as a 2nd Lt., before returning to the University in 1956 to complete his law degree. He was a faculty fellow at Harvard Law School in 1959-60, receiving an LL.M. degree in 1960.

Doug joined the Seattle law firm now known as Perkins Coie in June 1960, where he practiced for 20 years, specializing in corporate and utility law. In April 1980 he fulfilled a boyhood promise to himself to change careers before he was 50, joining The Boeing Company as Vice President Contracts. In 1981 he was asked to head Boeing's legal department, where he served as chief contracting officer and General Counsel. In 1986 he was elected Senior Vice President, serving as Chief Administrative Officer of Boeing until his retirement in 1997.

Until his second retirement in 2005, Doug served on a number of corporate boards, including Puget Sound Energy, where he was board chairman, Active Voice (acquired by Cisco), Peabody Coal, Simpson Investment Company and Washington Mutual. He also deepened and expanded his public service and community work, chairing the Washington Supreme Court's Commission on Justice, Efficiency and Accountability and the Washington State Blue Ribbon Commission on Transportation, and working with many nonprofits including the Greater Seattle Chamber of Commerce, KCTS Television, Long Live the Kings, Junior Achievement, Arts Fund Foundation, Pacific Science Center, and Landesa.

In 2001, Doug was honored as Citizen of the Year by the Seattle-King County Municipal League. In 1995 Doug and Gwen were each named Distinguished Alumnus of the University of Montana, the first couple to be so honored, and in 2011 Doug was honored for his outstanding career

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achievements by the University of Montana School of Business Administration.

Doug's kindness, generosity, and wisdom enriched the lives of his family and friends, as well as his community. Doug was preceded in death by his wife Gwen and brother Donald Beighle. He is survived by his second wife, Kathleen who shared his passions for nature, travel, and philanthropy, and his four children: Cheryl Beighle and husband Steve Schroeder; Randy Beighle and wife Stephanie; Kate Jacks; and Doug J. Beighle and wife Claire, all of Seattle; two stepchildren: Kristina Montague and husband Tom, of Chattanooga, Tennessee; and Serena Maurer and husband Sam Skrivan, of Seattle; fifteen grandchildren and step-grandchildren: Andrea, Jessica, Chris, Molly, Reid, Brianna, Jack, Patrick, Kendra, Chapin, Brecklyn, Ella, Max, Millie, and Jemma; and one newly born great granddaughter, Halle. Doug is also survived by his brother Richard Beighle and wife Bernice and sister-in-law Louise Beighle, all of Polson, Montana.

Doug died doing what he loved best-learning, meeting new friends, and sharing stories about his passions for fly fishing and the cabin in Kodiak, Alaska, where he shared many adventures with his brother, family, and good friends.

Visit www.dbmemorial.com to share words of comfort with his family. In lieu of flowers, memorial contributions may be made to the Pacific Science Center or Landesa.

Alden W. Pedersen

Alden "Pete" Pedersen, 85, passed away February 18, 2013, in Billings, MT. Pete graduated from high school in Richey, Montana in 1945. After his military service, he attended Western Montana College in Dillon, Montana. He transferred to the University of Montana, graduating in 1951. After pursuing a career in business, in 1963, he moved his family to Missoula to attend law school. He graduated from the University of Montana, School of Law in 1966. He returned to Billings to practice law. He retired from the firm of Pedersen and Hardy in 2010. He was preceded in death by his wife Lillian. He is survived by his son and daughter in law, Lance and Tamiko Pedersen of Hardin, Montana, his sister, Sylva Denney of Vancouver, Washington, his cousin Wesley (Heather) Van Hee of Chapel Hill, North Carolina his brother-in-law Irvin (Darlene) Nauman, of Billings, Montana, sister-in-law Connie (Bill) Cummings of Bozeman, Montana, and his beloved nieces and nephews.

Richard "Dick" Pinsoneault

NAVARRE, Fla. – Richard "Dick" Pinsoneault, 83, passed away at his home in Navarre, Fla., of leukemia on Dec. 14, 2012, surrounded by his beloved family. He was born Oct. 15, 1929, in St. Ignatius to the late Gustav Pinsoneault and Bertha (Dussault) Pinsoneault. He graduated from St. Ignatius High School, where he participated in all sports when he was not working on the family ranch north of town. He attended the University of Montana, graduating in 1953 with a bachelor of science in physical education. He was a walk-on for the Grizzly football team and was employed as a busboy at the original 4B's Restaurant in Missoula.

Upon graduation Dick entered the U.S. Air Force, where he met the love of his life, Marilyn "Mary" Carlisle, whom he married in 1955. Mary and Dick traveled around the country and overseas to Johnson Air Force Base, Japan, where Dick played on the Johnson Air Force Base football team when they won the Far East Championship. In 1957, he left the Air Force to return to the University of Montana to attend law school, graduating in January 1962.

He entered the Naval Judge Advocate General (JAG) Corps and proudly served until he retired in 1980. Duty stations included Great Lakes Naval Station, Ill.; Naval Station Newport, R.I.; and Naval Station Roosevelt Roads, Puerto Rico. His final duty station was Sand Point Naval Base in Seattle. While proudly serving our military, he received two National Defense Service Medals, a Navy Commendation Medal and a Navy Expert Pistol Shot Medal.

After retiring, he returned to the family ranch outside of St. Ignatius, where he practiced law until 1992. He valued education – well-known for his daily admonition, "Another day to excel!" – and served on the Mission School Board. He was also a devout Catholic and served on the Mission Catholic Church's Property & Finance Committee for many years. He was instrumental in the efforts to restore the frescoes and install an elevator in the church.

During these years, he served two terms in the Montana Senate representing District 27. He was honored to serve as chairman of the Senate Judiciary in his final term. He loved to ride his tractor around the ranch and putter around the homestead. He taught all of his grandsons to drive, making numerous trips on the country roads to the dump for practice. He also became famous for his Fourth of July pig roasts, the games he invented for our family reunions and his homemade ice cream.

Dick is survived by his wife of 57 years; daughters Tammie White of Navarre and Michelle (Don) Vipperman of Stevensville; sons Michael (Patricia) of Colorado Springs, Colo., and Thomas (Brenda) of Missoula; and grandsons Kyle (Laura) Vipperman of Raleigh, N.C., Andrew Vipperman of Hamilton, Matthew Pinsoneault of Colorado Springs and Gregory Pinsoneault of Chicago. He is also survived by sisters Jean Johnson of Spokane and Isabelle Seery of St. Ignatius; brother James (Madeline) Pinsoneault of Edmonds, Wash.; and a large extended family and circle of friends to whom he was fondly known as "Pop."

He was preceded in death by twin sons and a daughter who died in infancy; his parents; brothers Gustav Jr. and Harold (Jack) Pinsoneault; and sister Thelma Sjostrom.

In lieu of flowers, donations may be made to the St. Ignatius Catholic Mission, Wounded Warriors or your local hospice provider. A memorial service will be held in the summer of 2013 in St. Ignatius.

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ATTORNEY POSITIONS

ASSOCIATE ATTORNEY: Tarlow Stonecipher & Steele, PLLC, a five-lawyer litigation and transactional firm in Bozeman, seeks attorney with ten or more years of experience. The optimal candidate will have excellent verbal and written communication skills and substantial experience in either transactional/real estate-related work or general litigation/trial work. Compensation will be dependent upon experience and includes a good benefit package. Please submit a letter of interest and current curriculum vitae to tstonecipher@lawmt.com. All applications will be held in confidence.

CITY ATTORNEY: City of Great Falls, Montana. $90,000 - $105,000. For complete job description and to apply online, visit Prothman at http://www.prothman.com and click on "Current Searches." For questions, please call 206-368-0050. LLB or JD from accredited law school and admission to practice law in the State of Montana required. Minimum of 5 years practical experience as licensed attorney. Municipal law, trial litigation, and risk management experience, and familiarity with local government preferred. Apply by March 17, 2013 (first review, open until filled).

ASSOCIATE ATTORNEY: Small civil defense and business litigation firm in Missoula seeks attorney with 3-7 years' experience in similar practice. Excellent verbal and written communication skills and effective, efficient analysis and research skills required. Salary (dependent upon experience) plus benefits package. Please submit cover letter, resume, writing sample, transcript and salary requirements to kbeal@beallawfirm.com. All applications strictly confidential.

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PARALEGALS & OTHER PROFESSIONALS

SELF-HELP LAW CENTER FACILITATOR: The 11th Judicial District, Kalispell, is looking for a full-time coordinator for the Self-Help Law Center in Flathead County.

This position is responsible for administering and coordinating the Self-Help Law Center in Flathead County. The successful candidate will coordinate the workstation, which will provide the public with designated hours to find legal information; download, print, and/or fill out legal forms; get referrals to and applications for appropriate legal services and/or pro bono programs; and get information about community agencies who may be able to assist with underlying non-legal issues.

The facilitator will assist in the creation of the Center, staff regular hours at the Center, assist members of the public seeking information and referrals from the Center, and recruit volunteers to assist in the staffing of the Center. The Facilitator is also responsible for providing

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remote assistance- via phone, webcam, and/or online "chat" features- to users of remote self-help workstations in other jurisdictions during designated hours. Experience with this type of technology is important. Excellent communication skills are required.

- Salary grade15: $14.24 per hour
- The successful applicant will be subject to a background check.
- Newly hired Judicial Branch employees are subject to one year probationary period.
- Continuation of the position is subject to receiving additional funding from Legislature.

A full position description is available from Human Resources -- shgrandy@mt.gov

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Reflections on challenges facing new lawyers today

By Don Murray

We keep trying to make it easier, but breaking into the profession as a new lawyer is probably harder than ever. The practice of law is fraught with conflicts; for the uninitiated traps and snares lurk around every corner. The conflicting roles and responsibilities we face as lawyers are many and varied, and new lawyers are often ill prepared to reconcile those conflicts. Experience of course helps, but experience can be a harsh and unforgiving teacher, inclined to punish both lawyer and client.

The conflicts of which I speak are not just the conflicting interests between clients and prospective clients — those actually are among the more manageable ones we face and using the Rules of Professional Conduct as a lodestar, can be navigated safely for the most part. Rather, the conflicts of which I speak are the more internal and personal ones — the kind that present conflicts with our own interests, or that challenge us with difficult ethical and behavioral dilemmas. About these conflicts the preamble to the Model Rules of Professional Conduct makes this observation: "Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest."

And those "difficult ethical problems" come at us from all directions. Litigation is of course a fertile crucible for conflicts that most of us will grapple with early in our careers. We are expected to win our cases and our worth as lawyers is often gauged by how well we do that. Litigation is a rough and tumble arena and the new lawyer can be left feeling that to be successful it must be approached like a no-holds-barred cage fight. Yet through the fog of battle we are expected to comport ourselves with a certain restraint, accommodating opposing counsel and observing loosely-worded standards of conduct toward opposing parties and the court, all the while mindful of our overarching duty to the system of justice. Outside the courtroom conflicts arise when our responsibility to make justice more accessible to the poor collides with demands that we bring more money into our firms or repay student loans. Simply trying to please our clients while fulfilling our obligations to treat opposing parties and counsel with courtesy and respect can confront us with a maze of behavioral challenges. Then there are the more subtle conflicts that arise between our own personal moral values and our larger role as lawyers in a society ordered around the rule of law and dependent on the quality of our justice system.

Unfortunately, our legal education — as good as it is academically — does not equip us particularly well to manage these conflicts (or in some instances to even recognize them). Mentoring is thus crucial, but mentoring today is not what it was a generation ago. To be sure, there is some excellent mentoring that goes on in this state, but I would submit that it happens much less frequently — that it is dispensed by fewer lawyers and that fewer new lawyers are the beneficiaries of it — than was the case twenty of thirty years ago. The reasons for the decline are varied, but to a large extent they are economic. They run the gamut from demands to bill more time, to the reality that job opportunities are limited and more new lawyers are going into practice in small firms with other inexperienced lawyers, or on their own. Once it was routine for an experienced lawyer to take a new lawyer along to court proceedings, meetings and depositions. That the time spent might not be billable was a minor concern; it was seen as an important investment in the development of a new lawyer. But things are different today. Clients won't pay for this kind of "back-up," and the new lawyer is often under pressure to meet a certain threshold of billable time. Observing experienced lawyers, once considered indispensable, has become a luxury that in many instances cannot be justified. Mentoring's long-term dividends are too often overshadowed by its short-term costs.

For us seasoned lawyers — those upon whom mentoring depends — we have issues of our own. We've had "work-life balance" preached to us so our lives are not consumed, as were the lives of many who mentored us, by the "jealous mistress." Work-life balance necessarily means something has to go, and unfortunately, one of the casualties has been mentoring. Nor are we immune to the demands of the billable hour — a yoke that can sap from us the time once devoted to mentoring new lawyers. The cumulative result is that more new lawyers are left to fend for themselves, often inadequately prepared to cope with the myriad conflicts that challenge us as professionals on an almost daily basis.

The problems are serious and growing more so and the solutions aren't easy. Bar associations all across the country regularly grapple with both the problems and the solutions — not to mention the fallout from too many of the former and not enough of the latter. I don't have the answers, but I do want to commend to any new lawyer who might chance upon this article three works that have guided me and others in dealing with the conflicts all of us face.

The first is the Ten Commandments for Trial Lawyers. The Commandments were penned by George Dalthorp, an outstanding lawyer and a wonderful person who served the State Bar of Montana as its President in 1985-1986. George's Ten Commandments weren't chiseled in stone, but they are

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worthy of posterity. For me as a young lawyer they guided, and in some cases, liberated me to comport myself in my dealings with my adversaries the way I wanted to but wasn't sure I could while still advocating the interests of my clients. The Commandments are both instructive and empowering for a new lawyer. They had a big influence on me, and I highly recommend them to all lawyers, new and old alike. They are easy to find on the State Bar's website and in the Lawyer's Desk Book where they have appeared for years, flanked by several other worthy documents; Standards of Professional Courtesy to Clients, Standards of Professional Courtesy Among Attorneys, Standards of Professional Courtesy and Ethics Between the Judiciary and Attorneys, and the nine point Montana Values statement. All of them should be re-visited periodically.

The second writing I would recommend is University of Montana Philosophy Professor Tom Huff's essay, The Temptations of Creon: Philosophical Reflections on the Ethics of the Lawyer's Professional Role, 46 Mont. Law Rev. 47 (1985). Professor Huff's essay is a compelling and insightful examination of the conflict that can arise between the lawyer's institutional role in a society dependent of the rule of law, and personal inclinations to cling unflinchingly to our own moral convictions. The conflict is presented brilliantly in the context of Sophocles' ancient Greek tragedy Antigone. It is a scholarly and thought-provoking article and I highly recommend it.

The third, and perhaps most important work I would recommend is the preamble to the ABA Model Rules of Professional Conduct. The preamble was extensively rewritten as part of the ABA's Ethics 2000 project and adopted (with some minor but important changes) by the Montana Supreme Court in 2004. Captured economically in its twenty-one paragraphs is the essence of the practice of law. It is at once instructive, illuminating, challenging and inspirational. One cannot read it without feeling pride in one's profession, and new lawyers and old alike will find in it much upon which to reflect both personally and professionally. The preamble and the Model Rules, which have again recently been the object of review and revision by the ABA, are also found on the State Bar's website and in its 2013 Lawyers' Desk Book at page 259.

I close with a tribute to our friend and colleague Gary Day whom we suddenly and tragically lost this past month. Gary, who served this organization in many ways, including as its president in 1995-1996, was a big, strong, handsome man with a big, compassionate heart. All of us who served the State Bar with Gary admired his wonderful blend of wisdom and wit. Gary took his work seriously, but he never took himself too seriously. He was always kind and considerate, and never critical or demeaning of others. Gary placed justice above winning and service above self. He was an outstanding lawyer and an excellent judge and an all around great guy. Gary exemplified the "public citizen" extolled in the preamble to the Model Rules – always seeking "improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession."

It is tempting for us older lawyers, as we pine for the way things were, to lament that lawyers like Gary are a dying breed. But I don't believe that to be the case. This next generation of lawyers has tremendous potential and the capacity to produce many outstanding lawyers of exceptional skill and the highest standards of moral character and professionalism. It is up to us to help them fulfill that potential.

***Don Murray** was State Bar President in 2001-2002*

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