MONTANA LAWYER
State Bar of Montana
May 2013 | Vol. 38, No. 7

# State Bar Elections

Contested races for Area H, Area F and Secretary-Treasurer | **Q&A inside**

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MONTANA LAWYER

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## School of Law Summer Indian Law Program scheduled for June 10 - July 12, 2013

Spend the summer in beautiful Missoula, Montana studying Indian Law! The University of Montana, School of Law invites you to participate in the sixth annual American Indian Law Summer Program, June 10 - July 12, 2013. Students will have the opportunity to gain knowledge and practical skills from Professors and Practitioners with decades of experience relating to the subject area they are teaching.

Lawyers who attend earn 13 or 14 CLE credits per course. Names of those attending for CLE credit will be submitted to the State Bar of Montana. In the alternative, attendees can simply self-report on their CLE affidavit.

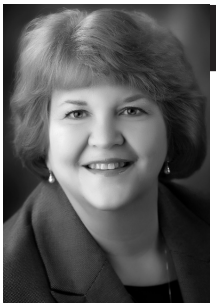
Any lawyer wishing to attend, who is not already enrolled for academic credit, must pay $375 per course to earn CLE credit.

Registration and payment can be made on the first day of the course via credit card or check made payable to The University of Montana School of Law. Courses have a varied numbers of seats open for attorneys. Please see individual descriptions at http://goo.gl/HvYQE. To pre-register for a course, please email Patience Woodill patience.woodill@umontana.edu. Attorneys may register up to the first day of class. Attendance at all sessions is required for full CLE credit.

Enrollment of Law Students, Graduate and Undergraduate Students, please visit the School of Extended & Lifelong Learning for registration information, or contact LisaMarie Hyslop, UM School of Law Registrar at 406-243-2690.

All classes are scheduled to be held in the Law Building, Room 215.

- **June 10 – 14:** Criminal Jurisdiction in Indian Country, 9 a.m. to noon
- **June 17-21:** Domestic Violence in Indian Country, 9 a.m. to noon
- **June 24-27:** Energy Development in Indian Country, 9 a.m. to 12:30 p.m.
- **June 28 – July 3:** Indian Child Welfare Act, 9 a.m. to 12:30 p.m.
- **July 8-12:** Indian Water Law, 9 a.m. to noon



**President's Message** | Pam Bailey

# Is safety an illusion?

It started out like any other day. I was at my office waiting for a client who was driving down to Billings from Roundup. At the time, I was in an office sharing arrangement with four other attorneys. Outside my door, I noticed another attorney's client sitting in a chair with a long box on his lap. I did not think much of it. Normally, I always have my door open unless I am with a client or on a confidential phone call. For some reason, I closed my door half way. Shortly thereafter, I heard the man's attorney returned from Law and Motion. The man said "hello" then I heard a loud muffled pop. The attorney said, "He's got a gun!" I got up and looked outside my door. Sure enough, the remnants of a man's head that had been shot off by a sawed off shotgun was outside my door.

I closed my door and tried to hide. Where? Under my desk? There was no way out. I was terrified. The other attorneys called me on the intercom and told me to stay in my office. The man was outside my door. I could hear what was left of his body gasping for air. It seemed like an eternity before the paramedics and the police arrived. When I was finally able to leave my office the sight I saw was horrific.

This was not a client that any attorney wants to represent. He had just entered a guilty plea for sexually assaulting a 7 year old girl. He was about to be sentenced and feared going to prison. The man sent the Billings Gazette a typed three page letter which arrived on the day of the suicide. He did not want to go to prison and blamed his lawyer for the outcome of the case. The Gazette reported that this man (who was at one time a business owner, a salesman and had recently been elected as a Republican committeeman in Billings) had a lifetime of sexually aggressive behavior towards women. His day of reckoning had arrived and he did not want to do the time. Suicide was his option. He had more than one shell in his gun. Who knows what would have occurred if his plan had gone awry?

My experience with a violent client is nothing new in Montana. In fact, during mediation in a civil law matter last year in Bozeman, a client made her "final offer" and pulled out a gun. Thankfully, the gun was wrestled away from her and no one was injured.

*I closed my door and tried to hide. Where? Under my desk? There was no way out. I was terrified. The other attorneys called me on the intercom and told me to stay in my office. The man was outside my door ...*

Regardless of the type of practice you engage in, we all deal with people who are at risk for becoming violent and dangerous. Our clients are dealing with issues concerning the loss of property, income, family, children and personal freedom. When they do not get the result they like we, as their attorneys, are often the first to blame. Add in mental illness, stress and desperation and you have a potentially dangerous situation.

Violent attacks committed against attorneys by clients enraged over their legal matters are nothing new. Every year in our country lawyers are attacked with deadly force by disgruntled clients or parties to litigation that the attorney was involved with before the attack. Big city law firms often have security measures in place that involve high tech tools such as portable alarms and hidden cameras. In Montana where half of attorneys are sole practitioners, high-tech safety measures are unrealistic.

What can we do to protect ourselves? Criminals have the right to an attorney. Others do not. I have rejected a few cases over the years because I knew the person I was dealing with was not safe. Many years ago, a therapist at the Mental Health Center called me to warn me that one of my clients had made threats against me. Luckily nothing came of it, but it made me more cautious as to the clients I accept. As a sole practitioner and woman, I pay particular attention when I am alone in my office. If I know ahead of time that someone has a history of violence I do not accept the case.

What about members of our judiciary in Montana? Our District Courts have very little protection from litigants who are dangerous. The Federal Judiciary has a significant amount of protection in place. How much longer before our State District Court judges receive similar protections?

The events of 9/11 changed us all. The events of Sandy Hook, Boston, and Aurora are constant reminders that safety may be an illusion. Regardless, we owe it to ourselves and our staff to have safety measures in place to not only prevent a dangerous situation from occurring, but also how to deal with a dangerous situation that has happened. Make a plan.

## ABA seeks your story for recruitment campaign

The ABA has launched its newest member recruitment campaign, featuring the tagline "Be a Leader. Become an ABA Member." The campaign capitalizes on the ABA's national influence and high-profile members. It provides a forum to share ABA experiences. Visit www.abaleaders.org .

The site, www.abaleaders.org, allows all ABA members to tell their "ABA story" and share it to promote ABA membership using social media and email. All visitors to the site are able to view the stories of each notable member, as well as all other ABA member stories as they are added to the site. Through the campaign, non-ABA member attorneys can join with complimentary trial ABA and Section memberships through August 31, 2013.

Please visit www.abaleaders.org and tell your ABA story. It will only take a few minutes for you to post a brief statement about the value you have found in ABA membership. Once you have created your page, you can easily share your story via LinkedIn, Facebook, Twitter or email using the links we provide at the top right of the website. Your experiences may influence others to join us as an ABA member.

## MacLean and Freeman announce opening

Erin F. MacLean and Southgate (Sox) B. Freeman, III are excited to announce the opening of Freeman & MacLean, P.C. A professional corporation serving clients in Montana & Wyoming

Ms. MacLean, formerly of Luxan & Murfitt, PLLP in Helena, will continue her Helena, Montana based legal practice in the areas of Health Care Law, Business Formation and Transactions, Employment Law and related litigation, along with her governmental affairs practice in Montana and professional non-profit association management.

Mr. Freeman will continue his practice of serving established Wyoming clients and conducting mediations throughout Wyoming and Montana.

Visit online at www.fandmpc.com.

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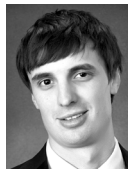
## Johnson joins Lewis, Slovak & Kovacich


Johnson

The law firm of Lewis, Slovak & Kovacich, P.C., is pleased to announce that Ross T. Johnson has joined the firm. Ross was born and raised in Conrad, Montana, graduating from Conrad High School in 2004. Following high school, he attended Brown University in Providence, Rhode Island, and wrestled intercollegiately. He earned a Bachelor of Science Degree in Economics in 2008. Ross returned to Montana to attend the University of Montana School of Law and earned his Juris Doctorate Degree in 2012. During law school, Ross worked as an intern at the Office of the State Public Defender and continued working on the family farm and ranch. Ross is admitted to practice law in all Montana State Courts and before the U.S. District Courts for the District of Montana. He is a member of the Montana Trial Lawyers Association.

Ross' practice will be limited to the firm's civil litigation practice, emphasizing plaintiffs' personal injury, toxic tort, wrongful death, and environmental litigation. Ross can be reached at (406) 761-5595 or www.lsklaw.net.

## Butler joins Crist, Krogh & Nord

The attorneys at Crist, Krogh & Nord, LLC are pleased to announce that Ed Butler has joined their practice. Ed is a former member of Sherman & Howard in Colorado Springs. His practice focuses on advising employers on labor and employment issues and defending them in all kinds of labor and employment law disputes and litigation. He is admitted in Montana as well as Colorado. Ed can be reached at (406) 255-0400 or ebutler@cristlaw.com

# ATJC to review pro bono requirement for admission to the State Bar of MT

The Access to Justice Commission created by the Montana Supreme Court in May 2012 is beginning work on the Court's request that it consider whether the Court should require pro bono service for admission to the State Bar of Montana. In September 2012, the New York Court of Appeals signed an order that will require applicants admitted to the New York State Bar on or after January 1, 2015, to complete at least 50 hours of pro bono service prior to applying for admission. New York's rule is the first of its kind, and it provides the basis for the proposal being considered by the ATJC's Pro Bono Bar Admission Requirement Working Group. Information concerning the New York rule and its background can be found on the New York Courts' website at http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml .

The Pro Bono Bar Admission Requirement Working Group is gathering information prior to making a recommendation to the Court by the July 1st deadline. In reviewing whether pro bono service should be a condition for bar admission, the Working Group is reviewing programs already in place at The University of Montana School of Law and throughout Montana, as well as information about what other states and other law schools require. Topics under discussion include, but are not limited to, the following:

- What activities should be eligible to qualify for pro bono service as a prerequisite to bar admission?
- What obstacles might exist for law students and prospective Bar applicants to acquire pro bono experience before seeking Bar admission?
- How will a pro bono requirement impact access to justice and the legal profession in Montana?
- In what volunteer legal activities are law students currently engaging?
- What goals and purposes will be served by having a pro bono admission requirement and how can those best be achieved?

On May 22, 2012, the Montana Supreme Court created the Access to Justice Commission as a new advisory commission to the Court. The ATJC is charged with assessing, planning, coordinating, and making recommendations concerning the provision of access to justice for all Montanans. This 18-member Commission held its first meeting on December 12, 2012. The Commission was formed out of the Montana Supreme Court Equal Justice Task Force and the Commission on Self-Represented Litigants, and consists of representatives from Montana's legal, judicial, legislative, and business communities.

If you would like to provide information or comment on any of these topics or obtain information about upcoming meetings, which are open to the public, please contact Kate Kuykendall of the Montana Justice Foundation by email at kkuykendall@mtjustice.org, or by phone at (406) 523-3920.

## Bar seeks award nominations

Print nomination forms for the William J. Jameson Award and George L. Bousliman Professionalism Award are on pages 8-9 in in the March Montana Lawyer. The Karla M. Gray Equal Justice, and the Neil Haight Pro Bono awards forms are on pages 10-11 in this edition. Copies of the nomination forms for all awards are available online at *www.montanabar.org*. Information and criteria are listed on the individual awards. Deadlines are May 15 except for the Neil Haight award, which is July 1.

## CLE affidavits mailed April 15; due May 15.

The annual CLE affidavits will be mailed out to Bar members on April 15th They must be returned (postmarked) by May 15th. Attorneys may attend and report CLE up until May 15th without penalty. Questions concerning CLE credits or reporting contact Kathy Powers, MCLE Administrator, (406) 447-2207 or kpowers@montanabar.org. More CLE information, including a list of approved programs for this reporting year, can be found at www.montanabar.org (click on the CLE icon in the Member Toolbox on the homepage)

## State Bar elections ballots due May 28

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. Read the candidate Q&A on starting on page 11

## Save the date

State Bar's Annual Meeting CLE is Sept. 19-20 at the Red Lion in Helena. Approximately 10 credits. Stay tuned for more info.

## In RE Revision of the Rules for Continuing Legal Education

**Summarized from an April 3 order - No. AF 06-0163**

The Montana Commission of Continuing Legal Education has filed a petition asking the Court to amend the Rules for Continuing Legal Education. The Court published the proposed changes and accepted public comment on them. One comment was filed.

IT IS ORDERED that the amendments proposed to the Rules for Continuing Legal Education are adopted, effective beginning with the 2013-2014 reporting year.

## In the Matter of the Appointment of a Member to the Commission on Practice

**Summarized from April 23 orders No. AF 06-0090**

Rule 2(A) of the Rules for Lawyer Disciplinary Enforcement (2002) provides that appointments to the Commission on Practice shall be made by the Supreme Court from a list of three licensed and practicing attorneys submitted to this Court as having received the three highest number of votes in an election by the Area members of the State Bar of Montana. Rule 2(A) further provides that this Court shall, by order, designate the time, place and method for the election of members for appointment to the Commission on Practice.

- The 4-year term of the attorney member from Area B, Chair of the Commission on Practice, John Warren, is due to expire on April 28, 2013. John Warren is retiring as a member of the Commission and an election is required. Area B is comprised of Silver Bow, Deer Lodge, Granite, Powell, Beaverhead, Jefferson and Madison Counties (2nd, 3rd and 5th Judicial Districts).
- The 4-year term of the attorney member from Area D, Steven R. Brown, is due to expire on Apri1 28, 2013. Steven R. Brown has consented to reappointment, however, an election is nevertheless required. Area Dis comprised of Chouteau, Liberty,Hill,Roosevelt, Daniels, Sheridan, Blaine, Phillips and Valley Counties (12th, 15th and 17th Judicial Districts).
- The term of the attorney member from Area F is due to expire on June 30, 2013. James Hubble has consented to reappointment, however, an election is nevertheless required. Area F is comprised of Judith Basin, Fergus, Petroleum, Meagher, Wheatland, Golden Valley and Musselshell Counties (10th and 14th Judicial Districts).
- The 4-year term of the attorney member from Area H, Robert J. Savage, is due to expire on Apri1 28, 2013. Robert J. Savage has consented to reappointment, however, an election is nevertheless required. Area H is comprised of McCone, Richland, Dawson, Prairie, Wibaux, Garfield, Treasure, Rosebud, Custer, Powder River, Carter and Fallon Counties (7th and 16th Judicial Districts).

Elections shall be had in Area B, Area D, Area F, and Area H for nominations of 3 resident bar members for each area whose names shall be submitted to the Court. The Court shall appoint one nominee from each area to membership on the Commision On Practice. Area B election shall be the responsibility of Hon. Judge Kurt Krueger; Area D election shall be the responsibility of Hon. Judge Daniel Boucher; Area F election shall be the responsibility of Hon. Judge Jon Oldenburg; Area H election shall be the responsibility of Hon. Judge Katherine Bidegaray.

Ballots must be returned on or before May 17. For more information, read the orders in full at supremecourtdocket.mt.gov and search for No. AF 06-0090.

## Discipline

**Summarized from a March 27 order PR 12-0662:**

On November 2, 2012, a formal disciplinary complaint was filed against Montana attorney Christian T. Nygren. The disciplinary complaint may be reviewed by any interested person in the office of the Clerk of this Court.

Nygren subsequently tendered to the Commission on Practice a conditional admission and affidavit of consent, pursuant to Rule 26 of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE). The Commission held a hearing on the conditional admission and affidavit of consent on January 16, 2013, at which hearing Nygren and his counsel were present.

On January 11, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation that Nygren's conditional admission be accepted.

We approve the findings, conclusions, and recommendation of the Commission on Practice. In his conditional admission, Nygren has admitted that, in a lawsuit in which he and his firm were hired by an insurance company to defend against counterclaims, he mistakenly misrepresented to counsel for opposing parties that he had been hired by their insurance company, and asked for and obtained confidential information from them about the case. When Nygren realized the true identity of his client, he notified the other counsel of his error, and he eventually withdrew from the case. He failed, however, to timely return to opposing counsel a copy of her file.

Nygren self-reported his misconduct to the Office of Disciplinary Counsel. He has admitted that his conduct violated Rules 1.1, 1.3, 1.4, 1.7, 1.15, 1.16, and 8.4(d) of the Montana Rules of Professional Conduct. Nygren's admission was tendered in exchange for discipline in the form of a public censure by this Court and a requirement that he pay the costs of the Office of Disciplinary Counsel and the Commission in connection with this matter. Based upon the foregoing,

The Commission's Recommendation that we accept Nygren's Rule 26 tendered admission is ACCEPTED and ADOPTED.

# Appropriate debt collection practices for the elderly

By Gail K. Bourguignon

For a myriad of reasons, many elderly Montanans have debt that has been turned over for collection and the debt level among seniors nationwide is rising.[1] Often these consumers have had no prior experience with debt collection, having paid their bills timely throughout their life. As they advance in age, however, several factors come into play. Injury and/or illness may leave them with burdensome medical debt that grows as their health deteriorates, steadily eroding their savings and diminishing their earning capacity. Even without the additional challenge of dementia or the like, deciphering insurance documentation and medical billing can be overwhelming. Further, the pace and technology of business and billing has changed dramatically in the past couple decades. In this climate, it is critical that advocates are informed about the debt collection process and the rights afforded consumers by state and federal laws.

Although other federal laws may govern in specific fact patterns, a basic understanding of the protections afforded by the Fair Debt Collection Practices Act (FDCPA)[2] will allow attorneys to recognize red flags and provide counsel to their elderly clients who are facing debt collection efforts. Intervening on a pro bono or limited scope representation basis for elderly clients may be enough to get that consumer into a manageable plan for resolution and protect them from sleeping on their rights or falling victim to abusive practices. Most debt collectors are well aware of the FDCPA and its counterpart regulations and strive honestly to comply with the letter and the spirit of those laws. As in any industry, however, there are exceptions and violations do occur. The following is a snapshot of the highlights of the FDCPA and suggestions for practitioners, chosen for their potential relevance to elderly consumers.

## Communication

Without the consumer's consent, debt collectors must not contact consumers at inconvenient times or places.[3] Telephone calls are generally expected to be placed between 8 a.m. and 9 p.m., in the consumer's local time zone, and may not be continuous or excessive. Calls to a consumer at their place of employment are prohibited if the debt collector knows or has reason to know that such communication is not allowed by the employer or the consumer has requested such a restriction.

In general, debt collectors may not discuss the collection of a debt with third parties who are do not fall into one of a few exceptions, including attorneys for the consumer or creditor, spouses, parents of minor children, guardians, executors, or consumer reporting agencies.[4] They may, however, seek location information from third parties pursuant to guidelines established in §804.

Any requests to limit telephone contact parameters should be honored, whether offered orally or in writing. A request to cease all communications, however, must be in writing.[5] Such a request is valid upon receipt by the collector, however it only applies to the debt specified and must be repeated, if desired, when subsequent accounts are assigned to the collector[6]. The consumer may waive the cease communication order by express waiver or initiating contact with the collector.

If an elderly consumer is not comfortable discussing the debt over the telephone, they may be more comfortable submitting a request that all communications be in writing or authorizing a third party to speak about their account on their behalf. Clearly, if a consumer can obtain representation by an attorney, the collector is mandated to communicate only through the attorney upon notice of such representation.[7] For many consumers, their debt collection matter may be resolved by one or two brief contacts between an attorney and the collector. This may be an ideal way to provide limited scope representation on a pro bono basis that serves a great need for the consumer and requires little time investment from the attorney.

## Harassment or Abuse and False or Misleading Representations

The FDCPA prohibits the use of any collection strategies the natural result of which is to abuse, harass, intimidate, or embarrass the consumer. [8] The use of profanity, racial or religious slurs, threats of violence or threats to publish their name are all examples of conduct that is prohibited by this section. There is no exhaustive list and the spirit of the law is honored by a case by case analysis.

When speaking with the consumer, a collector must also provide meaningful disclosure of the caller's identity. This may include the name of the collector, their identity as a debt collector[9], the purpose of the call and the name of the agency or creditor they represent.[10] It is important for elderly consumers

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to take notes and be clear about what agency or creditor they are speaking with and which dates of service or charges the call relates to. Confusion about these clarifying facts leads to unnecessary stress and time for many consumers who are struggling with multiple creditors and debts.

For many elderly consumers, processing incoming mail related to their bills is overwhelming. Encouraging them to keep their documents handy and organized can expedite resolution if a bill does end up in direct collection. Explanations of Benefits (EOBs) are often confused for bills and vice versa. Helping an elderly consumer set up a filing system to can empower them to face bills and collections with confidence and knowledge, rather than fear and potential despair. If there is no guardian or power of attorney appointed for an elderly person, merely designating a family member or other caregiver to process the mail can prevent untold stress for all involved.

Section 807 of the FDCPA prohibits collectors from using false, deceptive or misleading representations to consumers. This includes a mandate to accurately represent the amount owed and the current legal status of a debt.[11] A debt collector may not falsely represent that they are an attorney or threaten any legal action which they cannot lawfully take and/or do not intend to take.[12] This includes threats of criminal charges, post-judicial execution remedies prior to the entry of a judgment to allow for the same, or lawsuits on charges which are past the applicable statute of limitations. Subsection (11) requires that a disclosure be made in the initial communication with a consumer informing them that the communication is an attempt to collect a debt and that any information obtained in that communication will be used for that purpose. This is known as the "mini-Miranda" warning. Subsequent communications must also disclose that the communication is from a debt collector.

### Unfair Practices

A collector may not attempt to collect any amount that is not "expressly authorized by the agreement creating the debt or permitted by law."[13] Nor may they employ any unconscionable means to collect a debt. This section places a high burden on the collector to ensure that they have reviewed the documentation from the underlying creditor to be certain that they are in compliance with this section. It is critical that patients keep their bills, explanations of benefits, and receipts of payments to facilitate cross referencing and prevent any unpaid balances from being turned over for direct collection.

### Validation of Debt

Notice of certain rights afforded a consumer under the FDCPA is required to be provided to the consumer within five days of the initial communication with a consumer.[14] One of those rights allows a thirty day window for consumers to dispute the debt, or any portion of the debt, in writing. Upon receipt of such dispute, collectors are then required to cease collection efforts until verification of the debt is obtained and mailed to the consumer. Collection efforts, including litigation, may then resume, even if the 30 day window has not elapsed. A timely response paired with an organized filing system can save a consumer time, stress, and money by avoiding extra charges associated with litigation and the accrual of interest and fees.

## What if a Judgment has already been entered?

As with any civil lawsuit, a timely answer is critical to avoiding a default judgment. Many times, however, an elderly person may not seek an attorney's assistance until a judgment has been entered and the creditor has begun executing on the judgment. Although most federal benefits, such as SSI, are exempt sources of funds, the idea that a person is "judgment proof" is a fallacy.[15] This type of misleading language creates a false sense of security. A judgment is entered regardless of whether the defendant will have non-exempt funds available to satisfy the judgment. Once a judgment is entered, a creditor has a right to seek a writ of execution and serve it upon employers, banks, or other agencies, such as the Department of Revenue. Although financial institutions are obligated to protect exempt federal benefit payments, levies still occur when deposits from non-exempt sources are present.[16]

An important service can be provided by attorneys who are approached to assist with exemption claims.[17] Exemption claims are not self-executing. They must be claimed and established or they are waived, regardless of the exempt nature of the source of the funds.[18] Aside from filing an exemption claim within the 10 day window to do so[19], and gathering the supporting documentation (typically bank statements for the three months prior to and including the levy), the attorney can negotiate a payment arrangement with the judgment creditor to prevent future levies from occurring. Each levy costs a fee and typically causes stress for the person whose monthly budget is harpooned by an unexpected seizure of their funds. Rather than face repeated successful exemption claims, a workable payment arrangement can usually be reached with the judgment creditor.

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**"The key to protecting** elderly Montanans from experiencing abuse or exploitation is to empower them through appropriate use of information and advocacy."

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## Suggestions for Caregivers or Advocates

The key to protecting elderly Montanans from experiencing abuse or exploitation is to empower them through appropriate use of information and advocacy. Some folks can manage their bills and keep it all organized. Others desperately need someone to monitor the bills on their behalf. Sometimes, Grandma has moved from the former to the latter description without anyone realizing that fact. The following suggestions may help.

- Establish a system for processing incoming bills and keeping them organized, designating separate files for each underlying creditor
- Delegate bill monitoring, if necessary
- Respond promptly to the first communication from a debt collector
- Request validation of the debt in writing within 30 days of the first communication if any doubt exists about its validity
- Determine the level of comfort with communicating with the collector and request limitations as appropriate (i.e. only written communication, authorize another to speak to the collector on behalf of the elderly person etc.)
- If one bill has been turned over for collection, assume that a review of all outstanding bills needs to be conducted to be sure that none have fallen through the cracks that may still be with the underlying creditor
- Keep a notebook of all communications with debt collectors and creditors

For more information on protecting the elderly from abusive practices or exploitation, please see any of the websites listed below[20] or contact any of the members of the Elder Law Committee of the State Bar of Montana.

Endnotes

1 See Josh Boak, Rising Household Debt a Game Changer for Seniors, The Fiscal Times (March 28, 2013), found at http://www.thefiscaltimes.com/Articles/2013/03/28/Rising-Household-Debt-a-Game-Changer-for-Seniors.aspx#page1
2 Fair Debt Collection Practices Act 15 U.S.C. §1692 et seq. (hereinafter "FDCPA")
3 FDCPA §805
4 FDCPA §805(d)
5 FDCPA §805(c)
6 See FDCPA §805(c) for limited exceptions
7 FDCPA §805(a)(2)
8 FDCPA §806
9 FDCPA §807(11)
10 FDCPA §806(6)
11 FDCPA §807(2)(a)
12 FDCPA §807(4-5)
13 FDCPA §808 (1)
14 See §809 for more details about the validation notice requirements.
15 A partial list of exemptions is found at Mont. Code Ann. §25-13-6
16 See The Final Interim Rule at 31 C.F.R. §212
17 The procedure for claiming an exemption is found at Mont. Code Ann. §25-13-212
18 See Mont. Code Ann. §25-13-212(2), See also CBI v. McCrea, 365 Mont. 512 (2012.)
19 Mont. Code Ann. §25-13-212(1)
20 http://www.consumer.ftc.gov/articles/0149-debt-collection, http://www.consumerfinance.gov/older-americans/,

***Gail K. Bourguignon*** *is licensed in New York and Montana. She holds an M.A. in Community Counseling and worked with adolescents in residential and group home treatment programs before pursuing her law degree. She practiced child advocacy law for six years and now serves as counsel for Collection Bureau Services, Inc. in Missoula.*

# State Bar trustee candidate Q&A

***Editor's note:*** *President-Elect, Secretary-Treasurer, Area E, Area F, Area H are up for election. Area F, Area H, and Secretary-Treasurer have contested races and those candidates were asked to answer two multi-part questions in as few or many words as they wanted within a cap of 850 words (not including bios). Responses from contested races are printed on pages 11-18. We did not solicit responses from uncontested races -- President-Elect (Mark Parker) and Area E (Kent Sipe).*

## Secretary-Treasurer Candidates

### Tammy Wyatt-Shaw

Tammy Wyatt-Shaw earned her B.S.B.A, with honors, from the University of Arkansas in 1989 and her Juris Doctorate, with high honors, from the University of Montana in 1994. Tammy has spent more than 18 years representing individuals and businesses in civil litigation in Montana State and federal courts, both at the district and appellate levels, with an emphasis on personal injury and death cases, employment litigation and insurance coverage. She practices with the Williams Law Firm in Missoula, Montana.

Tammy is admitted to the State Bar of Montana, as well as the U.S. District Court of Montana and the Ninth Circuit U.S. Court of Appeals. She is BV-rated by Martindale-Hubbell. Tammy is Past President of the Western Montana Bar Association and the Missoula Food Bank. She has served on the Board of Trustees since 2006 and is an active member of the Defense Research Institute. She enjoys watching the trout rise with her husband Graeme from their homes on the Bitterroot River in Montana and the Calcurrupe River near Llifen, Chile.

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### Bruce Spencer

Bruce Spencer was born in Glasgow, Montana and raised in Great Falls. He attended the University of Montana for his undergraduate degree and obtained his JD from the University of Oregon. He lives in Helena with his wife and two young sons.

Bruce is a shareholder with Smith Law Firm, P.C., the oldest law firm in Montana. His practice areas emphasize, creditors rights, commercial law, commercial litigation, real estate, automotive law, insurance law, health care law and governmental relations.

Bruce is Member of the State Bar of Montana, and has served on its Board of Trustees and was a local bar president. He is the recipient of the 2004 First Judicial District pro bono award. In addition Bruce has lobbied the Montana Legislature on behalf of the State Bar for the past two sessions. Bruce is licensed to practice in Montana state and federal courts and is admitted to practice in the United States Supreme Court, 9th US Circuit Court of Appeals, the US Court of Claims, and the

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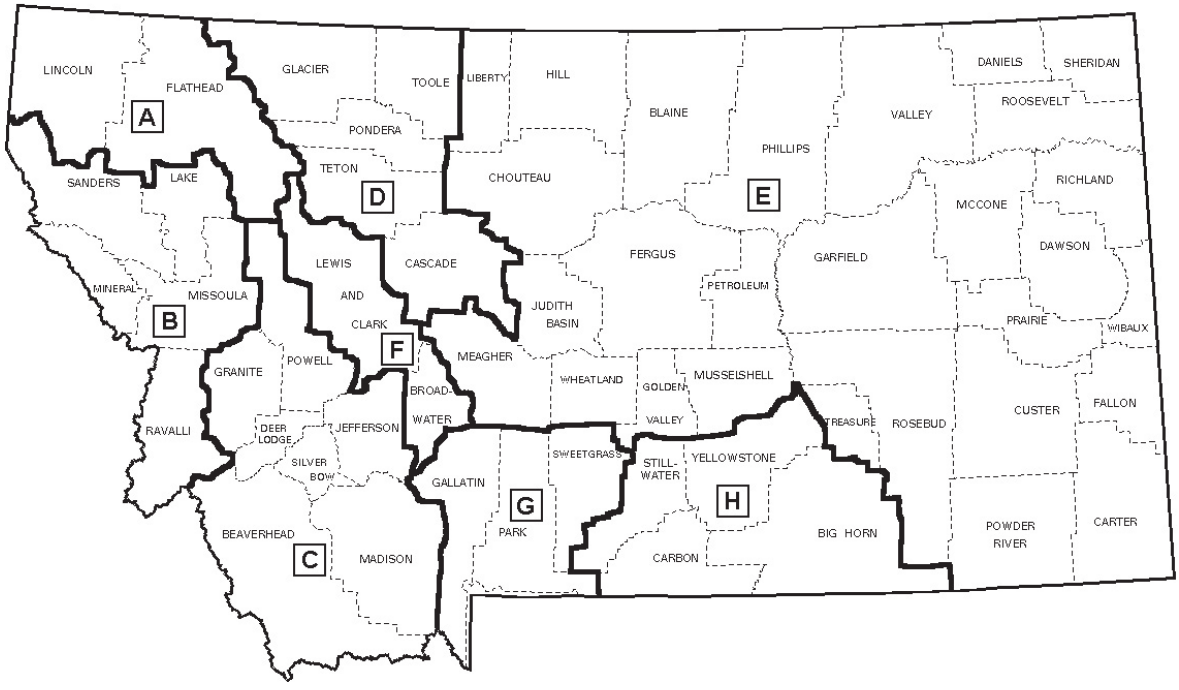
## State Bar Trustee Areas



### Luke Berger

Luke was born in Bozeman and was raised across the state from Baker to Dillon.

He is a graduate of Carroll College and University of Montana School of Law. Luke ran a soup kitchen program as an AmeriCorps volunteer in Baltimore, Maryland. He clerked for the Montana Supreme Court for Justices Morris, Cotter, and Warner.

Currently, Luke is a deputy county attorney with the Lewis and Clark County Attorney's Office where he prosecutes felony crimes and appears for the state in the First Judicial District Treatment Court and in involuntary commitments. He is married to Alexis Sandru. In his free time, he enjoys college sports, lively political discussions, and microbrews from the across the state.

#### How do you see the State Bar's role in relation to the courts? To the public? To its members?

The Bar's most important role is to effectively communicate with the courts, public, and its members. The Bar needs to be an effective conduit between these groups.

The Bar must also take on the role of educator when it comes to the public. Our profession is confusing enough to

**BERGER,** page 14

### Kate McGrath Ellis

Kate is an associate attorney with the law firm of Hughes, Kellner, Sullivan, and Alke, PLLP, where she practices civil litigation in the areas of employment law, construction law, insurance law, and health care law, primarily as defense counsel. Prior to joining HKSA in September 2010, Kate clerked at the Montana Supreme Court for two years for Justice John Warner (ret.) and Justice Michael Wheat. Kate graduated from the University of Montana School of Law, and then became a member of the State Bar of Montana and the Oregon State Bar. Currently, Kate is the president of the First Judicial District Bar Association and co-chair of the State Bar's Annual Meeting Committee, which will be held in Helena this year.

Kate is originally from Overland Park, Kansas (a suburb of Kansas City) but has lived out west since 1996. Practicing law is Kate's second career. Kate earned a Bachelor's degree in Biology and a Master's degree in Environmental Biology. For almost ten years after graduate school, Kate was a park ranger for the National Park Service in Grand Teton, Hawaii Volcanoes, and Rocky Mountain National Parks. In Kate's personal time, she enjoys running, telemark and cross-country skiing, biking, hiking, camping, and spending time with her husband, two daughters, and two dogs.

**ELLIS,** page 16

### Tom Keegan

Tom is a University of Minnesota Law School graduate (1973). His first employment was as a staff attorney at the Legislative Council from 1973-1975 during Montana's only two annual legislative sessions. Thereafter, Tom was chief (and only) legal counsel at The Montana State Fund from 1975-1976. Since July of 1976 he has been in private practice in Helena. He is a past-president of the First Judicial District Bar Association, member of the Lawyers' Fund for Client Protection since its creation in 1975 and is presently a member of the State Bar of Montana Board of Trustees.

Previously, Tom served on the Montana Board of Pardons from 1982-1990. Since 2001, he has been the attorney member of the Montana Lottery Commission.

He and his wife of 40 years have four children and five grandchildren.

#### How do you see the State Bar's role in relation to the courts? To the public? To its members?

The State Bar has always supported Montana's judiciary in any way it can and we should continue to do so. I have come a long way from 1975 when I actively opposed the Unified Bar. The programs that flowed from unifying the Bar have helped the public and the Bar's members immensely. Over the years

**KEEGAN,** page 16

### Monica Tranel

Monica grew up in eastern Montana and graduated from Gonzaga University and Rutgers School of Law. After spending most of a decade in Philadelphia, she returned home to Montana. Monica has a solo practice focusing on utility regulation and water law as well as a variety of other issues.

#### How do you see the State Bar's role in relation to the courts? To the public? To its members?

With respect to the courts, the State Bar should work to further fairness and neutral decision making in a relatively small bar association, providing a resource to both the decision makers and to the advocates to help make the process fair and objective where the participants often have long, and sometimes complex, relationships with each other.

In relation to the public the State Bar needs to provide a positive message regarding the role that attorneys have in society. Our message should be that the service we provide is about advancing justice, and move away from the perception of fighting and winning that is too often associated with lawyers. I would like to hear people say "My child should be a lawyer, she is really interested in just and right outcomes" rather than "My child should be a lawyer, she likes to debate."

The State Bar should be a resource for its members,

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### Ross W. McLinden

Ross is one of three current Bar Trustees for Area H (Yellowstone, Big Horn, & Carbon Counties), serving in that capacity for nearly two years now. He decided to become a Trustee because of his enjoyment serving on the State Bar's Professionalism Committee, which puts on the New Lawyer Workshops and the free Road Shows for attorneys around the State. Since becoming a Trustee, Ross has been appointed to serve on the State Bar's Finance Committee. He also volunteers for the State Bar's Fee Arbitration Panel for Yellowstone County.

Ross practices at Moulton Bellingham PC, focusing primarily on litigation, with an emphasis toward employment law, construction law, contract disputes, and insurance defense. He is from Richey, Montana (a small town in eastern Montana), and graduated from MSU–Billings after a one-year stint playing basketball at Montana Tech in Butte. He then attended Gonzaga Law School before returning to Billings.

In addition to being active in the State Bar, Ross also enjoys being active in the local community. He serves on the board of directors for Billings Studio Theatre, currently as its President. He is also a member of Billings West Rotary and serves on its Board of Directors.

**McLINDEN,** page 18

### Juli Pierce

Juli grew up in Billings, the oldest of five kids. After graduating from college, she was a social worker for Child and Family Services in Billings for two years. During this time, Juli decided she would make a greater impact for children as an attorney than she was able to make as a social worker.

After she graduated from law school, she started working at the Yellowstone County Attorney's Office where she now focuses on prosecuting violent and sexual felonies, mainly those cases involving child abuse and domestic violence.

Currently, Juli is a board member for the Yellowstone Area Bar Association; she has enjoyed getting to know members of her profession that work in other areas of the law since her area is so narrowly focused.

Juli would enjoy fostering communication between the State Bar and the local bar; she would share the perspectives from the local bar at the State level and vice versa. She also thinks it is important for government and public sector attorneys to be more involved with the Bar at the state and local level — adding that attorneys in their areas of expertise often become isolated from other attorneys who do not share the same specialties. Juli says being a Trustee for the State Bar would help foster that communication between herself as a government attorney and those in the private sector

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### Monique Stafford

Monique has been practicing law in Billings, MT since the fall of 2007 and is an associate at Crowley Fleck PLLP. She is a graduate of the University of Montana Law School and holds a B.A. degree in Sociology and a B.A. degree in English from the University of Montana. She was originally elected to the Montana State Bar Board of Trustees for Area H in September 2011 and will complete that term in September 2013.

Monique hails from Manhattan, MT, where her family still resides. In her spare time, Monique volunteers for Habitat for Humanity and Tiny Tails K-9 Rescue - a small breed rescue which focuses on canines, but which also accepts felines and other small breed animals as the need arises. As time allows, she works on her 1968 Mustang with her fiance, whom she plans to marry this summer.

#### How do you see the State Bar's role in relation to the courts? To the public? To its members?

The State Bar is intended to be the face of a divergent group of individuals whom all have at least one pursuit in common: the furtherance of justice and law in the State of Montana. While attorneys may differ in many respects, I have yet to meet a Montana attorney who does not honestly believe that the role of the attorney is to provide a voice for his or her client. The State Bar similarly supplies a voice to the public and courts

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### Michelle M. Sullivan

Michelle started as an associate with Holland & Hart after she graduated from the University of Montana Law School in 2000. A little more than four years into her practice, her twin daughters were born. Michelle stayed home full-time with them for about a year and a half. She then spent nearly six years as a part-time attorney at Holland & Hart, before returning full-time to the practice of law at the beginning of 2012. Michelle is a litigator, practicing in the areas of employment law and general commercial litigation.

Before attending law school, she worked as an auditor for KPMG, for a year each in Billings and Washington, D.C. She received undergraduate degrees in accounting and Spanish from MSU-Billings. Michelle spent the first 18 years of her life in Forsyth, Montana. Go Dogies!

When not working, she enjoys long weekend walks with her family, pizza, movie night on Fridays, and the occasional vampire novel.

#### How do you see the State Bar's role in relation to the courts? To the public? To its members?

In relation to the courts, the Bar can help by suggesting new rules and by creating opportunities for interaction between the Bench and the Bar. The Bar should communicate to all of its members changes in rules, including changes in the local

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**WYATT-SHAW,** from page 11

### How do you see the State Bar's role in relation to the courts? To the public? To its members?

The role of the State Bar is eloquently articulated in its Constitution. These constitutional principles and purposes stand strong irrespective of the passage of time or executive agenda. The State Bar must encourage the courts of this state to continue to improve the quality and timeliness of the administration of justice they deliver to litigants and persons appearing before them. To its members, the State Bar must foster, maintain and indeed require that those who engage in the practice of law in this state adhere to the highest standards of integrity, learning, competence, public service and conduct. In effectively discharging these duties, the Bar serves and garners the respect of the public.

### What do you see as the biggest hurdles the Bar will confront in the next 5 to 10 years?

In the seven years I have served on the Board of Trustees, three particular areas of concern come to mind.

First, the "technology divide." Changing technology creates unique competency issues; seemingly has resulted in declining professionalism and collegiality; and implicates client confidentiality in ways not fully revealed. The Bar must continue to monitor, assist and educate members as we move to "paperless offices," including the Clerks of Court.

Second, "state bar relevance." Member surveys suggest certain of the Bar's activities are becoming increasingly irrelevant, such as the Annual Meeting and dues being too high in relation to services provided. The Bar must change this perception; or alternatively, restyle the services it offers.

Third, "dwindling resources," both financially and professionally. Fifty percent of the Montana Bar is over 50 years old. Disability, retirement, and attrition may result in "orphan files," abandoned practices, and a leadership vacuum. Geographically defined legal communities as we know them may change or even cease to exist. The Bar must develop and retain recent graduates and new lawyers to fill this void.

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**BERGER,** from page 12

those of us practicing, so in educating the public, we need to offer the best neutral information regarding whatever the topic may be.

The Bar must also continue to listen to the concerns of our members and show we are listening by addressing the concerns of our local bar groups.

### What do you see as the biggest hurdles the Bar will confront in the next 5 to 10 years?

I see this as a tie between dealing with the changing needs of the public and the changing needs of our members.

The need for reduced fee or pro bono legal services has risen, and unless we adopt successful strategies to address these needs, we will reach a critical stage. This change in needs will influence the courts, which will in turn affect our practice directly and indirectly. I applaud the efforts taken by the access to justice committee and local bar groups in working to provide legal services. This is a great step, but we need to continue to take additional steps in that direction.

The needs of our members are also changing -- whether it be technological updates or the closing of practices. The Bar has seen these issues coming and both are hot topics at CLEs. Change is constant, so we must always keep that continual hurdle in mind.

By addressing these and other issues the State Bar will remain an important part of the state legal community.

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about its members.

The Preamble to the Montana Rules of Professional Conduct notes that an attorney's role is as advisor, advocate, negotiator, and evaluator. I believe the State Bar's role is the same: the State Bar should advise the members of matters of import for their practices, advocate for the betterment of the profession in the public forum, negotiate with the courts on matters affecting attorneys and the judiciary, and evaluate the current and future needs of the members so as to allow them to best direct how their profession should be shaped and cultivated.

### What do you see as the biggest hurdles the Bar will confront in the next 5 to 10 years?

It is no secret that the law often evolves slowly, with sudden bursts of activity. This kind of progression presents unique challenges. When the law is in one of the slower evolving stages, the desire to 'not fix what ain't broken' is strong. Leaving things to develop without a design is tempting during these phases, but can lead to the profession being completely unprepared for an abrupt change. I believe, therefore, that the biggest hurdle the Bar will confront in the next 5 to 10 years is inertia in planning.

There are multiple areas in the legal profession that desire considerable thought as the Bar moves in to the next few years; technology, access to justice, and costs of providing services are just a few of the major areas which will require focus. Although complete cohesion among the members is neither encouraged, nor in truth, really desirable (given that difference perspectives will often lead to positive growth) the Bar is at a point where it must decide how it wishes to proceed and what goals are should take prominence.

We have all seen the struggles that eastern parts of Montana have dealt with as the Bakken formation has exploded. In response, the courts and the Bar are doing their best to meet the needs of the public and the profession, but the road has not been easy for them in doing so. This shot across the bow, so to speak, can be a lesson for the rest of the profession: growth is coming to Montana, and without a development plan, we may be unable to meet the next boom, in whatever form it may come.

**SPENCER,** from page 11

Federal Circuit Court of Appeals.

Bruce enjoys gourmet cooking, golf, skiing, fishing, and spending time with his wife and sons enjoying all that Montana has to offer.

## How do you see the State Bar's role in relation to the courts? To the public? To its members?

Courts: I see the State Bar as the liaison between the member attorneys and the courts, as well as a partner with the courts in important public policy matters. Often attorneys will have concerns about a court or how courts are operating, but given the nature of our relationship with judges we are reluctant to express these concerns. I feel that the State Bar, can and should work with the courts to address these concerns, while if the attorneys wish, keeping the attorney identities confidential. The State Bar also, while maintaining good and open relationships with the Montana Supreme Court, needs to be able to have frank discussions with the Montana Supreme Court regarding tasks which the Court wishes the Bar to undertake. Finally, the State Bar should partner with our courts to engage in public outreach regarding the judiciary, lawyer rolls, and opportunities for the public to access the courts and legal assistance.

Public: The State Bar is the public face of lawyers in Montana. It can and should work to counter the negative attitude many in the public have about attorneys. This attitude affects not only those of us in private practice but also those in public service. The State Bar should continue with its efforts to inform the public about access to equal justice and continue to work to create a better judicial system which benefits the public.

Members: I feel this is an area where the State Bar can make the greatest strides in improvement. Many members while I was on the Board of Trustees wanted to know "What is the State Bar doing for me as a lawyer?" It is perfectly proper and right that the State Bar act as an advocate for its private and public members and endeavor to find ways to enhance the public and private practice of law. A happy and fulfilled attorney is one who will give back to his or her community and to our profession. I feel the State Bar should take a leading roll in assisting each member enhance the practice of law and our profession. In addition the State Bar needs to be out front in public discourse defending our profession and the court system.

## What do you see as the biggest hurdles the Bar will confront in the next 5 to 10 years?

The potential shortage of attorneys in future years may have a large impact on the Bar. We are as a whole getting older. (My wife took great glee in pointing out my grey hairs the other day, it was hard to find them due to the bald spot), It is getting tougher to fill the law school roster for each year. Obviously a lack of new members will have substantial impacts on the State Bar and the practice law.

Reciprocal status with other states and maintaining a unique Montana bar exam are issues that will need to be addressed. I feel the State Bar will need to take a public position on these issues. What is best for Montana attorneys and our court system must be the focus.

Funding for the public defender system will need to be addressed. This system is underfunded as it currently stands. We as lawyers need to recognize that it is a constitutional requirement of society to ensure that in cases where personal liberty is at issue an adequate public defender is available.

Establishing and maintaining an effective public outreach program to educate the public about our role in society should be a focus of the State Bar. After all, if our own Bar will not advocate for the profession who will?

My experience as a Trustee of the State Bar enabled me to meet with many lawyers statewide. I have found this to be enjoyable and educational. This experience also provides incites to how the State Bar functions and where it can be improved.

I feel that it is my obligation if elected to attend as many meetings as possible and to always be prepared for these meetings. I would treat my service to the State Bar just as I would my obligation to represent my clients in court. It would be my honor to serve you as your Secretary Treasurer.

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**SULLIVAN,** from page 13

rules of State district courts, the Montana federal courts, and the rules of various administrative agencies where Bar members practice.

For the public, the Bar should promote the pro bono work that lawyers already do and encourage more pro bono and civic work among its membership.

For its members, the Bar should provide a forum for the discussion of relevant topics related to its members, provide resources for practitioners, and continue its strong history of educating its members through inexpensive yet substantively solid CLE programs. The Bar should promote collegiality and professionalism among its members.

## What do you see as the biggest hurdles the Bar will confront in the next 5 to 10 years?

Technology will continue to make our lives as lawyers not only much easier but also incredibly more difficult over the next several years. Certainly, technology is a time-saver. But the difficulties in dealing with electronic discovery, learning new electronic filing systems, and keeping up with the latest hardware/software/malware/etc., not to mention the pressure to stay "plugged in" to the office 24/7, are the trade-offs for practicing in the 21st century.

As the members of the Bar become acquainted with and start practicing under the limited-scope representation rules, revising and refining these rules will be important to ensure the goals of allowing such representation are met without creating additional problems.

Generational differences among members of the Bar could be a challenge. Our membership is made up of traditionalist, baby boomer, Gen-X, and Gen-Y lawyers. Each has its own approach to life and to the practice of law. No approach is bad or wrong, but they are different, and should be recognized.

**ELLIS,** from page 12

## How do you see the State Bar's role in relation to the courts? To the public? To its members?

The State Bar's roles in relation to the courts, the public, and its members are not mutually exclusive because the State Bar serves to connect these groups, creating a stronger effort to achieve the goal of an efficient legal system. In 1974, the Supreme Court created a unified state bar. What struck me about the Order for unification was that the considerations of Montana's need for a state-wide unified bar apply equally to define the State Bar's role almost 40 years later. The Court held that the public would be served by a unified bar because it could best ensure that competent and ethical legal representation, by making certain that high standards were upheld by each attorney.

The State Bar's role remains unchanged today. The State Bar plays a critical role in the self-regulation of the legal profession by setting standards for admission to the bar and providing continuing education and professional development opportunities. Implied in the term "self-regulation" is that the Bar and the members must maintain open lines of communication. Not only does this require the Bar to reach out to the membership and solicit feedback on their needs, but it also requires the membership to participate in State Bar activities and take active roles in its leadership.

As recognized in 1974, the State Bar's role in relation to the public is inseparable from its role in relation to its members. The State Bar's fulfillment of its role in the self-regulation process serves the public because it significantly contributes to achieving the goal of having competent and ethical legal representation in Montana. The State Bar's duty to the public does not stop there, however. It must continue to strive to ensure all members of the public receiving the legal services they need. The State Bar must be a leader in providing access to justice by continuing to promote pro bono service among its members, funding entities that provide legal services for no or reduced fees, providing quality information and documents available to self-represented litigants and pro bono attorneys, and educating the public on the legal system.

The State Bar's role in relation to the court system similarly serves the goal of achieving efficient and effective administration of justice. The State Bar is in the best position to encourage the exchange of issues and ideas between the bench and bar by facilitating communication, oftentimes serving as the messenger and catalyst of needed change. For example, in February 2013, the First Judicial District held a bench/bar discussion between the First Judicial District Judges and the local bar members. Not only was this an opportunity for open communication about technical procedural issues, which helps the district run smoother, it also provided the rare opportunity for informal interaction with the judges outside of the courtroom. The State Bar plays a similar role of fostering and facilitating communication, albeit on a state-wide level, for the common purpose of achieving a strong and efficient legal system in Montana.

## What do you see as the biggest hurdles the Bar will confront in the next 5 to 10 years?

One hurdle the bar faces now and increasingly in the next 5 to 10 years is the impact of technology on the legal profession. The State Bar is in the best position to educate members on emerging technologies that attorneys are expected to know, such as keeping electronically-stored client information confidential, proper use of social media for investigative purposes, and competency in accessing up-to-date legal information, to name only a few. The State Bar will also have to address the flip side of this issue, which is the impact of technology on stress levels. With today's technology, attorneys are constantly interrupted by cell phone calls, email alerts, texts, and electronic reminders, often during critical personal time. On the other hand, attorneys are required to produce a well-focused, detail-oriented work product. These interruptions increase an attorney's stress levels related to competently finishing work, and could negatively impact the quality of work. As this problem continues to increase, the State Bar must educate members on tools to reduce stress created by these competing issues.

Another hurdle the State Bar faces in the future, as well as today, is providing access to justice for those who cannot afford it. The cost of taking a case to resolution, particularly any case requiring a jury trial, is preclusive for many people. On the other hand, most attorneys are limited in the amount of pro bono service they can do so they can earn a living. Providing information and documentation in the form of self-help law centers and online forms is a big step toward empowering litigants to access justice themselves. Technical and complex cases exists, however, that can overwhelm pro se litigants. The State Bar must continue to strongly encourage pro bono service to the community, fund programs like Modest Means and Montana Legal Services, promote limited representation, and use available technology to inexpensively educate pro se litigants and pro bono attorneys.

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**KEEGAN,** from page 12

the Lawyers' Fund for Client protection has reimbursed clients over $1,000,000 in funds stolen by Montana attorneys. The Lawyers' Assistance Program helps attorneys in need and also protects the public from the consequences of their impairments. The only caution I would add is the State Bar cannot solve all the problems of attorneys and the public and it needs to be aware of that and focus on the programs it has in place.

## What do you see as the biggest hurdles the Bar will confront in the next 5 to 10 years?

The biggest hurdles facing the State Bar in the next 5 to 10 years are the shortage of attorneys in rural areas and the impending retirement of the baby boom generation.

**TRANEL,** from page 12

providing assistance and guidance to the varied ways that attorneys choose to practice in Montana, from solo and small firms to larger firms. I would especially like to see all of us implement ways to allow lawyers, both men and women, opportunities to balance raising their families while continuing their profession. I think the Montana Bar is better than most at offering this balance; I would like to see it continue and grow and include both male and female lawyers.

### What do you see as the biggest hurdles the Bar will confront in the next 5 to 10 years?

It will be important for the Montana Bar to work to promote and protect the importance of good judgment in the practice of law. Technology can be a wonderful resource, but nothing replaces good judgment in advising clients and advocating for a certain outcome. The more our world speeds up, the more important it is to slow our thinking down and to be deliberate in our decision making. One way the Bar can do this as a practical matter is to make sure that retiring lawyers continue to participate in the Bar, offering lessons learned from decades of practice. Those lawyers are a tremendous resource we should reach out to consistently. Also, I would like to see the Bar continue to find ways to keep the Montana Bar collegial and respectful. One of the best parts of practicing in Montana is that we know we will see our adversaries and arbiters again. Focusing on the best parts of having a small Bar will benefit not only the members of the Bar but all of the people we serve.

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**PIERCE,** from page 13

throughout the state. She also thinks it's important to give back to the profession that has given so much to her.

### How do you see the State Bar's role in relation to the courts? To the public? To its members?

The State Bar should be integral in building and encouraging professionalism between the bar and the Courts. Part of that professionalism should come from enhancing the education of the Bar's members about the judiciary's role and what the judiciary expects from its members in their daily practices. With regular communication from the Bar such as the Montana Lawyer, the Bar could further open lines of communication. It is important to learn what the judiciary expects from those of us that appear before them.

The State Bar should expand its efforts to educate the public about how to obtain legal assistance in an area where there may be limited access. The State Bar should continue to make the Lawyer Referral Service even more accessible to the public; additional public awareness in this area would be beneficial. Unfortunately the public often has a negative perception of attorneys and I believe this is not a true picture of our profession. Attorneys need to re-establish that our profession is first and foremost a helping profession. The State Bar should continue its efforts to educate the public on attorneys' roles, ethical standards, and what is required of us to continue to practice law and help people across the State.

The State Bar provides quality assistance and support to those of us practicing law in Montana and should continue to provide competent and affordable continuing legal education programs to its members. The State Bar should continue to support strict ethical standards for its members based on the rules of professional conduct and work with the office of the disciplinary counsel. The State Bar should continue to provide assistance to lawyers regarding mental health and substance abuse as our profession experiences a significant amount of stress, no matter what area of law we practice. The SAMI program could be woven into other ethics education courses provided to members across the State in the coming years. It is important to provide assistance to those of us who need it and for the members to know that asking for assistance from other attorneys is acceptable and in fact, welcomed and encouraged.

### What do you see as the biggest hurdles the Bar will confront in the next 5 to 10 years?

I know many attorneys who are going to retire in the next few years. Just five years ago, who would have thought we would ever have a shortage of attorneys? But the stark reality that confronts us in the next 5 to 10 years is this shortage of practicing attorneys in the State. We as a State Bar need to encourage high school and college aged students to consider the law as a profession. Not only will there be a shortage of attorneys in our State, but due to the ever increasing complexity of many areas of the law, specialization has become the norm. This has served to limit the number of "general practice" attorneys and requires an even greater number of us to provide services to those who need it.

Closely related to this shortage of attorneys is the harsh reality of the shifting population centers in this State. Eastern Montana currently faces a significant shortage of attorneys and a mass influx of people. There is a need for so many attorneys to assist the few who now work near and around the Bakken oil fields. I am interested in addressing the problem of how we encourage migration east in the legal field while at the same time dealing with lack of housing and office space. We need to examine new ideas that can utilize current technology to its fullest capacity, thereby allowing attorneys from across the State to assist those in Eastern Montana who need legal help.

I want to continue to support the financial health of the State Bar as well. With a shortage of practicing attorneys will likely come a shortage of incoming funding for the services the State Bar currently provides. I plan to be involved in developing long term solutions to assist the profession as a whole.

**McLINDEN,** from page 13

### How do you see the State Bar's role in relation to the courts? To the public? To its members?

I view the Bar's role in relation to the Courts as a liaison between its members and the Courts. State Bar leaders should elicit and listen to its members' experiences, issues, and concerns pertaining to the practice of law and relay them to the Court. It is the Supreme Court, not the State Bar, that regulates the practice of law. As Trustees, it is our duty to communicate with the Courts the issues and concerns of our membership.

I view the Bar's role in relation to the public as one of education and good public relations. The Bar should strive to increase the public's understanding of the judicial system and the roles involved therein. A better understanding will lead to a more positive view of the Bar and its members. The Bar should also be out in the public highlighting and promoting the ways in which its members give back to their communities (whether it is through volunteer boards or pro bono work, etc.).

As for the Bar's role in relation to its members, I view it as one of service. The Bar should be providing the services that its members want, while at the same time avoiding services its members do not want. As an example, the Bar should be providing CLE's that its members find relevant (versus any old CLE), and the Bar should strive to provide the desired services in such manner as to not further increase cost upon its members. The Bar must also look out for its members' best interests during Legislative Sessions. Our goal must be to remain self-regulated.

In the end, the State Bar's enunciated Mission is to lead the profession and serve the public interest. There are various views on how to accomplish that mission, but in reality, there is no single right way. The legal profession is ever changing, and so to must the Bar and its members.

### What do you see as the biggest hurdles the Bar will confront in the next 5 to 10 years?

This is a very timely question because last year (at the Bar's Long Range Planning Meeting), the goal was to identify the biggest challenges confronting the Bar. State and local Bar leaders participated in that meeting. Many challenges were identified, but the top eight (in no particular order) were: (1) lack of civics education, (2) a technology divide, (3) long delays in civil litigation, (4) the number of pro se litigants, (5) aging attorney demographics, (6) end of practice issues, (7) prioritizing bar services and programs, and (8) State Bar relevancy.

Of these eight challenges, I view the last two as particularly important given the state of the Bar. If the Bar continues down the path it has been going, it will be looking at a dues increase in the very near future. I certainly do not want to see that happen, and I know many attorneys around the State cringe at the thought. Thus, the Bar needs to re-evaluate and prioritize the services and programs it provides. I am happy to report that the Bar is currently rewriting its Strategic Plan in an effort to address those issues, but it will always be a work in progress.

The goal of re-evaluating and prioritizing the Bar's services and programs should not only be to avoid a dues increase, but to also become more relevant to its members, which I know many attorneys do not believe it to be. I hope to continue to work to change that belief, and I ask for your support and vote. Thank you.

# Prior statements in Montana: Part II

*Prior consistent statements under M.R.E. 801(d)(1)(B); shouldn't Montana cases be consistent?*

**By Cynthia Ford**

Last month, I wrote about prior inconsistent statements under M.R.E. 801(d)(1)(A). For that type of evidence, the rule, the Comment, and the cases are fairly easy. If a witness testifies on the stand differently from what she said outside the courtroom, her out-of-court inconsistent statement is admissible for both impeachment and substantive proof.

This month's subject, prior consistent statements under M.R.E. 801(d)(1)(B), is much less straightforward. Whereas prior inconsistent statements are usually admissible, prior consistent statements are not, and the law about when they might be is quite confusing. The language of the Montana rule differs from the federal version and although the Montana Commission Comment indicates Montana wanted a similar rule with clearer language, the difference has mattered in some cases. Further, the myriad Montana Supreme Court cases attempting to apply this Montana rule are, as we say technically, a mess. It is little wonder that a judge recently called me for some help on this issue, and little wonder that I could not provide much. I hope the research I have done on this issue will help some of you in current cases, and lead to some changes to make the law in this area clearer.

## Background

Under the common law, and under the Montana and Federal Rules of Evidence, the general rule about prior consistent statements is exactly the opposite of the rule about prior inconsistent statements. Prior inconsistent statements under M.R.E. 801(d)(1)(A) are admissible without restriction, both for impeachment and substantive purposes. (See the previous issue of The Montana Lawyer for more on this subject, and the difference between the Montana and federal rules on inconsistent statements). The presumption is that the prior consistent statements do not come in. "Under common law, a witness could not be supported by evidence of prior consistent statements because no amount of repetition makes the story more probable. 4 Wigmore Evidence, Section 1124 (3rd ed. 1940)." Montana Commission Comment to M.R.E. 801(d)(1)(B).

However, even at common law, a witness who was accused of lying on the stand for a specific reason could have her other consistent statements admitted at trial if they were made before the alleged reason to lie occurred. The Rules, federal and Montana, carried this approach forward, and allow prior consistent statements to be admitted in some, but only a few, circumstances. When they are admissible, the prior consistent statements (like inconsistent statements) may be considered as substantive as well as rehabilitative evidence.

The M.R.E. Commission Comment to M.R.E. 801(d)(1) cites the federal Advisory Committee Note to F.R.E. 801(d)(1):

> Subdivision (d)(1) deals with certain prior statements of the witness who is now testifying and subject to ideal conditions of oath, cross-examination, and presence of the trier of fact. The Commission feels that the application of the conditions at the trial or hearing is sufficient to take these statements out of the hearsay rule, for requiring their application at the time the statement was made would have the effect of excluding almost all prior statements. Therefore, these prior statements are admitted as substantive evidence. It should also be noted that **the subdivision limits the types of prior statements placed outside the hearsay rule to three: This is a compromise between allowing "general use of prior prepared statements as substantive evidence" which could lead to an abuse of preferring prepared statements to actual testimony, and allowing no prior statements to be admitted**, which is not sensible, for " ... particular circumstances call for a contrary result. The judgment is one more for experience than logic". Advisory Committee's Note, supra 56 F.R.D. at 295. (Emphasis added).

Even though the Montana Evidence Commission quoted with approval the federal Advisory Committee Note to 801(d)(1)(B), the Montana version of the prior consistent statement rule, 801(d)(1)(B) is a bit different from exact wording of the federal rule. Here are the two current versions, with the language that differs from the other in bold:

> F.R.E. 801(d)(1)(B):
>
> (d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:… (B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant **recently fabricated it or acted from a recent improper influence or motive in so testifying**;
>
> M.R.E. 801(d)(1)(B):
>
> (d) Statements which are not hearsay. A statement is not hearsay if:
>
> … the statement is ...(B) consistent with the declarant's testimony and is offered to rebut an

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> express or implied charge against the declarant of **subsequent fabrication, improper influence or motive…**(Emphasis added).

The Montana Evidence Commission consciously changed the language of the F.R.E. version (which was then stylistically different from the 2011 version set out above) explaining:

"Clause 801(d)(1)(B) is not the same as the Federal Rule. It provides " ... consistent with his testimony and his offer to rebut an express or implied charge against him of recent fabrication or improper influence or motive ... ". The clause deletes "recent" and "or" following fabrication so that it reads " ... consistent with his testimony and is offered to rebut an express or implied charge against him of subsequent fabrication, improper influence or motive ... ". The Commission changed the language of the Federal Rule to make the clause clearer."

The Montana Comment indicates that the language of M.R.E. 801(d)(1)(B) conformed to the then-existing state common law on admission of consistent statements, and mentions explicitly the requirement that the consistent statement must have been made before the grounds occurred which impeach the witness. The Comment also notes that the rule expands the common law in one way only, that the prior statement now can be used for substantive evidence in addition to rehabilitation of the witness:

> the common law does allow rehabilitation of a witness who has been impeached on the grounds mentioned in the clause. …**The prior consistent statement is allowed to rehabilitate the witness because it was made prior to the existence of the impeaching evidence; that is, the consistent statement is made and subsequently the impeaching evidence comes into existence**. When a witness testifies consistently with these prior statements, it " ... will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of discrediting influence".
>
> …
>
> Existing Montana law is consistent with and perhaps broader than the clause. The clause does change Montana law to the extent that **it allows prior consistent statements to be admitted as substantive evidence**. (Citations omitted, emphasis supplied).

The Commission mentioned three Montana cases (from 1901,1903 and 1975) discussing the common law rule about prior consistent statements, noting that the first one had not actually applied the rule and the second had specifically declined to do so. The third of the cases, though, did allow the prior consistent statements into evidence. The Commission observed:

> this case is consistent with the language of the clause, although it may also be interpreted as expressing concern over which story is the truth and not when the stories were told. Dicta in that case also indicates that the court should allow rehabilitation by prior consistent statements with any form of impeachment. On these two points it is apparent that this case is broader than the clause.

Thus, the Montana Commission clearly intended to restrict use of prior consistent statements to limited situations where the witness has been impeached only on the specific grounds ("triggers") listed in the rule, not just any form of impeachment. It also intended to implant a chronological requirement for the use of this exception to the general rule prohibiting consistent statements as hearsay. Lastly, the Commission intended the Montana version of the rule to do the same thing as the federal rule, only better.

In its seminal case on this issue, the U.S.Supreme Court took the same view of F.R.E. 801(d)(1)(B): prior consistent statements are admitted sparingly, only when specific types of impeachment have been asserted:

The Rules do not accord this weighty, nonhearsay status to all prior consistent statements. To the contrary, admissibility under the Rules is confined to those statements offered to rebut a charge of "recent fabrication or improper influence or motive," the same phrase used by the Advisory Committee in its description of the "traditiona[l]" common law of evidence, which was the background against which the Rules were drafted. See Advisory Committee's Notes, supra, at 773. **Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited...**(Emphasis added)

Tome v. U.S., 513 U.S. 150, 157, 115 S.Ct. 696, 701 (1995). (More about Tome below).

**The trigger can occur at any stage in the proceeding, whenever the opponent intimates that the witness' testimony is the result of recent fabrication, improper influence, or improper motive**

## Federal "trigger" cases

The Federal Advisory Committee which first drafted Rule 801(d)(1)(B) observed that, under the then-proposed rule, the blame for admission of a witness' prior consistent statement lies at the door of the party opposing that witness' testimony: "if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally." Advisory Committee's Note, supra, 56 F.R.D. at 296.

Thus, a party who wishes to limit the impact of a witness' testimony to the one statement in court should take care to avoid making any "express or implied charge" that the witness has recently fabricated his testimony, or "recently" became subject to an "improper influence or motive." As the federal cases illustrate, making such a charge "opens the door" to admission of the prior consistent statements, thus compounding the testimony of the witness. The door can be opened by argument, as early as opening statement, as well as by cross examination. Once it is opened, opposing counsel can bring in the consistent statements which occurred prior to the fabrication, improper influence or

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improper motive.

Until the door is opened, those statements remain hearsay and are inadmissible.

In a recent 7th Circuit case, the defendant's opening statement told the jury that the codefendant had a plea agreement which rewarded him for testifying for the government. Not only was the prosecutor allowed to bring in the consistent statement of the witness made prior to the plea agreement, he was allowed to do so on direct examination, thus "pulling the teeth" of the subsequent cross-examination.

> Foster clearly implied in his opening statement that Anderson would lie about Foster's involvement in the robbery in order to curry favor with the government. By implying that Anderson's plea agreement gave him an incentive to lie, **Foster opened the door to the admission of Anderson's prior consistent statements on direct examination, before Foster had an opportunity to challenge Anderson's credibility on cross-examination**. See United States v. Cherry, 938 F.2d 748, 756 (7th Cir.1991) (holding witness's prior consistent statement admissible in part because defense counsel implied during opening statement that witness had fabricated her testimony); United States v. LeBlanc, 612 F.2d 1012, 1017 (6th Cir.1980) (holding witness's prior consistent statement admissible where defense counsel implied in his opening statement that witness "should not be believed because of the favorable consideration he received from the government in his plea bargaining agreement"). Anderson's prior consistent statement was not hearsay under Rule 801(d)(1)(B), and the district court did not err. (Emphasis added).
>
> U.S. v. Foster, 652 F.3d 776, 787 (C.A.7 (Ill.),2011).

The Ninth Circuit cases are to the same effect. In U.S. v. Stuart, for example, the defense lawyer called a FBI agent to testify about an inconsistent statement the witness had made in an interview. The 9th Circuit affirmed the trial judge's admission of consistent statements made in the same interview:

> The record in this case reveals that, prior to the agent's testimony, Stuart had vigorously cross-examined Van de Water regarding his plea agreement with the Government, thereby calling into question Van de Water's motive in testifying. Therefore, the introduction of prior consistent statements made prior to the plea agreement was proper. United States v. Allen, 579 F.2d 531, 532-33 (9th Cir.1978) (prior consistent statements of a declarant made to an agent may be elicited from the agent under Rule 801(d)(1)(B) where defendant had sharply attacked the credibility of the declarant and implied that the declarant was testifying out of a motive to avoid criminal prosecution).
>
> U.S. v. Stuart, 718 F.2d 931, 934-35 (9th Cir.,1983). See also, U.S. v. Rinn, 586 F.2d 113 (9th Cir., 1978).

## Montana "trigger" cases

The Montana rule and most of the Montana cases similarly require the opponent to state or imply that the witness' testimony is the result of recent fabrication, motive or influence before the prior consistent statements can be admitted. However, some of the older cases seem to have missed this requirement and allowed prior consistent statements in, just because some form of impeachment had occurred. These cases violate both the letter and spirit of M.R.E. 801(d)(1)(B), and should be overruled.

The most recent case is State v. McOmber, 340 Mont. 262, 173 P. 3d 690 (2007). McOmber was convicted of solicitation to issue a bad check. His friend, Bill Peltier, testified at trial for the prosecution. He said on the stand that McOmber had been arrested for another charge, and had called Peltier to post bond for him. When Peltier said he didn't have enough money in his account to write a check, McOmber encouraged him to do so anyway, because McOmber would collect enough from other people to cover the check in the morning. Those other people didn't come through, Peltier's check bounced, and Peltier was arrested on a bad check charge. While in jail, Peltier first gave a written statement and then an oral interview. His bad check charge was dropped to a misdemeanor, to which he pled guilty, and McOmber was charged with the felony solicitation.

After Peltier testified against McOmber, the prosecution tried to introduce both his written statement and the transcript of his interview. The defense counsel used the old "gilding the lily" objection, which actually gets to the common law rule that generally prior consistent statements are inadmissible hearsay (which would be a better phrase for your objection). The trial judge overruled the objection, citing M.R.E. 801(d)(1)(A). On appeal, the Supreme Court laid out the general requirements for admission of prior consistent statements:

> Under the rule, there are **four requirements** that must be met for a statement to be admissible as a prior consistent statement:
>
> "(1) the declarant must testify at trial and (2) be subject to cross-examination concerning her statement, and (3) the statements to which the witness testifies must be consistent with the declarant's testimony, and **(4) the statement must rebut an express or implied charge of subsequent fabrication, improper influence or motive**." *State v. Teters,* 2004 MT 137, ¶ 25, 321 Mont. 379, ¶ 25, 91 P.3d 559, ¶ 25. (Emphasis supplied).
>
> State v. McOmber, 2007 MT 340, 340 Mont. 262, 266, 173 P.3d 690, 694-95.

The Court found that the defense indeed alleged that Peltier was fabricating in order to obtain favorable treatment of his own felony charge, and that the charge was in fact dropped to a misdemeanor, so that there was a charge of improper influence

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or motive. Nonetheless, the Court found (harmless) error in the admission of the prior statements, on chronological grounds (see below), holding that the consistent statement was not "prior" to the alleged influence or motive.

State v. Teters, 2004 MT 137, 321 Mont. 379, 385-86, 91 P.3d 559, 564, was a stepfather sexual abuse case. (A lot of the 801(d)(1)(B) cases, state and federal, arise in this context). The victim testified, and the prosecution introduced her prior statement to a social worker. The defendant objected, but lost both in trial and on appeal:

In the present case, defense counsel launched a general attack on J.U.'s credibility by insinuating that she possessed a motive to fabricate her testimony, and that she had been improperly influenced by her mother. Although implied, these charges of improper motive and influence were sufficient to satisfy the fourth requirement of Rule 801(d)(1)(B), M.R.Evid.

In contrast, in State v. Lunstad (1993), the child victim testified about the "private touch" by the defendant. The prosecution then tried to admit the child's four prior consistent statements to a therapist; the defendant objected on hearsay grounds and was sustained. The prosecution then took another tack: when the defendant testified later, the prosecutor directly asked him on cross-examination whether he thought that the victim was lying. (There were no questions about any specific motive or influence for the alleged lies). When he said "Yes," the prosecution re-offered the prior consistent statements made by the victim to her therapist under M.R.E. 801(d)(1)(B). The trial court bit and admitted the statements. The Supreme Court found this to be reversible error:

Here, the State itself opened the door by directly asking Mr. Lunstad if C.H. was lying, and then attempted to bolster C.H.'s credibility by the admission of the very prior consistent statements that the district judge had ruled inadmissible hearsay in the State's case-in-chief. The State cannot use this type of cross-examination to get evidence admitted which it could not get admitted prior to its cross-examination. We hold that it was an abuse of discretion and reversible error to allow the rebuttal testimony, in the form of prior consistent statements, to be presented on these facts.

State v. Lunstad, 259 Mont. 512, 516, 857 P.2d 723, 725-26 (1993). [But see, State v. Hart, 303 Mont. 71, 82, 15 P.3d 917, 924 (2000), a non 801(d)(1)(B) case, where the Court distinguished Lunstad and stated: "We refuse to adopt a bright-line rule regarding the propriety of questioning the defendant about the truthfulness of other witnesses.... we commit the decision on whether to allow this type of questioning in any particular instance to the sound discretion of the district court."]

## Effect of error in admitting consistent statements which do not meet the requirements of 801(d)(1)(b)

### Montana Approach

State v. Mensing was another sexual intercourse without consent case, this one decided in 1999. Again, the victim testified at trial and the prosecution tried to introduce two additional statements she had given to the investigating officers, both substantially similar to her trial testimony. The defense objected on hearsay grounds, but the trial judge admitted both statements under M.R.E. 801(d)(1)(B). On appeal, the State argued that the defendant had implied fabrication by the victim, citing the defense cross-examination about how many times the victim had met with the prosecuting attorneys and questions pointing out inconsistencies in the victim's testimony. The Supreme Court held that the cross-examination merely attacked the victim's overall credibility, and did not imply any specific motive for fabrication. Therefore, the prior consistent statements were not admissible:

> Here, Mensing only questioned Perry about inconsistencies in her story and implied that her memory was faulty as a result of drinking alcohol and smoking marijuana on the night in question. He did not question Perry regarding whether she had any reason to testify falsely. There was no charge-direct or implied-of a specific motive to fabricate. Our review of the record does not support the State's assertion that Mensing attacked Perry's credibility in a manner sufficient to allow admission of her prior consistent statements.
>
> ¶ 17 We conclude that Mensing made no express or implied charge of fabrication, improper influence or motive against Perry during her cross-examination and, as a result, the officers' testimony regarding her prior statements was not admissible as nonhearsay under Rule 801(d)(1)(B), M.R.Evid. ... Consequently, we further conclude that the District Court abused its discretion in admitting the law enforcement officers' hearsay testimony regarding Perry's prior statements.
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> State v. Mensing, 1999 MT 303, 297 Mont. 172, 176-77, 991 P.2d 950, 954.

Mensing's conviction was upheld, however, because the Court found the error to be harmless. More startling, it indicated that wrongful admission of prior consistent statements would **always** be harmless error:

> …a defendant is not prejudiced by the introduction of inadmissible hearsay testimony when the hearsay statements are separately admitted through the testimony of the declarant or through other direct evidence. *State v. Veis,* 1998 MT 162, ¶ 26, 289 Mont. 450, ¶ 26, 962 P.2d 1153, ¶ 26. Furthermore, **where the declarant testifies at trial and the defendant is given the opportunity to cross-examine regarding the statements at issue, the improper admission of the declarant's out-of-court statements is considered harmless.** (Emphasis added).
>
> State v. Mensing, 1999 MT 303, 297 Mont. 172, 177, 991 P.2d 950, 954.

(Mensing has been cited only once in Montana, and in a case where the prior consistent statement was held to be admissible.

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However, its language has never been overruled.)

In Veis, cited by Mensing, the Court stated:

> where hearsay testimony has been erroneously admitted, the defendant must have suffered prejudice as a result of the error to be entitled to have his conviction reversed. *See State v. Stuit* (1996), 277 Mont. 227, 232, 921 P.2d 866, 869; *State v. Riley* (1995), 270 Mont. 436, 440, 893 P.2d 310, 313.
>
> ¶ 26 **We have held that a defendant is not prejudiced by hearsay testimony when the statements that form the subject of the inadmissible hearsay are admitted elsewhere through the direct testimony of the "out-of-court" declarant or by some other direct evidence. *See Stuit,* 277 Mont. at 232, 921 P.2d at 869; *State v. Graves* (1995), 272 Mont. 451, 460, 901 P.2d 549, 555; *Riley,* 270 Mont. at 440, 893 P.2d at 313.** Our holdings reflect the fact that when a defendant has the opportunity to cross-examine a declarant because he or she is present at trial and testifies, the dangers that the hearsay rule seeks to avoid are not present and, therefore, hearsay regarding the declarant's out-of-court statement that is admitted during another witness's testimony is harmless. *See State v. Canon* (1984), 212 Mont. 157, 164, 687 P.2d 705, 709 (concluding that the testimony was not hearsay, but stating that even if it had been, there would have been no prejudice because "the defendant had all of the necessary opportunity to protect himself by cross-examination of [the declarant].").
> (Emphasis added).
>
> …
>
> ¶ 28 Here, in the District Court trial both of the boys testified prior to Dugan-Laemmle's testimony. Each of them identified Veis as their abuser. In addition, S.J. identified the letter and list of names that he had written during his therapy and described both the directions he had been given by Dugan-Laemmle when asked to write them and the content of his writings. He testified that in both the letter and the list he explicitly identified Veis as his abuser. Veis had full opportunity to cross-examine both boys. At no point during his cross-examination of S.J. or B.J. did Veis challenge the boys' identification of Veis as their abuser. Accordingly, Dugan-Laemmle's hearsay testimony about the boys' identification of their abuser during therapy was simply cumulative of the boys' own testimony and did not deny Veis the opportunity to confront his accusers.
>
> State v. Veis, 1998 MT 162, 289 Mont. 450, 457-458, 962 P.2d 1153, 1157.

Wow! The language in these two cases, Veis and Mensing, amounts to a judicial rewrite of Rule 801(d), in effect saying all prior statements of a witness are admissible, or at least that there will be no consequence for their admission. This, in turn, directly contravenes the intent of the Montana Evidence Commission which drafted the restrictive language of Rule 801(d), as well as the intent of the Federal Advisory Committee, as expressed in the Notes to F.R.E. 801(d).

## Federal approach

Compare this approach with that of the federal courts. In Tome v. U.S., 513 U.S. 150, 157, 115 S.Ct. 696, 701 (1995), the U.S. Supreme Court remanded a father's conviction for sexual abuse of his daughter precisely because of the admission of the victim's prior consistent statements. (This case is discussed in more detail in the next section). On remand, the 10th Circuit held that some of the statements were admissible under Rule 803(4), but that the statements made by the girl to her mother, her babysitter, and a social worker did not meet the requirements of 801(d)(1)(B) in view of the Supreme Court decision, nor did they fulfill any hearsay exception, and were inadmissible. The court went on to hold that the admission of these statements was not harmless, and reversed the conviction.

## Montana should enforce 801(d)(1)(B)

If the Montana rule is to actually mean what it says, the Montana Supreme Court should take another look at its enforceability. If a prior consistent statement is not admissible, but there is no potential reversal if it is admitted, it is a rare advocate who would back away from using it, and perhaps a rare judge who would strictly enforce the rule if a possible error is "always harmless."

### Chronology requirement: Both the montana and federal versions of 801(d)(1)(b) allude to an additional timing relationship requirement, once the trigger has been pulled

The F.R.E. version states: "consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant **recently fabricated it or acted from a recent improper influence or motive in so testifying**;"

The M.R.E. version is: "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of **subsequent fabrication, improper influence or motive…"** (Emphasis added).

## U.S. Supreme Court "Required Chronology" case is clear:

The United States Supreme Court took cert in 1995 to resolve a conflict between the federal circuits on the exact requirements of F.R.E. 801(d)(1)(B). In Tome v. U.S., the witness was 6 years old when she testified, very haltingly, about her father's sexual acts with her. (Observing her demeanor on the stand, the trial judge observed "We have a very difficult situation here.") The parents were divorced and engaged in a custody battle in tribal court. The defendant's theory was that his daughter fabricated her story in order to be able to remain with her mother at the

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end of her summer visit, even though the tribal court order in place gave the accused father physical custody.

The trial judge admitted six prior statements of the young victim, made prior to trial to a babysitter, the mother, a social worker, and three pediatricians. The 10th Circuit affirmed all six admissions, following the flexible "balancing" approach used in the 9th Circuit to the "subsequent" language in 801(d)(1)(B).

The Supreme Court rejected this approach, and held that prior consistent statements are inadmissible unless they predate the alleged reason to alter the testimony:

The prevailing common-law rule for more than a century before adoption of the Federal Rules of Evidence was that **a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but it was inadmissible if made afterwards**. As Justice Story explained: "[W]here the testimony is assailed as a fabrication of a recent date, ... in order to repel such imputation, proof of the antecedent declaration of the party may be admitted." Ellicott v. Pearl, 35 U.S. (10 Pet.) 412, 439, 9 L.Ed. 475 (1836) (emphasis added). See also People v. Singer, 300 N.Y. 120, 124–125, 89 N.E.2d 710, 712 (1949).

McCormick and Wigmore stated the rule in a more categorical manner: "[T]he applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias, interest, influence or incapacity originated." E. Cleary, McCormick on Evidence § 49, p. 105 (2d ed. 1972) (hereafter McCormick). See also 4 J. Wigmore, Evidence § 1128, p. 268 (J. Chadbourn rev. 1972) (hereafter Wigmore) ("A consistent statement, at a time prior to the existence of a fact said to indicate bias ... will effectively explain away the force of the impeaching evidence" (emphasis in original)). **The question is whether Rule 801(d)(1)(B) embodies this temporal requirement. We hold that it does.**

Tome v. U.S., 513 U.S. 150, 156, 115 S.Ct. 696, 700 (1995). (Emphasis added).

## Montana "Required Chronology" cases are not so clear

Although many other states have distinguished or outright disagreed with Tome in interpreting their own versions of the hearsay rule, the Montana Supreme Court has cited it with approval on several occasions.

In State v. Lawrence, 285 Mont. 140, 158, 948 P.2d 186, 197 (1997), where the Supreme Court ultimately held that the disputed evidence was inconsistent with the trial testimony, it first commented about the requirements for admission of consistent statements:

Appellant correctly states that in order to introduce a witness's prior consistent statements, the proponent must first lay the necessary foundation as outlined in Rule 801(d)(1)(B) and State v. Lunstad (1993), 259 Mont. 512, 517, 857 P.2d 723, 726 (holding that a declarant's prior consistent out-of-court statements are **admissible only when those statements were made before the alleged fabrication, improper influence, or motive arose**). See also,Tome v. United States (1995), 513 U.S. 150, 115 S.Ct. 696, 130 L.Ed.2d 574. (Emphasis added)

Just a year later, though, the Court inexplicably dismissed an argument on appeal based on Tome: "He cites Tome v. United States (1995), 513 U.S. 150... In Tome, the Court interpreted Fed.R.Evid. 801(d)(1)(B), which is different from Rule 801(d)(1)(B), M.R.Evid." State v. Johnson, 288 Mont. 513, 524, 958 P.2d 1182, 1189 (1998). This is an area where Montana trial judges and lawyers need more consistent guidance from the Montana Supreme Court.

The existing Montana cases divide into two camps: those where the witness' consistent statement was made before, and those where the consistent statement was made after, the alleged reason to lie (or at least shade testimony) came into existence.

## Cases where the prior statement was admissible non-hearsay, because it predated the alleged reason to lie

In State v. Teters (2004), discussed above, the stepdaughter victim testified at trial about the defendant's sexual abuse of her. The trial judge later allowed evidence of her prior consistent statements through the testimony of a representative of the Utah Dept. of Child and Family Services, who had interviewed the victim. The Supreme Court held this was proper, because the defense counsel had suggested in opening statement that the girl was lying to help her mother in a "messy divorce." The interview occurred well before the spouses separated, so there was no "messy divorce" when the prior statement was made. The chronology (statement, then messy divorce proceedings, then testimony consistent with the statement) thus met the requirement that the prior consistent statement occur prior to the alleged motive to fabricate:

> In *State v. Lunstad* (1993), 259 Mont. 512, 516, 857 P.2d 723, 726, we emphasized that **prior consistent statements are admissible only when a specific motive to fabricate is alleged and the prior consistent statements were made before the time the alleged motive to fabricate arose.**
>
> ¶ 28 Furthermore, the consistent statements were made prior to the time the alleged motivation to fabricate arose. *See Lunstad,* 259 Mont. at 516, 857 P.2d at 726. In his opening statement, defense counsel implied that J.U. had been subject to the improper influence of her mother, who was in the midst of a "messy divorce" from Teters. However, J.U.'s statements to Burdette occurred prior to the parties' separation in April 2001, and well before the commencement of divorce proceedings. Accordingly, **J.U.'s statements were made prior to the alleged motivation to fabricate arose, and are admissible under Rule 801(d)(1)(B),** M.R.Evid. We therefore hold the District Court did not err in admitting Burdette's testimony concerning J.U.'s prior consistent statements of sexual abuse.

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(Emphasis added).

State v. Teters, 2004 MT 137, 321 Mont. 379, 385-86, 91 P.3d 559, 564.

State v. Sheffelman (1991) is another sexual abuse case. Its holding is as messy as its facts. In her opening, the prosecutor alluded to the girl's prior consistent and inconsistent statements and indicated that the girl told her story to prevent her stepfather from returning to the home and continuing the molestation. The prosecution was later able to introduce the prior consistent statements into evidence, over the defendant's objection.

The Supreme Court affirmed the admission of those statements. First, it observed that both the prosecution and defense openings had discussed possible motives for the girl to falsify testimony. On direct examination, the prosecution introduced several inconsistent statements she had made. The defendant cross-examined the girl, and intimated that she had been subject to improper influence from the prosecutor. The prosecution was then permitted to introduce several witnesses who testified about out of court statements the victim had made to them which were consistent with her trial testimony. The Court distinguished between the impeachment of "you have been lying all along" from "you are lying because the prosecutor influenced you":

> The defendant claims he does not assert a subsequent fabrication on the part of the victim, but that she was fabricating or lying all along. Generally speaking, if this were true, prior consistent statements would not be admitted. However, given the fact that the defense implied improper influence on the part of the prosecuting attorney in cross examining the victim, we hold that her prior consistent statements in this case were properly admitted.
>
> State v. Scheffelman, 250 Mont. 334, 339, 820 P.2d 1293, 1296 (1991).

Acknowledging that some jurisdictions (notably Colorado and New Mexico) have given up the chronological requirement, and allow all prior statements in, without regard to their timing relative to the alleged motive or influence to fabricate, the Montana Supreme Court decided to join the majority of jurisdictions which retained the common law approach:

Most jurisdictions still look to the time that the statement was made in order to address concerns of relevancy, however. These jurisdictions hold that in order to be relevant, a prior consistent statement must be made before the declarant has a motive to fabricate. If a declarant makes consistent statements after the motive to fabricate arises, the relevancy of those statements under Rules 402 and 403, M.R.Evid, is lost because they have no bearing upon truthfulness or veracity. See e.g. United States v. Miller, (9th Cir.1989), 874 F.2d 1255, 1272...

**We believe that the most logical view is that held by the Ninth Circuit. As described above, this view requires the prior consistent statement to be made before any motive to fabricate has arisen. This view is most in line with the traditional common law and with common sense notions of relevancy.** (Emphasis added).

250 Mont. at 340-314, 820 P.2d at 1297.

The problem with Sheffelman lies in its application of this theory to its facts. The Court affirmed admission of the consistent statements under Rule 801(d)(1)(B), holding that:

According to Scheffelman, the victim's prior statements should not have been admitted because she had a motive to fabricate when they were made. However, according to the testimony, the victim's motive for fabrication was that she did not want Scheffelman to return to the family household and continue his pattern of abuse. This reason cannot be considered a motive to fabricate. Rather, it is inherently intertwined with the truth or falsity of the charge of the crime itself. It may provide the impetus to report the defendant's abuse, but it does not evidence any motive to lie or fabricate. Therefore, we hold no error was committed in allowing the prior consistent statements into evidence.

250 Mont. at 341, 820 P.2d at 1297.

Justice Trieweiler filed a separate opinion in which he concurred with the holding admitting the prior consistent statements, but simply said "I do not agree with all that is said in the majority's discussion of prior consistent statements." (The bulk of his opinion dissented about an issue of expert witness qualifications).

If the girl's motive was to prevent her stepfather's return, that motive existed at the first time she spoke about the abuse, and so the consistent statements are all subsequent, not prior to, the existence of her alleged motive. The only logical way to read Sheffelman, although the Court did not articulate this specifically, is to parse the language of the rule ("offered to rebut an express or implied charge against the declarant of **subsequent fabrication, improper influence or motive…**") so that the word "subsequent" modifies only "fabrication," and thus there is no temporal requirement for that prior consistent statements offered to rebut any implication of improper influence or motive. Although this interpretation is grammatically possible, it does not comport either with the common law or the Tome approach. In Lunstad, the Court discussed but distinguished Sheffelman; its description of Sheffelman is somewhat clearer than the original case itself:

> [In Sheffelman] Court held that a prior consistent statement was allowable if it was made before any motive to fabricate had arisen. However, if a defendant does not assert that the victim is subsequently fabricating her story, but claims, as in this case, she was lying all along, prior consistent statements are not admissible. Scheffelman, 820 P.2d at 1296. In Scheffelman, the Court held that, because the defendant alleged the victim was improperly influenced, no error was committed in allowing the prior consistent statements into evidence under Rule 801. Scheffelman, 820 P.2d at 1296 .
>
> State v. Lunstad, 259 Mont. 512, 517, 857 P.2d 723, 726 (1993).

Two years later, the Court acknowledged its improvement of Scheffelman, and reaffirmed its commitment to the chronologic requirement:

> We interpreted Rule 801(d)(1)(B), M.R.Evid., in Scheffelman and refined that interpretation in State

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> v. Lunstad (1993)... . We emphasized in Lunstad that prior consistent statements are admissible only when a specific motive to fabricate is alleged and the prior consistent statements were made before the time the alleged motive to fabricate arose. Lunstad, 857 P.2d at 726.
>
> State v. Fina, 273 Mont. 171, 182, 902 P.2d 30, 37 (1995).

The Court observed that, although the defendant wanted to admit the consistent out-of-court statements of the defense witnesses:

Fina does not establish that any specific motive to fabricate was raised at trial regarding any of the witnesses whose statements are at issue here. He also does not establish that any express or implied charge was raised that any or all of the witnesses were improperly influenced or had improper motives.

273 Mont. at182, 902 P.2d at 37.

Fina did not identify on appeal any impeachment by the prosecution which would trigger 801(d)(1)(B); indeed, he did not identify any particular witness or any particular out of court statement which would qualify for non-hearsay treatment. Therefore, 801(d)(1)(B) did not apply, and the consistent statements remained inadmissible hearsay.

The Lunstad/Fina gloss on Sheffelman helps, but not enough. The Montana Supreme Court cited Lunstad in a 1998 case which confuses the issue even more. State v. Johnson is another sexual assault case. This time the defendant was not a family member, and the victim was an adult. She claimed that, instead of giving her the promised ride home, Johnson drove her to an isolated trail outside Hamilton and raped her. The defense theory was that the intercourse was consensual, and that the victim concocted the rape story afterwards to maintain her relationship with her boyfriend and another man (the Supreme Court described this as "hiding her promiscuity from others").

The victim gave a lengthy interview to the police after she was rescued by passers-by. There were two versions of the typed transcript, which led to confusion at trial because the defendant had a version which the victim had annotated in handwriting, which somehow the prosecution did not have. Johnson's lawyer used the annotated version to impeach the victim during her cross-examination, and may have adduced some of the same statements during the detective's cross-examination as well (the case is not clear on this point). The State then offered the whole transcript into evidence "under Rule 801(d)(1), M.R.Evid., as either a prior consistent or prior inconsistent statement."

State v. Johnson, 288 Mont. 513, 522, 958 P.2d 1182, 1188 (1998). The confusion lay in exact words the victim handwrote in the transcript: "I kept going back and forth." The defense claimed this meant that she was physically going back and forth, voluntarily participating in the encounter with pleasure; the victim explained that this phrase described her mental state, alternating between scared and furious, which would be consistent with her testimony.

The trial judge chose the consistent statement approach, and admitted the transcript under 801(d)(1)(B). Both sides discussed the prior statement in their closings: the prosecutor argued that it was "not that inconsistent" with her testimony, while the defense argued that it was very different from what she said on the stand and supported the defense theory that she had fabricated the story all along. On appeal, the defendant cited both Tome and Lundstad. The Court dismissed Tome in a single observation that the federal version was different from M.R.E. 801(d)(1)(B) (which did not refer at all to the Commission's express desire to emulate and clarify the federal rule); see above. The Court then went on to cite with approval the Lunstad principle that if the defendant alleges the victim has been lying from the start, there is no "subsequent" fabrication, so consistent out of court statements are not admissible. The Court's next two paragraphs are both confused and confusing:

> ¶ 45 In this case, the prior statement in the annotated transcription may have had general impeachment value to the defense, but ... nothing in it supported Johnson's theory that the victim was concocting the rape to hide her promiscuity from others. The prior statement thus provided no independent basis for defense counsel to question the victim about a "motive to lie all along," but was relevant only to suggest that the victim's overall credibility was suspect because of her various statements concerning the rape.
>
> ¶ 46 The annotated statement was initially brought before the jury by the defense, for purposes of impeachment. The defense attempted to use the annotated transcription as *a prior inconsistent statement by the victim. Under that argument, the annotated transcription would have had to predate the motive to lie.* But, as the District Court noted, the victim's statements in the annotated transcription proved to be fairly consistent with her trial testimony. *A prior consistent statement which predates the motive to lie is admissible into evidence.* Therefore, we conclude that the State was thereafter entitled to utilize the statement as a prior consistent statement to rehabilitate the witness, and the annotated transcription was admissible under Rule 801(d)(1)(B), M.R.Evid.
>
> State v. Johnson, 288 Mont. 513, 524, 958 P.2d 1182, 1189 (1998).

Obviously, the Court made perhaps a typographical error, but its confusion between the requirements for prior consistent v. prior inconsistent statements deepens the murk.

In State v. Hibbs (1989), four young girls accused their 58 year old neighbor of forcing them to perform sexual acts on him. All four of them testified at trial. After they had testified, the prosecutor was allowed to call two of their mothers and a social worker, who testified about prior consistent statements made by the girls. The defendant objected to all the consistent statements as hearsay, but was overruled. The Supreme Court affirmed their admission under Rule 801(d)(1)(B), citing the defense attack on the credibility of the girls, but acknowledging that

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it was a general attack that they did not know the difference between fantasy and truth. In opening, defense counsel warned the jury: "Be sure...the children...know the difference between truth and fantasy, between the truth and a lie." In his cross-examinations of them, he continued with this theme: "he questioned the children *repeatedly* (original emphasis) over whether they knew what a lie was and whether they had ever lied." The Court held: "In asking such questions, defense counsel placed the credibility of the child witnesses in issue," State v. Hibbs, 239 Mont. 308, 313, 780 P.2d 182, 185 (1989), and therefore their prior consistent statements were admissible to rebut the attack on the witnesses' credibility. There was no analysis at all about the chronological relationship between the alleged fabrication and the out of court statements, nor any identification of any improper motive or influence, both of which appear to be necessary under the plain language of the rule. The lesson from Hibbs seems to be that if the opponent attacks the credibility of any witness in any way, all prior consistent statements of that witness made out of court are admissible. This simply does not comport with either the plain language of Rule 801(d)(1)(B) or the Comments of the Montana Evidence Commission to that rule.

## Cases where the prior statement was inadmissible hearsay because it did not predate the alleged reason to lie

In State v. McOmber, 340 Mont. 262, 173 P. 3d 690 (2007), discussed earlier, the defense clearly triggered 801(d)(1)(B) when it cross-examined witness Bill Peltier about the plea bargain he received for a related charge, implying he shaded his testimony against McOmber in return, an "improper motive" or "improper influence." After Peltier testified against McOmber, the prosecution offered as exhibits both Peltier's written statement and the transcript of his interview, both made while he was in jail. The defense counsel used the old "gilding the lily" objection, which actually gets to the common law rule that generally prior consistent statements are not admissible (which would be a better phrase for your objection). The trial judge overruled the objection, citing M.R.E. 801(d)(1)(A), and admitted both statements. The Supreme Court found this was error, on a chronological ground:

> ¶ 15 We have previously held that the prior consistent statement rule "only applies when the declarant's in-court testimony has been impeached by another party's allegations of subsequent fabrication, improper influence, or motive." *State v. Lunstad,* 259 Mont. 512, 515, 857 P.2d 723, 725 (1993). **In addition, to qualify as a prior consistent statement under M.R. Evid. 801(d)(1)(B), the statement must have been made *before* the alleged motive to fabricate arose.** *Teters,* ¶ 27; *State v. Veis,* 1998 MT 162, ¶ 24, 289 Mont. 450, ¶ 24, 962 P.2d 1153, ¶ 24 (citing *Tome v. U.S.,* 513 U.S. 150, 167, 115 S.Ct. 696, 705, 130 L.Ed.2d 574 (1995)). (Emphasis added).

State v. McOmber, 2007 MT 340, 340 Mont. 262, 267, 173 P.3d 690, 695. The timing of the prior statements and the motive to lie was critical:

> Crucially, as to the requirement that the statements were made prior to the time the alleged motive to fabricate arose, McOmber claims this requirement was not met and, therefore, the exhibits' admission was in error. The State charged Peltier with the felony count of issuing a bad check on December 2, 2003, and he was arrested in February 2004 on that charge. While incarcerated in the Powell County jail, Peltier made his written statement on February 18, 2004, and the interview with Captain George took place the following day. McOmber maintains that Peltier's motive to fabricate existed prior to the time he made his statements to Captain George—i.e., the motive arose when Peltier was arrested. We agree with McOmber's assertion. Given that Peltier's prior consistent statements were made after he had been charged and jailed on the felony charge, it is clear that the alleged motive to fabricate arose *before* he made those statements.
>
> State v. McOmber, 2007 MT 340, 340 Mont. 262, 267-68, 173 P.3d 690, 695. The admission of the prior statements was error.[1]

State v. Maier was a1999 case, involving attempted homicide. One of the shooting victims was Robert Bradford. He testified at trial, identifying Maier as the shooter. The defense cross-examined to the effect that Bradford first found out "around town" who had been arrested for the shooting, and then went to the police and told them it was Maier. The prosecutor was allowed to call the detective who recounted Bradford's out-of-court statement that Maier was the shooter. The Supreme Court concluded that this was an inappropriate use of 801(d)(1)(B) because of the timing of the alleged motive to fabricate and the out of court statement:

> ¶ 38 We conclude that Detective Hollis' testimony concerning what Bradford told him about the identity of the shooter was not a prior consistent statement. In *State v. Lunstad* (1993), 259 Mont. 512, 857 P.2d 723, this Court held that Rule 801(d)(1)(B) "only applies when the declarant's in-court testimony has been impeached by another party's allegations of subsequent fabrication, improper influence, or motive." *Lunstad,* 259 Mont. at 515, 857 P.2d at 725. The *Lunstad* Court further held that prior consistent statements must be made before a declarant's alleged motive to fabricate arose. *Lunstad,* 259 Mont. at 516, 857 P.2d at 726.
>
> ¶ 39 In the present case, Maier's cross-examination of Bradford clearly suggested that Bradford's motive to fabricate arose as soon as he learned of Maier's arrest:
>
> Q. So isn't it true that you didn't see who was

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1 The Court held, however, that this trial error was harmless, and the conviction stood.

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sitting in there shooting at you-

...

Q. That you ran around town trying to get the name of who was sitting in that seat shooting at you. And once you got the name, because Mr. Maier had been arrested, you went in to the police and you told them, Mr. Maier is the one that was shooting at me? Isn't that true?

A. No. I seen who it was. I just went around and tried to find out to verify my mind before I start accusing someone.

Bradford testified that he thought he had talked to police about Maier several days after Maier was arrested. We conclude that Bradford's statement was not a prior consistent statement under Rule 801(d)(1)(B), M.R.Evid., because he made it after his alleged motive to fabricate arose.

State v. Maier, 1999 MT 51, 293 Mont. 403, 412, 977 P.2d 298, 305. Once again, though, the Court held that this error was harmless.

Similarly, in State v.Veis, 289 Mont. 450, 962 P.2d 1153 (1998), the defense theory was that the young victims had been sexually abused but by someone other than Veis. In support of that theory, the defense introduced a note which one of the boys had written, indicating that he had been raped by his father (who was not Veis). The boy's explanation was that the note was false, but he had written it to work up his courage to report Veis' abuse. The prosecutor then called the boys' therapist, who recounted what the boys had said about their abuser during therapy sessions. The Supreme Court held this evidence to be hearsay, outside the non-hearsay definition of 801(b)(1)(B):

in order for a statement to be admissible as a prior consistent statement pursuant to Rule 801(d)(1)(B), M.R.Evid., it must, among other things, have been made before the declarant had a motive to fabricate. *See Tome v. United States* (1995), 513 U.S. 150, 167, 115 S.Ct. 696, 705, 130 L.Ed.2d 574, 588; *State v. Lunstad* (1993), 259 Mont. 512, 517, 857 P.2d 723, 726. Here, based on Veis's theory of defense, S.J.'s motive to fabricate his accusations about Veis existed prior to the time that he revealed during therapy to Dugan-Laemmle that Veis was his abuser. Accordingly, testimony from Dugan-Laemmle regarding who S.J. identified during the exercises constitutes hearsay that is not admissible as a prior consistent statement.

State v. Veis, 1998 MT 162, 289 Mont. 450, 962 P.2d 1153, 1156-57. (However, here again the Court went on to hold that the error in admitting the hearsay testimony was harmless; see above).

State v. Lunstad was actually decided on "trigger" grounds, the Supreme Court holding that the prosecutor can't create the impeachment of its own witness on cross-examination of the defense witnesses, as a pretext to admit prior consistent statements. (See above). However, the Court went on to discuss the chronology requirements, and held that the statement did not qualify for admission under 801(d)(1)(B) anyway:

[W]e also hold that the statements of C.H. were not admissible under Rule 801(d)(1)(B), M.R.Evid., because such statements were not made prior to the time C.H.'s alleged motive to fabricate arose. In this case, Mr. Lunstad claimed that C.H. threatened to tell her father about the touch if Mr. Lunstad would not give her a piggy back ride. The only possible motive to fabricate suggested by Mr. Lunstad was the fact that C.H. was angered at him for refusing her the piggy back ride. Therefore, any "motive" arose on November 4, 1991, the day C.H. allegedly made that statement to Mr. Lunstad. Any statements C.H. made after that date, including statements to her father (November 4, 1991), the police officer (November 5 and 6, 1991), and her counselor (January, 1992), could not be prior consistent statements, because they were made subsequent to the time C.H.'s alleged motive to fabricate arose. Therefore, C.H.'s statements were not admissible as prior consistent statements as contemplated by Rule 801(d)(1)(B)...

259 Mont. 512, 516-17, 857 P.2d 723, 726 (1993).

## Conclusion

It is time to clean up this troublesome area of Montana evidence law. The easiest way to do that is to change the language of the rule itself so that it conforms exactly with the current version of F.R.E. 801(d)(1)(B). The recent stylistic amendments to the F.R.E. substantially improved 801(d)(1)(B) by repeating the temporal requirement for both types of impeachment: "offered to rebut an express or implied charge that the declarant **recently fabricated it or acted from a recent improper influence or motive in so testifying."** This is the best way to accomplish the original intent of the Montana Commission to retain the common law disfavor of out-of-court consistent statements, while allowing those few which actually counter specific accusations of improper influence on a witness' testimony.

When the change is made, the Montana Commission Comment to the new version of the rule can reiterate the general rule (that prior consistent statements are inadmissible hearsay) and clarify the specific requirements for the few exceptions to that rule. At the same time, the Montana Supreme Court should acknowledge and resolve its prior inconsistent applications of M.R.E. 801(d)(1)(B), so that both trial judges and trial lawyers clearly understand when a statement qualifies for admission under the rule. The Court should also clarify the divergence in its opinions, some of which seem to state categorically that error in admitting prior consistent statements which do not qualify for the non-hearsay definition is always harmless and not a ground for reversal. (On the other hand, the Court could choose to affirm its occasional statement that all prior consistent statements are admissible, as a few other states have done, which would be another way to solve the problem. If the Court chooses this approach, the M.R.E. should be amended accordingly, so that the rule and the case law are consistent).

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

# Know a good lawyer?

## *A look at the Flathead's pro bono program*

**By Brian Muldoon**

After many years of careful preparation, in 2011 the Northwest Montana Bar Association launched a new program to engage as many lawyers as possible in providing pro bono services to the Flathead's underserved population. The key elements of the program are **(1)** its voluntary nature; **(2)** proper training of lawyers in the areas of greatest need, primarily family law; and **(3)** ongoing support as lawyers wade into legal issues not otherwise familiar to them.

The program is a partnership with Montana Legal Services, which provides logistical help and malpractice insurance for eligible cases. Potential family law clients are first screened for eligibility by Angie Wagenhals, the MLSA program coordinator in Missoula. If it meets the financial and substantive criteria, Angie then contacts the next Flathead lawyer on her list of volunteers. In the past two years, pro bono lawyers have volunteered for over 51 cases, with 28 lawyers serving as volunteers this past year alone. We have served 300% more clients than before the program was initiated, and there are fewer than ten cases awaiting assignment at any time. The pro bono program seems to be working even better than we expected.

Recognizing that the Montana Supreme Court may, at some point, elect to promulgate some form of mandatory pro bono requirement, we decided to take a different approach. Our focus is on meeting the needs of the less fortunate in our community rather than on finding a way to get every lawyer to meet the 50-hour pro bono target. Lawyers are accustomed to following rules and meeting deadlines, and obviously would comply with a Supreme Court mandate. But one of the great advantages of a voluntary program is that it invites lawyers to serve from a place of compassion rather than compulsion. And that's good for lawyers—it gives us a psychological payoff that isn't always a part of our work. Our brain's reward system puts a high premium on helping others—it's one of the reasons our species has been so successful. The brain rewards us with dopamine for helping others just as if we were being helped. It literally feels good to be good, as one of our more active volunteers can attest:

"My pro bono clients are almost always grateful for what I do for them," observes Marybeth Sampsel, a Flathead Pro Bono Lawyer of the Year. "They may not have money, but they always try to give back in whatever way they can. I get fresh vegetables from the garden, baked goods, whatever they can make or buy. Those are the things that mean the most to me. I really value the relationship I have with my pro bono clients. It's about something more than money—not that I don't appreciate my paying clients, too! They're the ones who make it possible to help those who can't pay."

Compassion isn't usually found in the law school curriculum, but it's an essential component of why many lawyers enter the profession. **The key is not to become so overwhelmed** that we are unable to run a successful practice and keep up with the paying work.

Compassion isn't usually found in the law school curriculum, but it's an essential component of why many lawyers enter the profession. The key is not to become so overwhelmed that we are unable to run a successful practice and keep up with the paying work. As with other helping professions, compassion "burn-out" can be a genuine concern. The best way to avoid that kind of stress is to make sure the burden is shared—as in, "many hands make light work."

Something like 90% of the pro bono work in the Flathead arises out of family law—divorces, contested parenting plans, temporary restraining orders and the like. And these kinds of cases tend to carry with them the greatest emotional charge—far more than one would encounter with business lawsuits or estate planning. So this presents a double challenge for the non-family

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law practitioner: how to give sound legal advice, and, simultaneously, how to work with the client's (and the other party's and perhaps their lawyer's) volatile emotions.

Each summer the Northwest Montana Bar Association offers a free day-long training program in family law to its members, with six hours of CLE credit. The agenda includes the basics of family law, a section on the emotional dynamics of family conflict, and a raft of legal forms commonly used by practitioners in the Eleventh District. Each program also now includes an afternoon session that addresses more advanced issues for those who have taken a case or two in the prior year.

We realized that it was unreasonable to expect lawyers to volunteer their time if they didn't have some basic understanding of the applicable law. But lawyers are, of necessity, very adaptable—we are constantly learning about new developments and facing new and unexpected factual situations. We know how to organize data and apply legal principles. So most volunteers found it relatively easy to negotiate the unfamiliar waters of family law once they were given a basic foundation. And family law is not particularly complex, legally. As one of our local judges pointed out in last year's training, it tends to be very fact-dependent. Common sense goes a long way.

But we also knew that we couldn't simply abandon the volunteer lawyers once they took a case. So a number of experienced family law practitioners have served as mentors—sharing their favorite forms, giving advice and suggesting strategies, or even working as co-counsel with a volunteer. Local mediators have donated their services on a pro bono basis to help bring cases to closure, and the courts have been incredibly supportive. This year we started to recognize those who have gone above the call of duty and awarded the Pro Bono Lawyer of the Year to two wonderful volunteers, Marybeth Sampsel and Kay Lynn Lee, both of whom also carry a very full load of paying family law cases.

Our pro bono lawyers have also created a partnership with the Self-Help Law Center—attorney Kay Lynn Lee spends her lunch hour every Wednesday assisting pro se litigants to calculate child support, often assisted by lawyer Eric Hummel. And we now offer monthly legal clinics at the courthouse to provide brief consultations to self-represented litigants. Rachel Payne from the Self-Help Law Center screens the questions and provides the volunteer lawyers with enough background to enable them to conduct conflict checks before they show up for a ninety-minute session.

Self-represented litigants now appear in court in over 70% of the contested hearings. Because this places a tremendous burden on our judges, who strive to be fair without leaning too far in one direction, we are now offering two-session classes in courtroom protocol and the basics of family law to those who choose to represent themselves. While they probably won't become experts in the hearsay rule, this training at least promises to make hearings more efficient.

The next stage of our work is to expand the pro bono menu to include landlord-tenant disputes, simple estate planning and guardianship matters. There is some talk of including free, brief consultations at this year's Law Day celebrations. And, of course, many lawyers prefer to provide pro bono help to non-profit organizations such as churches and service organizations.

Frankly, it feels good to help. Lawyers are in the fortunate position of being able to change lives—to protect a child from an abusive parent, to help an unhappy couple make sense of their parting, to enforce a child support order so that a family on the edge doesn't fall into poverty. There is a special grace that comes with compassionate service, and pro bono lawyers are among its greatest beneficiaries. It's a wonderful antidote to the epidemic of depression that weighs so heavily on our profession.

I think most of our volunteer lawyers would agree that lawyers who provide pro bono service always get the better end of the bargain. We certainly don't lose any business by providing this service. And, needless to say, it doesn't hurt our public image, either.

# Perspectives from the bench

### Hon. David Ortley
11th Judicial District

"Pro bono service has long been an important hallmark of the legal profession and remains one of the unique facets of our profession which distinguishes us from others. More importantly, pro bono service affords us an opportunity to provide access to those whose voice might not otherwise be heard in the administration of justice and procedural fairness.

While pro bono service has always been important to the profession and our legal system, it is more so now than at any time in the recent past. If our system of justice is going to endure the challenges before us, the legal profession must embrace pro bono service in order to ensure equal access and procedural fairness to all citizens."

### Hon. Dusty Deschamps
4th Judicial District

"I have always been proud to be an attorney because I regularly see that most lawyers are in the profession because they want to help people and routinely prove it by being generous with their time and money. I can't think of any other profession that is so-well represented in the volunteer programs that make American society so special and unique. Of course, this community service is frequently rewarded by the fact that it is often different and fun. So, my special admiration goes to members of the bar who serve the community by donating their time to doing pro bono legal work that is just that: work. Plus, it is work that these volunteers would otherwise be paid to do and they are giving it up for free.

As a judge I especially appreciate this service because it significantly facilitates the efficient administration of justice, allowing the court system to work better for all of us. My only regret is that I often see the same people volunteering over and over. Pro bono legal service is an ethical responsibility for all attorneys and one that I encourage all of us to actively perform to spread the load as well as to enhance the quality of the society we live in."

# Court cases from Feb. 15, 2013- March 16, 2013

**By Beth Brennan**

The Montana Supreme Court issued 17 published decisions between February 15, 2013 and March 16, 2013. There were 14 unanimous decisions: 12 were 5-0; one was 4-0, and one was 7-0.

The issues that caused justices to dissent or write separately were:

- Whether an obscene insult uttered over the phone to a state employee was unprotected by the First Amendment under the "fighting words" exception (no), and whether the Privacy in Communications Act is unconstitutionally overbroad (yes). *State v. Dugan* (6-1) (Cotter, J., for the majority; Rice, J., dissenting)
- Whether the proper venue for trial in an accident where a vehicle was hit in one county but came to rest in another is the county where the collision occurred, the county where the damaged vehicle came to rest after being hit, or both (where the collision occurred). *Yeager v. Morris* (4-3) (Cotter, J., for the majority, joined by Justices Baker and Rice, and District judge Todd Baugh; Morris, J., dissenting, joined by Justices Wheat and McGrath)
- Whether an arbitration clause in an online payday loan agreement was enforceable (no). *Kelker v. Geneva-Roth Ventures* (4-2) (Morris, J., for the majority, joined by Justices Wheat and McGrath; Cotter, J., specially concurring; Baker, J., dissenting, joined by Justice Rice).

The Court affirmed in 14 cases, affirmed in part and reversed in part in two cases (*State v. Dugan, Stewart v. Rice*), and reversed in one case (*In re the Marriage of Eslick*).

**Chief Justice McGrath** wrote two majority opinions.
**Justice Cotter** wrote four majority opinions and one special concurrence (*Kelker v. Geneva-Roth*).
**Justice Rice** wrote one majority opinion, one concurrence, and one concurrence/dissent (*State v. Dugan*).
**Justice Morris** wrote four majority opinions and one dissent (*Yeager v. Morris*).
**Justice Wheat** wrote one majority opinion.
**Justice Baker** wrote two majority opinions and one dissent (*Kelker v. Geneva-Roth*).

The Court also issued 10 unpublished decisions during this period.

### *City of Bozeman v. Cantu,* 2013 MT 40 (Feb. 19, 2013) (5-0) (McKinnon, J.)

**Issue:** Whether the municipal court had the power to require a defendant convicted of two misdemeanor sexual assaults to undergo a psychosexual evaluation as a condition of his deferred sentences.
**Short Answer**: Yes.
*Affirmed*
**Facts:** David Cantu, 18, was riding his longboard when he rode past a woman and grabbed her buttocks. The next day, he was riding his bike when he rode past another woman and grabbed her breast. He was charged in municipal court with two counts of misdemeanor sexual assault.

**Procedural Posture & Holding:** Cantu pled guilty. The municipal court imposed a deferred sentence for two years on each count, committed Cantu to jail for 20 days, and, over Cantu's objection, required Cantu to obtain a psychosexual evaluation and engage in a minimum of six months of therapy unless released sooner by the therapist. Cantu appealed to the district court, which affirmed. Cantu appeals to the Supreme Court, which affirms.

**Reasoning:** When deferring imposition of a sentence, the court may impose any reasonable conditions or restrictions during the period of deferment. Although Cantu's convictions were for misdemeanors, and are not sexual offenses as defined under § 46-23-502, the statutory authority to impose reasonable conditions includes the authority to order a psychosexual evaluation of the defendant. A condition is reasonable as long as it has a nexus to the offense for which the defendant is being sentenced. The condition requiring a psychosexual evaluation was both reasonable and related to the offender and the offense. The municipal court did not abuse its discretion.

### *State v. Caswell,* 2013 MT 39 (Feb. 19, 2013) (5-0) (Rice, J.)

**Issue:** (1) Whether Caswell's due process rights were violated by the loss of 15-20 minutes of trial testimony, and (2) whether evidence of Caswell's prior assault against the victim was properly admitted to show her lack of consent.
**Short Answer**: (1) No, and (2) yes.
*Affirmed*
**Facts:** Peter Caswell and Beth Caswell were married for more than 40 years and had five children, all of whom are now adults. Caswell and Beth have lived separately since March 2009, when an argument escalated and Caswell punched Beth several times in the face. Caswell was ultimately convicted of one count of misdemeanor partner/family member assault from that incident. In August 2010, Caswell came to Beth's house and forced her to have sex with him, in spite of her saying no, telling him to leave, biting him and trying to hit him with a flashlight.

Caswell was charged with one count of felony burglary, one count of felony sexual intercourse without consent, and one count of misdemeanor partner/family member assault. Caswell moved in limine to exclude evidence of the March 2009

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assault. The court allowed it for the issue of consent to the sexual intercourse, not to show that Caswell was acting in conformity with that character, and instructed the jury as such.

A jury convicted Caswell of sexual intercourse without consent and partner/family member assault, but found him not guilty of burglary. Caswell was sentenced to 60 years in prison without parole for the rape, and one year in the Lincoln County jail for the assault, to run consecutively.

The court reporter discovered during transcription that 15-20 minutes of a police officer's testimony was not recorded. The district court, sua sponte, ordered that the record be supplemented in accordance with M.R. App. P. 8(7). The state filed a statement of recollection, citing the prosecutor's handwritten trial notes, the recording log, exhibit logs, the partial transcript, and a consultation with the witness who was testifying. Caswell's counsel stated he had no independent recollection of the missing testimony, but believed objections were made, although he could not recall the court's rulings.

**Procedural Posture & Holding:** The district court issued an order adopting the statement of unavailable evidence. Caswell objected, and the court denied his objection. Caswell appeals, arguing his due process rights were violated by the loss of the testimony, and the district court erred by admitting evidence of Caswell's prior assault on the victim. The Supreme Court affirms.

**Reasoning:** (1) To determine whether a court's failure to record part of a criminal trial violates a defendant's right to due process, the court uses the *Britt* test, which reviews the value of the transcript to the defendant in connection with the appeal, and the availability of alternative devices that would fulfill the same functions as a transcript. The Court finds that Caswell establishes the first element, but not the second.

(2) Caswell contends that evidence of his previous assault on Beth should have been excluded as irrelevant, unfairly prejudicial, and raising an improper propensity inference. Beth's consent was the central issue of the trial, and the district court did not abuse its discretion in admitting evidence of the previous assault for the issue of consent. The court gave a limiting instruction, and interrupted the prosecutor's closing argument to advise the jury as to the limitations of the evidence. Although the Supreme Court advises that the "better policy" is to issue written findings of fact and conclusions of law on this issue after holding a hearing, it finds the lower court clearly articulated the evidentiary boundaries.

### *State v. Dugan*, 2013 MT 38 (Feb. 19, 2013) (6-1) (Cotter, J., for the majority; Rice, J., concurring and dissenting)

**Issue:** Whether Dugan's utterance over the phone was unprotected "fighting words"; (2) whether the Privacy in Communications statute is unconstitutionally overbroad; and (3) whether the statute is unconstitutionally vague.

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

*Affirmed in part, reversed in part, and remanded*

**Facts:** Dugan visited the county Victim Services office for help with obtaining an order of protection against the mother of his children, who was about to be released from prison. Dugan was denied entry to the office because he had been loud and disruptive in the past, and was told to call instead. A week later, Dugan called and spoke to the staff member whose name he'd been given. She told him she could not help him and suggested he get the paperwork from the clerk of court. He became aggressive and agitated, and called her a "fucking cunt" before hanging up on her. He did not threaten her or anyone else.

**Procedural Posture & Holding:** A deputy sheriff cited Dugan for violating the Privacy in Communications statute, § 45-8-213, MCA. Dugan moved to dismiss, arguing the charge violated his free speech rights, and the statute was unconstitutionally vague. The justice court denied the motion, and Dugan entered a plea of nolo contendre. He was sentenced to 180 days in jail with all but five suspended, and ordered to pay $585.

Dugan appealed to the district court, which determined the utterance constituted unprotected "fighting words," and the statute was not unconstitutionally vague or overbroad. Dugan appeals, and the Court affirms in part, reverses in part, and remands to allow Dugan to proceed to trial.

**Reasoning:** (1) Fighting words, "which by their very utterance inflict injury or tend to incite an immediate breach of the peace," are unprotected by the First Amendment. *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942). After reviewing federal and state case law, the Court concludes that because Dugan's utterance was made over the phone, and not in person, it does not fall into the "fighting words" category. The Court also refuses to apply the captive audience doctrine, and finds that Dugan's speech was not a "true threat." (2) The statute makes "obscene, lewd, or profane language . . . prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy or offend." § 45-8-213 (1)(a). The Court holds that this provision is facially overbroad, and strikes it from the statute. Dugan may be prosecuted, but the state must prove his intent to offend her. (3) Finally, the Court holds that the statute is not unconstitutionally vague.

**Justice Rice's Concurrence and Dissent:** Justice Rice dissents to issues 1 and 2, and concurs in issue 3. (1) Dugan's utterance "had only one purpose: to injure and abuse Redmond-Sherrill, to reduce her human dignity to nothing more than a sexual act or a sexual body part." ¶ 75. As such, Justice Rice would hold it was unprotected speech. (2) Justice Rice would construe the prima facie evidence sentence of § 45-8-213 as a permissive inference rather than a mandatory presumption.

### *Bostwick Properties, Inc. v. Montana DNRC,* 2013 MT 48 (Feb. 27, 2013) (5-0) (Morris, J.; Rice, J., concurring)

**Issue:** Whether the district court properly reversed DNRC's denial of Bostwick's water use permit application.

**Short Answer**: Yes.

*Affirmed*

**Facts:** Bostwick Properties applied for a water use permit in Dec. 2006 for a subdivision. The agency deemed the application complete in Feb. 2007 and noticed it for public comment. DNRC did not act on the application, and Bostwick sought a writ of mandate in Dec. 2007. DNRC denied the application, and the district court granted the writ. This Court reversed because the act had already been done, and DNRC found Bostwick had not proved all criteria by a preponderance. *Bostwick I,* 2009 MT 181. The Court remanded for a hearing.

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Bostwick requested that DNRC disqualify itself on the basis of bias; DNRC refused. DNRC determined that Bostwick's water use would result in a net depletion of surface water, and that Bostwick failed to demonstrate lack of adverse effect, requiring it to mitigate. It then found Bostwick's mitigation plan inadequate.

**Procedural Posture & Holding:** Bostwick petitioned for review by the district court. The court agreed that Bostwick failed to prove no net depletion of surface water and lack of adverse effect, and was therefore required to mitigate its water usage. The court determined Bostwick's mitigation proposal was adequate as a matter of law, and held that DNRC had improperly denied Bostwick's application. The court also noted that DNRC had exhibited bias against Bostwick, but found no prejudice. Bostwick appeals, DNRC cross-appeals, and the Supreme Court affirms.

**Reasoning:** Bostwick's had to prove all statutory criteria by a preponderance. DNRC had authority to deny Bostwick's permit after finding Bostwick failed to meet its burden. The Court holds that runoff from subdivision roads may not be used to calculate potential depletion of surface water, as Bostwick does not have a permit to appropriate the runoff, and permits are the sole way to appropriate water.

Bostwick next argues that the uncertainty of the exact effect on the Gallatin River of its extracting water from the aquifer should support a conclusion that no net depletion or adverse effect has been shown. The Court disagrees, noting that this shifts the burden to DNRC. Although DNRC acknowledges it erred in issuing a water use permit to the Yellowstone Club under similar facts, it has the authority to deny a permit where uncertainty exists regarding hydrological connections.

The Court next holds that any additional depletion of water from the Gallatin River could adversely affect senior appropriators, as no legally available water exists on the Gallatin during irrigation season. Bostwick's use is therefore not de minimis, and the Court refuses to require senior appropriators to force Bostwick' to stop using water, as that again shifts the burden from Bostwick to senior appropriators.

Bostwick sought to mitigate its water usage with a water right, but the mitigation would occur only during the irrigation season, not the non-irrigation season. The district court found that Bostwick's non-irrigation-season water use would adversely affect only FWP, and that Bostwick demonstrated no adverse effects for its irrigation-season-only mitigation plan.

Finally, the Court affirms the district court's finding that DNRC's bias does not mandate reversal.

**Justice Rice's Concurrence**: Justice Rice would have remanded for a new hearing as he does not agree that affirming the substantive decisions necessarily renders the bias irrelevant. Additionally, as a matter of due process, it is appropriate that bias claims be addressed as a threshold issue rather than as a final issue reviewed for demonstrated prejudice.

### *Sayers v. Chouteau County*, 2013 MT 45 (Feb. 27, 2013) (5-0) (Morris, J.)

**Issue:** (1) Whether the lower court properly applied the *Reid* analysis to determine whether Lippard Road is a public road; and (2) whether the lower court properly held that Lippard Road is a public road.

**Short Answer**: (1) Yes; and (2) yes.

*Affirmed*

**Facts:** Bob Sayers owns about 5,400 acres of undeveloped farmland in Chouteau County. Most of his land is in Township 26 North, Range 10 East, but a portion is in Township 25 North, Range 10 East. He bought the land in 1992 from the Federal Land Bank. Lippard Road travels through his land.

**Procedural Posture & Holding:** Sayers sought a declaratory judgment regarding whether Lippard Road remains a county road south of its intersection with Section 26 and 27 in Township 26 North, Range 10 East. The district court determined that the record tended to suggest Lippard Road had been established as a county road from its junction with Highway 87 to the railroad right-of-way in Section 1, Township 25 North, Range 10 East. Sayers appeals, and the Supreme Court affirms.

**Reasoning:** (1) The Court has already recognized that strict compliance with the jurisdictional requirements to establish a road by petition would pose an unjustifiable burden on the public to prove a public road created nearly 100 years earlier. *Reid v. Park County*, 192 Mont. 231 (1981). Instead, the court may evaluate the record taken as a whole to determine whether a public road was created. Sayers argues there is a complete record here, which obviates the need for a *Reid* analysis. The Court disagrees, and finds the district court properly viewed the record as a whole.

(2) The facts in the record support the district court's determination that Lippard Road is a public road for the entirety of the contested section.

### *State v. Hicks,* 2013 MT 50 (Feb. 27, 2013) (5-0) (McGrath, C.J.)

**Issue:** (1) Whether assault on a minor is a forcible felony under the deliberate homicide statute; and (2) whether the video reenactment of Hicks pushing a mannequin was unfairly prejudicial.

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

*Affirmed*

**Facts:** Three-year-old KB died in March 2010 from severe brain injuries suffered after her mother's boyfriend, Jerimie Hicks, shoved her into a wall. Hicks told emergency responders and the police that KB had fallen down the stairs, and that he threw their puppy against the wall to get it away from her, leaving a dent in the wall. Eventually he told detectives he had lost his temper and shoved her into a wall. Using a child-sized mannequin, Hicks demonstrated how hard he had pushed KB.

Hicks later asked his mother to retrieve items from the house that could be incriminating.

**Procedural Posture & Holding:** Hicks was charged with deliberate homicide and solicitation to tamper with physical evidence. He filed a motion in limine to exclude the videotape showing how hard he had pushed KB, and the district court denied it. After the jury was sworn in, Hicks moved to dismiss the deliberate homicide charge, arguing assault on a minor was not a forcible felony. The court denied his motion. After a

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six-day trial, the jury convicted Hicks of both charges. He was sentenced to 100 years in prison with a 25-year parole restriction for the deliberate homicide, and a concurrent five-year sentence for the solicitation. He appeals, and the Supreme Court affirms.

**Reasoning:** Hicks was charged with felony murder, which requires a predicate offense. Any forcible felony can support a charge of felony murder. The state alleged assault on a minor as the predicate offense for Hicks' felony-murder charge. Hicks contends it is not a forcible felony because assault on a minor is a misdemeanor. The court looks at the plain meaning of the statute, which defines a forcible felony as any felony that involves the use or threat of physical force or violence against the individual. § 45-2-101(24). Assault on a minor is punishable by imprisonment for up to five years; thus, it is a felony. The district court correctly held that Hicks' assault on KB was a forcible felony.

(2) Hicks argues the videotape showing him throwing the mannequin into a wall was unfairly prejudicial. The video reenactment was probative. Although it was incriminating and prejudicial, it was not unfairly so. The district court did not abuse its discretion by admitting the entire video into evidence.

### *Yeager v. Morris,* 2013 MT 44 (Feb. 27, 2013) (4-3) (Cotter, J., for the majority, joined by Baker, J., Rice, J., and Judge Todd Baugh; Morris, J., dissenting, joined by Wheat, J. and McGrath, C.J.)

**Issue:** Whether the proper venue for trial is the county where the collision occurred or the county where the damaged vehicle came to rest after being hit, or both.

**Short Answer**: The county where the collision occurred.

*Affirmed*

**Facts:** Della Yeager and her daughter were injured in a collision with a pickup truck driven by Michael Morris, Jr., a Glacier County resident, and owned by Michael Morris, Sr., a Teton County resident. The collision occurred in Teton County, but Yeager's vehicle was propelled across the county line into Cascade County, and came to rest there.

**Procedural Posture & Holding:** Yeager filed a complaint in Cascade County alleging negligence against Morris, Jr. and negligent entrustment against Morris, Sr. Morris, Jr. moved to change venue to Glacier or Teton counties, asserting Cascade County was an improper venue. The district court granted the motion, and changed venue to Glacier County. Yeager appeals, and a divided Court affirms.

**Reasoning:** The proper venue for a tort action is either a county where a defendant resides or the county in which the tort was committed. § 25-2-122(1), MCA. Neither defendant resides in Cascade County, so Cascade County must be the county where the tort was committed. The Court has previously held that a tort is committed whether there is a "concurrence of breach of obligation and the occasion of damages." ¶ 12 (quoting *Circle S Seeds*). When a Fergus County resident traveled to Yellowstone County to see a doctor, who prescribed medication, and the patient went home, took the medicine, and suffered an adverse reaction, the Court held the tort was committed in Yellowstone County. *Howard v. Dooner*. When the breach and the damages occur in different counties, fairness to the defendant is a fundamental requirement. *Circle S* is distinguished on its facts because the tort took place in multiple counties. Here, "the tort was indisputably committed in one county only – Teton County." ¶ 17.

**Justice Morris's Dissent:** The majority holds that breach of duty is the only relevant element of a tort in determining venue. The vehicles collided in Teton County, propelling Yeager's vehicle across the county line into Cascade County. Thus, at least a portion of Morris's actions took place in Cascade County. Yeager suffered damages in Cascade County. Justice Morris would hold that either Cascade or Teton counties would qualify as proper venues.

### *Hartsoe v. Christopher*, 2013 MT 57 (March 5, 2013) (5-0) (Wheat, J.)

**Issue:** Whether Hartsoe's claims against Judge Christopher were properly held barred by judicial immunity and res judicata.

**Short Answer:** Yes.

*Affirmed*

**Facts:** John Hartsoe filed a complaint against Judge Christopher of the Twentieth Judicial District, alleging that she violated several of his constitutional rights. She voluntarily appeared prior to being served, and moved for summary judgment on the grounds of judicial immunity as well as res judicata and collateral estoppel.

**Procedural Posture & Holding:** After a hearing, the district court granted her motion on all three grounds. Hartsoe appeals, and the Supreme Court affirms.

**Reasoning:** "[J]udges are immune from suits for civil damages for acts performed in their judicial capacities." ¶ 12. Hartsoe conceded that all acts forming the basis of his complaint occurred while Judge Christopher was acting in her official capacity. Therefore, summary judgment on the basis of judicial immunity was proper. The Court takes notice of *Hartsoe v. Heisel*, in which Judge Molloy dismissed Hartsoe's complaint on the grounds that Judge Christopher was protected by judicial immunity, and holds that res judicata bars Hartsoe's claim here.

### *In re the Marriage of Eslick*, 2013 MT 53 (March 5, 2013) (7-0) (Cotter, J.)

**Issue:** Whether the district court abused its discretion in refusing to grant David a continuance and entering a default decree of dissolution, thereby prejudicing David.

**Short Answer:** Yes.

*Reversed*

**Facts:** David has been in prison since December 2010. Lori petitioned for dissolution in October 2011, retaining counsel in March 2012. David has been pro se throughout the dissolution. The district court allowed David to appear by telephone at all hearings.

David did not appear telephonically for the final pretrial conference on June 12, 2012. Lori's counsel informed the court that an order had been returned to clerk's office from the prison showing David was not there. The court directed Lori and the clerk to attempt to find David, and rescheduled the final pretrial

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conference for a week later.

Unbeknownst to the court, David had been transported to a Missoula hospital five weeks earlier for amputation of part of his foot, and did not return to his unit at the prison until June 18, 2012. He did not receive any mail until he returned to his unit. On that day, he mailed a motion to the court asking for a 60-day continuance. The district court held the final pretrial conference on June 19, 2012, at which Lori informed the court David was back at the prison.

**Procedural Posture & Holding:** Lori moved for a default judgment against David for failing to appear telephonically at the final pretrial conference. The court granted her motion, vacated the trial date, and set a hearing for entry of the final decree on June 26, 2012. On June 21, 2012, the court received David' motion for a continuance. On June 22, 2012, the court entered an order stating it had received the motion and would consider it at the scheduled hearing. David did not appear at the June 26 hearing. The court entered a default decree of dissolution.

David sent a letter to the clerk asking if the court would vacate the final decree. The court responded stating that if it was a letter to set aside the default it was denied. David appeals the court's decision not to grant his motion for a continuance, and the Supreme Court reverses.

**Reasoning:** A decisions to grant or deny a continuance is in the sound discretion of the district court, and will not be overruled unless there is an affirmative showing that the movant has suffered prejudice caused by the district court's abuse of discretion.

David drafted and mailed his motion for a continuance as soon as he could. He could not appear at the June 19 hearing because the prison requires inmates to request use of a telephone well in advance. Because of these extraordinary circumstances, which were beyond David's control, David demonstrated good cause for granting his motion for a continuance.

Lori argues that the default decree did not prejudice David. David's inability to appear at the final pretrial conference or trial resulted in his inability to present witnesses or exhibits. He specifically disputes several findings made by the Court regarding marital debts and assets. This is sufficient to establish prejudice, and the district court abused its discretion.

### *In the Matter of MJ,* 2013 MT 60 (March 5, 2013) (5-0) (McKinnon, J.)

**Issue:** (1) Whether MJ was properly adjudicated a youth in need of care, and (2) whether the district court properly awarded custody to MJ, Sr.

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

*Affirmed*

**Facts:** MJ was born with numerous medical issues and hospitalized for the first three months of his life. The suspected cause of his problems is maternal drug use, as his mother, OJ, tested positive for methamphetamine at the time of MJ's birth. MJ denied using meth, but admitted to using marijuana. MJ's prognosis is guarded. He will require ongoing pediatric specialty care beyond what is available in Montana, and will need a parent who can provide constant care. While he was in the hospital, OJ did not visit consistently, and indicated she would not seek follow-up care for MJ. MJ was released into his father's care.

DPHHS filed a petition for emergency protective services and adjudication of a youth in need of care. The district court granted temporary protective services and set a show cause hearing.

OJ did not appear at the hearing. Her counsel represented he had had no contact with her. The department indicated they had been in contact with her until two weeks before the hearing. MJ, Sr., MJ's father, was at the hearing and stipulated to a finding that MJ was a youth in need of care. He sought custody of MJ. As an airman in the Air Force, he wanted to transfer to a location with medical facilities to address MJ's needs. The court set an adjudicatory and dispositional hearing for July 24, 2012.

**Procedural Posture & Holding:** OJ appeared at the July 24 hearing with counsel, who requested a continuance on the grounds that he had met OJ only moments earlier. The court reset the hearing for August 7, 2012. OJ did not appear. The court took testimony regarding MJ's medical needs, OJ's failure to appreciate the magnitude of those needs, and MJ, Sr.'s involvement with MJ. A child protective specialist testified that MJ, Sr. had demonstrated he could appropriately parent MJ and provide for MJ's medical needs.

The district court found that MJ was a youth in need of care, and then held a disposition hearing to determine MJ's best interests. The treating physician, child protective specialist and guardian ad litem testified that MJ, Sr. should have custody. The district court awarded custody to MJ, Sr., and OJ appeals. The Supreme Court affirms.

**Reasoning:** To adjudicate a child as a youth in need of care, the state must prove by a preponderance that the child has been abused, neglected, or abandoned. Here, the record supports such a finding based on OJ's drug use during pregnancy, her failure to appreciate the severity of MJ's medical needs, and her unwillingness to learn what was required to care for MJ.

Additionally, the court properly awarded custody to MJ, Sr., so that he could relocate to an air base with more advanced medical care. The court's decision to award custody to MJ, Sr., was proper. If OJ wants to ensure she can visit MJ more often, the proper procedure is to initiate a parenting plan action.

### *In the Matter of RF*, 2013 MT 59 (March 5, 2013) (5-0) (McKinnon, J.)

**Issue:** (1) Whether the district court properly ordered RF's involuntarily commitment to the Montana State Hospital, and (2) whether RF received ineffective assistance of counsel.

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

*Affirmed*

**Facts:** Police were called to Albertson's in Billings and found RF agitated, afraid, and appearing to suffer from paranoid delusions. He was taken to Billings Clinic Psychiatric Center and evaluated by the medical director, Dr. McDermott.

**Procedural Posture & Holding:** The county attorney's office petitioned for RF's involuntary commitment. The district

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court determined there was probable cause to believe RF suffered from a mental disorder, and that he met the statutory criteria for involuntary commitment. He appointed counsel and set an initial hearing, at which he appointed Dr. McDermott to evaluate RF. Dr. McDermott testified that RF suffered from severe mental illness, was homeless and without resources, and could not sustain himself untreated. RF testified in his defense.

After the evidentiary hearing, the court involuntarily committed RF to the Montana State Hospital. RF appeals, and the Supreme Court affirms.

**Reasoning:** (1) The Court reviews the evidence and finds substantial evidence to support the lower court's conclusion that RF was unable to care for himself, and that he presented an imminent threat of injury to himself or others. (2) RF argues his counsel was ineffective because he failed to object to hearsay statement in Dr. McDermott's report, failed to advocate for RF, and failed to question whether the state hospital was the least restrictive environment for RF's treatment. Because the lower court had substantial evidence to order commitment even without the hearsay statements, counsel's performance was not deficient for failing to object. The record shows that RF's counsel did advocate for RF. Finally, Dr. McDermott testified no other facility was available for a mental disorder as severe as RF's. RF's claim of ineffective assistance therefore fails.

### *Rukes v. State,* 2013 MT 56 (March 5, 2013) (5-0) (Baker, J.)

**Issue:** Whether the district court properly dismissed Rukes' petition for post-conviction relief.

**Short Answer:** Yes.

*Affirmed*

**Facts:** In May 2009, Jack Rukes was arrested and taken to jail for allegedly assaulting his wife. The officer at the jail did not record her interview with Rukes, but took notes that she later converted into a written report. Rules moves to suppress his statements because the interview violated newly enacted legislation requiring custodial interrogations to be recorded. The district court denied the motion because the states were not yet in effect.

Trial was set for January 2010, but continued after his original counsel withdrew, and the court gave new counsel time to prepare. Trial was held March 10, 2010, in front a jury. During trial, a court officer sat close enough to Rukes that a juror asked the bailiff who the man was, and the bailiff replied he was "Mr. Rukes's guard."

The jury returned a guilty verdict on the charges of felony aggravated assault and misdemeanor unlawful restraint. The district court sentenced Rukes to 20 years in prison with ten suspended for the felony conviction, and six months in jail for the misdemeanor, to be served concurrently. The court ordered a mental evaluation of Rukes, and ordered him not to have contact with his wife and children.

**Procedural Posture & Holding:** Almost seven months after he was sentenced, Rukes's appellate counsel filed a brief pursuant to *Anders v. California*, raising nine possible issues for appeal, stating none of them were meritorious, and asking permission to withdraw. Rukes did not respond, and the Court granted appellate counsel's motion to withdraw, and dismissed Rukes's appeal. Rukes then filed a response, which the Court considered before upholding its previous order.

Rukes then filed a petition *pro se* for post conviction relief. The district court found most had already been raised on direct appeal, and the others lacked merit. The court dismissed Rukes's petition. Rukes appeals, and the Supreme Court affirms.

**Reasoning:** Many of Rukes's claims are barred from appellate review because they were or could have been raised on direct appeal. The Court reviews them and explains its conclusions on each.

### *State v. Holm,* 2013 MT 58 (March 5, 2013) (4-0) (Morris, J.)

**Issue:** (1) Whether the district court properly found Holm's counsel provided effective assistance, and (2) whether the district court abused its discretion by denying a motion to continue trial eight days before trial so that Holm could retain private counsel.

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

*Affirmed*

**Facts:** Brian Holm was driving north on Brooks Street in Missoula at night in November 2010 when he veered across the street and onto the sidewalk, killing Brian Beaver. Holm's BAC was .1. He also had .14 mg of Ambien in his blood, as well as .14 mg of an antidepressant and .2 mg of hydrocodone.

**Procedural Posture & Holding:** After requesting and receiving one continuance, and filing then withdrawing a second motion to continue, Holm appeared before the court eight days before trial and asked for more time to substitute new counsel and allow counsel time to prepare. The court denied the motion on the basis of Holm having failed to show diligence. He was convicted, and appeals. The Supreme Court affirms.

**Reasoning:** (1) Before allowing an indigent criminal defendant to substitute counsel, the trial court must make an initial inquiry into whether the defendant's complaints about his appointed counsel are "seemingly substantial." Here, Holm claimed his appointed counsel was ineffective for failing to interview or subpoena any witnesses, and for failing to retain any experts. The court asked appointed counsel to respond to the complaints, and he explained that he had interviewed multiple witnesses, but had not subpoenaed any because all fact witnesses were already subpoenaed by the state. He also stated that he had discussed the decision to call experts with other lawyers in his office as well as his investigator, and decided not to hire any experts. The district court's conclusion that these complaints were not "seemingly substantial" was not an abuse of its discretion.

(2) If a district court abused its discretion in denying a motion for continuance, the court looks to whether the defendant was prejudiced. If the ruling prevented the defendant from retaining private counsel, the Court presumed prejudice. Thus, the issue is whether the district court abused its discretion. The district court must consider a motion for a continuance in light of the diligence shown by the moving party. Here, Holm testified he was waiting to hear the time

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of the blood draw before seeking replacement counsel; however, his appointed counsel told the court the delay in this information did not prejudice Holm. He had already received one continuance, and moved for a second one before withdrawing it. He did not mention seeking replacement counsel until eight days before trial. The victim's family had already made arrangements to come form Washington, and a witness had already made arrangements to come from Alaska. The court did not abuse its discretion is determining Holm did not make a good faith, diligent effort to retain substitute counsel.

### *Stewart v. Rice,* 2013 MT 55 (March 5, 2013) (5-0) (Baker, J.)

**Issue:** (1) Whether Clark Rice is entitled to a new trial on the basis of various errors, and (2) whether the district court committed reversible error by proceeding to trial without first addressing Edythe's mental competency, ensuring the parties met statutory notice requirements, and whether the trial violated Edythe's right to due process.

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

*Affirmed in part, reversed in part, remanded*

**Facts:** Edythe Rice owns and lives on a small ranch in Big Horn County. She is in her late eighties; her son, Clark, helps her with the ranch. In January 2006, between 5 and 5:30 p.m., Clark turned a tractor onto Old Hwy. 87 from a dirt road and began driving north. He could see cars approaching from a distance. The tractor's lights were not on, and its left side extended into the highway's northbound land. Juanita Stands was also driving northbound. She approached at high speed and struck the tractor's left tire, causing her vehicle to spin into the southbound lane, where it collided with Vianna Stewart's vehicle. All three vehicles were totaled, and Juanita and Vianna suffered injuries.

Vianna filed a complaint in December 2006 against Juanita and Clark. Juanita cross-claimed against Clark, who counterclaimed against Juanita. Vianna added Edythe as a defendant under the doctrines of *respondeat superior* and negligent entrustment in 2009. The trial was scheduled for December 2009, but was continued as the parties filed motions to dismiss and for summary judgment.

By 2011, Clark and Edythe could no longer pay their attorneys, who moved to withdraw. In his affidavit supporting his motion, Edythe's attorney stated that he believed Edythe was no longer competent to understand the proceedings or assist in her defense. He requested that a conservator be appointed before further proceedings, and moved to allow Edythe to testify by deposition, as in her doctor's medical opinion, she would not be "available" by the time of trial. The court granted the motion to withdraw and to allow her to testify by deposition, but did not address Edythe's competency.

**Procedural Posture & Holding:** Clark consented to waiving his right to jury trial, and the district court conducted a bench trial in July 2011. Clark and Edythe appeared *pro se*; Edythe was present but did not present any evidence or participate in the trial.

The court held that Clark was negligent *per se* and that his negligence caused the collisions. It held Edythe vicariously liable as the ranch principal. It apportioned 20% of the fault to Juanita, and 80% to Edythe and Clark jointly and severally, finding Juanita's damages to be $582,516, and Vianna's $48,502. Clark and Edythe appeal. The Court affirms the verdict as to Clark, but reverses as to Edythe and remands for an evaluation of Edythe's need for a conservator and for a new trial on Edythe's vicarious liability only.

**Reasoning:** (1) Clark, appearing *pro se*, raises several issues that the Court quickly analyzes and dismisses. (2) Edythe argues that the Court erred in failing to address her competency, that the plaintiffs failed to serve a Rule 10 notice on her, and that the trial violated her due process rights. (a) The issue of Edythe's competency was raised by her counsel's affidavit and by his motion to allow her to testify by deposition. The failure to evaluate her competency "raises significant questions of the fundamental fairness of the proceedings with respect to her unrepresented participation in the trial." ¶ 31.

(b) Vianna served Clark with a Rule 10 notice after his counsel withdrew, but did not similarly serve Edythe. The Court has previously held that actual notice is insufficient. *Quantum Electric*. Rule 10 "is an important procedural safeguard intended specifically to protect unrepresented litigants like Edythe from procedural unfairness." ¶ 35. The failure to serve Edythe with a Rule 10 notice requires reversal of the judgment against her.

(c) The Court declines to decide this issue as it is reversing and remanding on Edythe's first two issues.

### *Thayer v. Hollinger,* 2013 MT 52 (March 5, 2013) (5-0) (McGrath, C.J.)

**Issue:** Whether the district court properly held that Big Sky Lake homeowners do not have express easements for unrestricted access across four roads on Hollingers' property.

**Short Answer:** Yes.

*Affirmed*

**Facts:** Thayers et al. ("Homeowners") own lakeshore lots abutting Big Sky Lake. Hollingers own land surrounding the lake, but not abutting the lake and not abutting any of Homeowners' lots. Homeowners claimed an express easement allowing them unrestricted use of four roads or trails on Hollingers' land. Hollingers allow permissive use of the roads or trails for non-motorized access, but Homeowners sought to use motorized vehicles.

**Procedural Posture & Holding:** After Hollingers installed gates at several points to block motorized access, Homeowners brought suit. Upon cross-motions for summary judgment, the district court granted Hollingers' motion, holding that none of the documents relied on by Homeowners established an easement across Hollingers' land. Homeowners appeal, and the Supreme Court affirms.

**Reasoning:** The Court reviews the documents upon which Homeowners rely. An express easement must be "clearly depicted." ¶ 7. The Court finds no such depiction in any of the documents.

### *In the Matter of RWK,* 2013 MT 54 (5-0) (March 6, 2013) (Cotter, J.)

**BRIEFS,** next page

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**Issue:** (1) Whether the district court violated RWK's rights when it failed to obtain a personal waiver of rights under § 53-21-119(1), MCA, and (2) whether there is a valid order authorizing the involuntary administration of medication.

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

*Affirmed*

**Facts:** RWK is a 55-year-old man with a history of schizoaffective disorder. Police transported him to the emergency room on Christmas Eve 2011 after he caused a disturbance at a church. RWK had lived in a group home and was a patient of the Center for Mental Health. His records indicated he had stopped taking his medication several days earlier.

**Procedural Posture & Holding:** The state petitioned for involuntary commitment, alleging RWK was unable to care for his basic needs and appeared to pose a danger to himself and others. The district court set a hearing, appointed a public defender and appointed a statutory friend. The state sought commitment for up to 90 days. RWK's counsel stated that RWK understood his rights and the nature of the proceeding, and wished to waive his rights under § 53-21-119, MCA. RWK did not object to his counsel's representations. The court ordered RWK's commitment.

A month later, the state moved to amend the commitment order and allow the involuntary administration of medication. The staff psychiatrist at the state hospital testified that RWK refused all medication and remained delusional, and refused to eat or drink adequately. The district court held a hearing, and RWK appeared via video. RWK's counsel objected, stating involuntary medication had not been discussed and the court lacked authority to alter the terms of the commitment. After briefing, the district court held it could construe and grant the state's motion to amend as a Rule 60 or Rule 59 motion. RWK appeals, and the Supreme Court affirms.

**Reasoning:** (1) The lower court's finding that RWK was capable of making a decision about his procedural rights, and knowingly waived those rights, is supported by the record and complies with § 53-21-119(1), MCA, even though the court relied on RWK's counsel's representations, and RWK did not make a personal statement. RWK and his statutory friend were present in open court.

(2) The district court's original order of commitment stated that RWK "shall take such medication, as the attending physician shall prescribe, both at the state hospital and, also, during community outpatient treatment." The Court holds this is sufficient to comply with the statute, and that the district court's findings support the conclusion that involuntary medication was the best alternative. The Court urges district courts to "plainly and clearly state in orders of commitment whether the circumstances justify" involuntary medication, and if so, the reason involuntary medication is chosen over other alternatives.

### *Kelker v. Geneva-Roth Ventures, Inc.,* 2013 MT 62 (4-2) (March 12, 2013) (Morris, J., for the majority; Cotter, J., specially concurring; Baker, J., dissenting)

**Issue:** Whether the district court properly held the arbitration clause in the online loan agreement unenforceable.

**Short Answer:** Yes.

*Affirmed*

**Facts:** Tiffany Kelker submitted an online application for a $600 payday loan from Geneva-Roth Ventures, which charged her an interest rate of 780% APR. Geneva-Roth ultimately withdrew more than $1,800 in interest charges from Kelker's bank account. The loan agreement, which Kelker signed electronically, had an arbitration clause.

In completing the application, Kelker clicked on a box that stated she had read, understood, and agreed to be bound by the loan agreement. The full text of the agreement was not visible on her compuer screen unless she scrolled down. While Geneva-Roth used bold fonts and all capital letters to draw attention to certain provisions of the loan agreement, it did not highlight the arbitration clause.

**Procedural Posture & Holding:** Kelker filed a class-action suit against Geneva Roth for charging interest higher than the 36% APR allowed by the Montana Consumer Loan Act for payday loans, § 32-5-301, MCA. Geneva-Roth moved to compel arbitration. The district court deemed the arbitration clause unenforceable and denied the motion. Geneva-Roth appeals, and a divided Court affirms.

**Reasoning:** When a party challenges the validity of the arbitration clause, a court may resolve that dispute. The validity of an arbitration clause is determined by state law governing the validity, revocability, and enforceability of contracts generally.

Kelker relies on *Kortum-Managhan* to argue that the clause is unenforceable. Geneva-Roth argues the clause is not invalid under Montana contract law, and further, that *Concepcion* changed the U.S. Supreme Court's interpretation of the Federal Arbitration Act and thus preempts *Kortum-Managhan*. The Court first finds that *Concepcion* does not invalidate its analysis in *Kortum-Managhan*.

The Court uses a factors test in determining whether a contract or arbitration clause in unconscionable. Factors include lack of meaningful choice, a take-it-or-leave-it offer, a party lacking sophistication, and unequal bargaining power of the parties. A contract is unconscionable if it is a contract of adhesion and the terms unreasonably favor the drafter. The Court holds that the loan agreement is a contract of adhesion. It next determines that the arbitration clause unreasonably favored Geneva-Roth, fell outside Kelker's reasonable expectations, and in conjunction with other parts of the agreement, created an ambiguity. For all of these reasons, it is unconscionable.

**Justice Cotter's Special Concurrence:** Justice Cotter would apply § 27-5-114(2)(b), MCA, which states that arbitration clauses are enforceable when the total consideration is over $5,000. The corollary is that arbitration clauses are unenforceable when the consideration is less than $5,000, as it is here. Although this argument was not raised below, Justice Cotter believes it is appropriate when faced with a waiver of fundamental rights, including the right to access the court system, the right to jury trial, and the right to appeal.

**Justice Baker's Dissent (joined by Justice Rice):**

**BRIEFS,** next page

# United States Supreme Court deals a blow to copyright owners with foreign licensees

**By Toni Tease**

It is a fundamental principle of U.S. copyright law that the owner of a copyright has certain exclusive rights. These rights include the exclusive right to distribute the work in the United States. Section 602 of the Copyright Act prohibits importation into the United States of works that would have infringed a U.S. copyright if those works had been made here. There are certain limited exceptions; for example, scholarly, educational or religious organizations may import one copy of an audiovisual work solely for archival purposes.

The "first sale" doctrine provides that if someone lawfully purchases a copy of a work (for example, by going to a bookstore and buying a book), then that person may sell or dispose of the copy as she sees fit. (She may not, however, make copies of the book.) In other words, the copyright owner has no right to limit further distribution of a work once he authorizes that first sale.

The issue presented to the U.S. Supreme Court in *Kirtsaeng d/b/a BlueChristine99 v. Wiley & Sons, Inc.*, 2013 U.S. LEXIS 2371 (March 19, 2013), was whether a copy that was made outside of the United States with the author's permission and then imported into the United States fell under the copyright owner's exclusive right to distribute (and to prevent others from importing his work into the United States) or the fair sale doctrine (which would allow purchasers of authorized copies of the work to freely distribute them).

The majority held that in the situation where a copy of a work is printed abroad and sold with the copyright owner's permission (so there was no infringement in the foreign country), the copyright owner may not complain when those very same copies are imported into the U.S. In this case, the copyright owner argued that the first sale doctrine should apply only to copies made in the U.S. and that companies should not be able to print works abroad and then import them into the United States without the copyright owner's permission.

Although not expressly stated in the opinion, one of the facts undoubtedly taken into consideration by the Court was that the copyright owner (in this case, *Wiley & Sons*) would have received royalties based on the sale of copies of the work abroad. Why then should the publisher receive a second set of royalties when those same copies are imported into the United States? The publisher argued that the copies sold for less abroad than they would have in the United States and that, therefore, it was effectively cheated out of royalties that would otherwise have been due based on the higher U.S. prices.

The Court's decision emphasized the global nature of today's economy and expressed a concern for the repercussions of imposing a geographic limitation on the first sale doctrine. Had the Court ruled in favor of the publisher, such a decision may have (theorized the Court) resulted in a restriction of trade. The Court spoke of "free trade" and "readily movable" goods, the message being that publishers need to develop their business models (and pricing strategies) around global markets rather than country-centric policies.

There is no question that the *Kirtsaeng* case constitutes a blow for copyright holders in the United States. In this author's view, this case had echoes of the Court's decision in *Bilski v. Kappos* (click here for our article on *Bilski*), a case involving the patentability of business methods. Although the legal issues presented in these two cases were entirely unrelated, the Court in both cases expressed a desire to "modernize." In *Bilski*, the issue was allowing the law to evolve with technology. In *Kirtsaeng*, the issue is recognizing (or embracing, depending on your viewpoint) the global nature of our economy.

There is much speculation that *Kirtsaeng* will be followed by some sort of legislative action. Given Congress' fiscal priorities, it is unlikely that the legislature will act on this issue this year. In the meantime, copyright holders would be well advised to review their Foreign Rights Agreements to ensure that they are priced accordingly--that is, to cover the possibility, if not the eventuality, that those foreign copies may make their way into the United States.



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**BRIEFS,** from previous page

The Court's decision is prohibited by federal law prohibiting state-law rules with a disproportionate impact on arbitration agreements, and unsupported by generally applicable state contract law. The district court erred by basing its determination that the arbitration clause was unconscionable on the oppressiveness of the interest rate. It is a generally applicable principle of contract law that ignorance of the contents of a contract is not grounds for relief from its provisions. Because an arbitration clause waives fundamental rights, however, the Court has applied a more stringent standard to arbitration clauses.

The *Kortum-Managhan* factors are designed to determine whether an individual knowingly gave up fundamental rights to trial by jury and access to the courts. The Court suggests Kelker was compelled by economic duress to sign a contract calling for a 780% APR, incorporating the district court's error of looking to the unconscionability of the contract as a whole rather than the unconscionability of only the arbitration clause.

The arbitration clause in the loan agreement is not one-sided and does not unreasonably favor Geneva-Roth. It is not unconscionable. Justice Baker would reverse the district court.

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## Richard Pinsoneault

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.

## Robert W. Conley

It is with deep sadness that the family of Robert ("Bob") W Conley announces his passing from natural causes on March 26, 2013 at the Newport Hills Villa in Bellevue, WA. Born on January 29, 1922 to Allerton and Hildred Conley, Bob lived his formative years in the bucolic splendor of the farming land of Washta, Iowa-- a place that he would fondly remember throughout his life--with several relatives, including his beloved Aunt Cote. Soon after reaching adulthood, in the days immediately following Pearl Harbor, Bob enlisted in the Army Air Corps. Noting that the Air Corps did not have the losses that had been expected at the war's start, Bob felt supremely lucky to be never sent to serve outside the continental United States, unlike some of his comrades whom he never saw again.

Upon the end of World War II, Bob matriculated at the University of Iowa, where he was recognized as being a summa cum laude student at both its undergraduate and law schools. Upon his graduation from law school in 1950, Bob followed the advice of Horace Greeley by leaving the plains of Iowa for the mountains of Montana. It was in the Treasure State where Bob hit his stride as a man who wore many hats: deputy sheriff, lawyer, entrepreneur (as he owned an insurance adjustment company), insurance claims manager for Travelers Insurance (after selling his company), and geologist/surveyor/mining assessment worker. It was also in Montana that Bob married the former Joan Allen and had a son James.

In the mid-1970s, the family moved to Lubbock, TX and later Bellevue, upon being transferred by Travelers to revamp that company's claims departments in West Texas and the Northwest, respectively. His professional accomplishments included being named Claims Manager of the Year in 1980. With his typical modesty, Bob downplayed this honor by saying that the award just followed the most noteworthy natural disaster of the year: in his case, a volcano. Upon his retirement in the early 1990s, Bob found time to indulge his passions in investing, watching the Seattle Mariners (for whom he had been a season ticket holder since 1979), and, starting in 2003, being a devoted grandfather to his granddaughter Chloe. It is safe to say that anyone who ever met Bob, who mixed intelligent sagacity with earthy realism in almost every conversation, would be incapable of forgetting him and his unique style.

Bob, who is preceded in death by his father, mother, and brothers John, Benjamin, and Kenneth, is survived by his brother Richard, and sisters Barbara, Margaret, and Colleen. He is also survived by his aforementioned wife, son, granddaughter, as well as daughter-in-law Suzanne.

*— Obituary courtesy of www.cascadememorial.com*

## Continuing Legal Education

**For more information** about upcoming State Bar CLE, please call *Gino Dunfee at* ***(406) 447-2206.*** You can also find more info and **register at *www.montanabar.org***, just click the CLE link in the Member Tools box on the upper-right side of the home page. We do mail out fliers for all multi-credit CLE sessions, but not for 1-hour phone CLE or webinars. The best way to register for all CLE is online.

### May

**May 10 — Cybersleuth's Guide to the Internet.** Red Lion Colonial Hotel, Helena. 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.

### June

**June 14 — New Lawyers' Workshop and Road Show.** In Billings. Sponsored by the Professionalism Committee. Workshop free to new admitees. Approximately 3 ethics.

### July

**July 25-26 — Annual Bankruptcy Section CLE.** Fairmont Hot Springs Resort. Sponsored by the State Bar's Bankruptcy Section, approximately 10 CLE credits.

### September

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

### October

**Oct. 4 — Women's Law Section CLE.** Chico Hot Springs Spa & Resort. Credits pending.
**Oct. 11 — Arbitration.** Sponsored by the Dispute Resolution Committee. Credits pending.

# ROADSHOW

## Billings

**June 14**
Crowne Plaza 2-5 p.m.

## The Road Show qualifies for 3 ethics credits:

- Limited Scope Representation & Ghostwriting
- Conflicts of Interest
- Technology & Purloined Documents
- SAMI

**FREE**

*Please RSVP Robert Padmos at (406) 447-2202 or rpadmos@montanabar.org*

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This is the most current list of 1-hour CLE available through the Bar's on-demand catalog. Follow the CLE link in the Member Toolbox on the upper-right side of the home page at *www.montanabar.org* then go to "On-Demand Catalog." You can also go there directly at this URL: *http://montana.inreachce.com*. The courses are $50 and you can listen or watch them at your computer. To order content on a disc, visit the bookstore at *www.montanabar.org*.

**Ethics/SAMI**
- SAMI - Dependency Warning Signs | Jan. 2012
- SAMI - Is It Time to Retire? | Jan. 2012
- SAMI Smorgasbord | April 2012
- SAMI - Ethical Duties and the Problem of Attorney Impairment | April 2012
- Ethics and Elder Law | Jan. 2013
- SAMI - Understanding Behavioral Addictions in the Legal Professional | Feb. 2013
- SAMI - The Aging Lawyer | March 2013
- All Ethics, Nothing But Ethics | March 2013
    - Regulating Lawyers in Light Of Globalization and Technology: ABA Commission on Ethics 20/20 and other Recent Developments
    - Ethics and Elder Law Part 1: Elder Law, Powers of Attorney, Capacity, Dementia and Model Rules
    - Ethics and Elder Law Part 2: Litigating Guardian and Conservatorship
    - Do Loose Lips Sink Ships? Ethical Implications Of Confidentiality Agreements
    - Stress, Compassion Fatigue and Dealing with Emotional Clients (SAMI)

**Family Law**
- Drafting Family Law Briefs to the Montana Supreme Court | Oct. 2011
- How NOT to Mess Up Children During a Divorce Proceeding | Jan. 2012
- Settlement Conference Dos and Don'ts | Feb. 2012
- Facilitating Co-Parent Communication with OurfamilyWizard.com | June 2012
- Social Networking | Nov. 2012
- Income, Estate, & Gift Tax Consequences Of Divorce | Jan. 2013
- Hendershott v. Westphal, 2011 MT 73 | Feb. 2013 (pending)
- Point of Transformation: Divorce | March 2013 ( pending)

**Government**
- Recurring Issues in the Defense of Cities and Counties | March 2012

**Probate and Estate Planning**
- Probate Update | Dec. 2011

**Law Office Practice and Management**
- Online Resources for Lawyers | Feb. 2012
- "Microsoft Office 365" - Tips and Tricks | Feb. 2013 (pending)

**Civil**
- Electronically Stored Information - Montana Rules of Civil Procedure | March 2012

**Labor and Employment**
- Contested Case Procedures Before the Department of Labor and Industry | March 2012

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

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

**Healthcare**
- A Look Inside: OCR Compliance Audits

## CLASSIFIEDS POLICY

All ads (up to 50 words) have a minimum charge of $60. Over 50 words, the ads are charged at $1.20 per word. Ads that are published at the charges above in The Montana Lawyer magazine run free of charge on this web site. Ads running only on the website will be charged at the magazine rate. The ads will run through one issue of the Montana Lawyer, unless we are notified that the ad should run for more issues. A billing address must accompany all ads. Email Pete Nowakowski at pnowakowski@montanabar.org or call him at (406) 447-2200 for more information.

## ATTORNEY POSITIONS

**JUVENILE PROSECUTOR:** Crow Tribe of Indians, Office of Legal Counsel – Crow Executive Branch. Full-time Juvenile Prosecutor, Crow Agency, Montana.Law Degree from an ABA-accredited Law School is preferred but not required.. Must be admitted to practice by the Crow Tribal Court or take and pass the Tribal Court bar examination. The Juvenile Prosecutor shall prepare and present in Youth Court all cases in which the offense, if committed by an adult, would be a criminal offense, and all cases involving status offenses, including interviewing witnesses, legal research, preparation of pleadings and the presentation of evidence, under the direction of the Tribal Prosecutor. Shall become familiar with the Crow Law & Order Code, Juvenile Code, and Rules of Civil Procedure together with any other ordinances of the Crow Tribe and relevant case law and precedent from Crow Tribal Courts. Salary depends on experience. Position is grant-funded. Position open until filled. Preference will be given to qualified Crow Tribal members and members of federally-recognized Indian tribes. Please submit cover letter, resume, and references to:

Office of Legal Counsel, Crow Tribe
Attn: Melissa Holds the Enemy
P.O. Box 340
Crow Agency, MT 59022

E-mail mholdsenemy@crownations.net for more information. All applications held confidential.

**ACLU LITIGATOR:** The American Civil Liberties Union of Montana Foundation will have an opening this fall for an ambitious litigator in our two lawyer Missoula office. ACLU/MT invites applications from experienced legal professionals with an interest in and understanding of constitutional law to be part of a team advancing impact litigation in defense of civil liberties. Please send resume and letter of interest to scottc@aclumontana.org.

**DEPUTY COUNTY ATTORNEY:** The Roosevelt County Attorney's Office is seeking a full-time deputy county attorney. Applicants must be licensed to practice law in the State of Montana. Advising the Board of County Commissioners will be a primary concern. The position will also require knowledge of criminal law. Salary is set at 85% of County Attorney's salary with applicable County benefits provided. Submit a letter of interest, resume and two (2) recent letters of recommendation to: Donna K. Reum, Legal Assistant, Roosevelt County Attorney's Office, 400 Second Ave. South, Suite A, Wolf Point, Montana 59201 or by email to dreum@rooseveltcounty.org and rpatch@rooseveltcounty.org. Closing date: May 31, 2013.

**DEPUTY COUNTY ATTORNEY:** The Hill County Attorney's Office has one (1) full-time Deputy County Attorney position open for hire. Salary depends on qualifications and experience plus all applicable Hill County benefits. A full job description is available at Havre Job Service. Please provide a cover letter, resume, transcript, writing sample, and references to the Hill County Personnel Office, 315 Fourth Street, Havre, Montana 59501. This position is open until filled. For more information, please contact the Personnel Office or Gina Dahl, Hill County Attorney at 265-5481 extension 211.

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