MONTANA LAWYER
State Bar of Montana
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## Inside



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# Take time to thank a hero — you may be practicing with one

I am the daughter of a World War II Veteran. My father passed away in 1985 at the age of 59. I often wish that I knew more about the time my father spent in the Navy. Like many Veterans, my dad did not talk much about his experiences. I know that he enlisted after the Japanese attacked Pearl Harbor. He was only 17 years of age, and had to get his parents' permission. I remember hearing what a difficult decision it was for my grandmother to sign the papers to allow her only son, and oldest child, to go to war. I know my father was on the U.S.S. Storm King and traveled across the Pacific and spent time in Japan.

My father was not unlike most Veterans. They just do not talk about their military experiences. Often, you do not know that they were in the military until they pass away.

There are many members of our State Bar who are distinguished Veterans. Many of you may not know that our Executive Director, Chris Manos, is a West Point graduate who commanded a detachment in the first Gulf War from 1990-1991. He retired as a Colonel. Chris is an attorney who practiced in Bozeman and Big Timber before becoming our Executive Director in 2002.

Great Falls Trustee, Mike Talia, served in Iraq with the Army after high school. He left military service and attended law school. In 2008, Mike joined the Montana Army National Guard as a JAG officer and continues to serve in that capacity today. Mike is an associate with Church, Harris, Johnson and Williams, P.C.

Our State Bar delegate to the American Bar Association, Damon Gannett, is an Air Force Veteran and former JAG officer.

The Social Security Administrative Law Judges in Montana, whom I practice before, are all Veterans. Judge Lloyd Hartford is a former Marine who served in Vietnam. Judges Jessica Pugrud and Michael Kilroy are former JAG officers for the Air Force.

**John Bailey,** father of State Bar President Pam Bailey, was a WW II Navy veteran.

There are numerous members of our bar who deserve recognition for their service to our country. Often, the problem is identifying who they are. State Bar statistics show that we have 30 members who are "active military," including 5 in state and 25 out of state.

The most moving story I can convey about a Veteran in our bar association would be that of Loren Torkelson, who practiced in Billings. I met Loren on many occasions, but found him to be very quiet and difficult to get to know. Loren died in 1995, at the age of 54, after suffering from a heart attack. When his obituary appeared in the paper, many of the attorneys in Billings, including myself, were shocked to learn that Loren was a Vietnam Veteran who was a First Lieutenant in the Air Force. During his second tour of duty as an Air Force F4 Phantom pilot, he was shot down over North Vietnam in 1967, a month shy of his 26th birthday. Loren ejected and was captured by the North Vietnamese and imprisoned in the infamous "Hanoi Hilton." He spent six years as a prisoner of war enduring abuse and deprivation at the hands of his captors. He finished out the war as a highly decorated officer. In 2005, Loren's family was given a Purple Heart in recognition of the injuries he endured as a prisoner of war.

The Yellowstone Area Bar Association holds memorial services for its deceased members. I recall attending Loren's service. Attorneys were asked to share their memories of Loren. The most poignant memory was shared by Billings' attorney, Randy Bellingham. Randy recalled being in Jakes, a local watering hole for attorneys, one night after work having a few drinks. Randy ended up having a drink with Loren and they discovered they were both Vietnam veterans. Randy said he thought he had it tough serving in the Army during Vietnam until Loren opened up about his experiences. It was obvious that Randy was deeply humbled by Loren's time as a prisoner of war. Randy, a partner at Moulton Bellingham, P.C. passed away one year later, in 1996, at the age of 47 in a kayaking accident.

I cannot possibly acknowledge and thank all of the honorable men and women of the State Bar of Montana who have served, or who continue to serve in the military. This month we celebrate Veteran's Day. Please take the opportunity to seek out and thank your fellow attorneys who have served our country.

## Legal Administrators' 2012 law firm survey results available

The Big Sky Chapter Association of Legal Administrators has compiled results from the 2012 Montana law firms survey. Fifteen law firms who have over four attorneys completed the survey which provides useful information on law firms' salary and benefit ranges as well as what technology is being used by attorneys and staff. Survey results are available for $115. Contact Kandy Jenkins, Boone Karlberg P.C., at 543-6646 if interested.

## Ball joins Faure Holden as new associate

Faure Holden Attorneys at Law, P.C. is pleased to announce that Dana A. Ball has joined the firm as an associate attorney.


Ball

Dana is a native of Evanston, Wyoming. She found her way to Montana on a basketball scholarship at MSU-Northern where she was recognized with Academic All-Conference and Academic All-American honors. She earned a B.S. in Business Administration and a B.A. in Liberal Arts (magna cum laude) from MSU-Northern in 2009.

Dana left Montana to attend Southern Methodist University-Dedman School of Law in Dallas, TX. She graduated from SMU in May 2012 and decided to return "home." During law school, Dana worked for the Federal Trade Commission and the Susan G. Komen for the Cure Foundation. Dana also acted as a legal research assistant for the former Dean of the SMU Dedman School of Law, focusing on antitrust and business competition law.

Dana is admitted to practice law in Montana state court and before the U.S. District Court, District of Montana. She is a member of the Montana, Cascade County and Montana Defense Trial Lawyers. She will support Jean Faure and Jason Holden in their trial practice including employment and labor law, school law, civil and commercial litigation, insurance coverage and criminal defense.

## Tunning, Chaon join Moulton Bellingham as new associates

Moulton Bellingham PC recently hired two new associates, Adam Tunning and Paul Chaon.

Tunning practices primarily in the area of commercial and civil litigation. Adam is originally from Omaha, Nebraska. After graduating from the University of Nebraska-Lincoln with a degree in Finance and Marketing.

Adam enrolled at the University of Nebraska College of Law. During his first summer in law school, Adam interned with the United States Attorney's Office in Billings. Adam returned to Billings the following summer to intern at Moulton Bellingham PC. Adam is licensed in both the State of Montana and the State of Wyoming.

Chaon practices primarily in the areas of civil and commercial litigation.

Paul was born and raised in Great Falls, Montana. After graduating from Arizona State University with a Bachelor of Science degree in Accountancy, he attended Gonzaga School of Law and graduated in May 2012 with a Juris Doctor degree. While at Gonzaga, he interned at the United States Attorney's Office and served as the Public Service Editor for the Gonzaga Journal of International Law.

## Charlton opens new practice in Helena


Charlton

Craig Charlton is excited to announce he has opened his own law practice in Helena, the Charlton Law Firm, PLLC. Craig has been in private practice in Helena since 2003, and previously to entering private practice he was a law clerk for Montana Supreme Court Justice Jim Rice. The firm's practice primarily focuses on commercial and business transactions and litigation, real estate, estate planning, probate, and general civil litigation. Craig can be reached at (406) 502-1214 or craig@charltonlawmt.com.

## Nine Holland & Hart attorneys named to Best Lawyers in America 2013

Nine Holland & Hart attorneys were named to Best Lawyers in America 2013: Jeanne Matthews Bender (Employment Law - Management, Labor Law - Management, Litigation - Labor & Employment); Shane P. Coleman (Litigation - ERISA, Litigation – Intellectual Property, Litigation - Patent, Patent Law); Kyle Gray (Appellate Practice); Charles W. Hingle (Banking and Finance Law, Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law); W. Scott Mitchell (Commercial Litigation, Employment Law - Management, Litigation - Environmental, Natural Resources Law, Personal Injury Litigation - Defendants, Product Liability Litigation - Defendants, Workers' Compensation Law - Employers); Elizabeth A. Nedrow (Employee Benefits (ERISA) Law); Laurence W. Petersen (Banking and Finance Law, Corporate Law, Energy Law, Natural Resources Law, Project Finance Law, Real Estate Law, Tax Law, Trusts and Estates); Jason Ritchie (Employment Law - Individuals, Employment Law - Management, Labor Law - Management, Litigation - Labor & Employment); and Robert L. Sterup (Commercial Litigation, Real Estate Law).

## Bryan joins Bryan Law Firm


Bryan

The Bryan Law Firm, P.C. (formerly Mark A. Bryan, P.C.), is pleased to announce that Justin Bryan has joined the firm. Justin received his undergraduate degree from the University of Victoria, where he majored in economics and minored in business. Justin then moved to Missoula to attend the University of Montana School of Law. After graduating from the School of Law in 2011 with honors, Justin continued his legal education at the University of Florida, where he obtained his LL.M. in taxation. Justin has now

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returned to Bozeman, where he was born and raised. In his free time, he enjoys mountain biking, road biking, rock climbing, and skiing, thus making Bozeman the ideal place for him to live. Justin's practice will focus on tax, trusts, and estates.

## Axelberg, Gaitis inducted into National Academy of Distinguished Neutrals

The National Academy of Distinguished Neutrals is pleased to confirm the induction of 2 local attorney-mediators to the association's new Montana Chapter.

- Tracy Axelberg, Kalispell — www.nadn.org/tracy-axelberg
- James M. Gaitis — www.nadn.org/james-gaitis


Axelberg


Gaitis

For more information about the Montana Chapter visit www.nadn.org/montana. Formed in 2008, the National Academy of Distinguished Neutrals is an association whose membership consists of ADR professionals distinguished both by their hands-on experience in the field of civil and commercial conflict resolution and by their commitment to the practice of alternative dispute resolution.

Membership is by invitation only and limited to attorney mediators and arbitrators who have proven experience in the field. All Academy members have been thoroughly reviewed and found to meet stringent practice criteria. Members are amongst the most in-demand neutrals in their respective states, as reviewed by both peers and local litigation firms. For criteria and further details, please visit www.nadn.org/membership.html.

## Cardey-Yates takes on new role at Kennecott

Lynn Cardey-Yates, currently vice president, legal, at Kennecott Utah Copper, will assume a new role in the company as the vice president of sustainable development beginning Oct. 1. Cardey-Yates will replace Rohan McGowan-Jackson who recently accepted the role of vice president, innovation and resource development. Cardey-Yates is a member of the State Bar of Montana and previously practiced in the state.


Cardey-Yates

In her new role, Cardey-Yates will lead Kennecott's health, safety, permitting and environmental teams, oversee energy programs, and manage all water and land resources, including Daybreak. She will also work with community leaders, regulators and other stakeholders to garner continued support for sustained business growth.

During her numerous years at Rio Tinto and Kennecott, Cardey-Yates has held vice president and general counsel positions, and currently serves as a board member of The Nature Conservancy in Utah and a trustee of the Rocky Mountain Mineral Law Foundation. Prior to joining Kennecott, she was a partner and member of the Board of Directors at Parsons Behle & Latimer in Salt Lake City and a partner at Burns, Wall, Smith & Muller in Denver, Colo. She earned her Juris Doctorate from the University of Denver, College of Law.

## Tyrrell joins Kasting, Kauffman & Mersen, PC as new associate

Kasting, Kauffman & Mersen are pleased to announce that Lilia N. Tyrrell, Esq. has joined the firm as an associate attorney. Ms. Tyrrell received her bachelor's degree from Connecticut College and her law degree from the Washington University School of Law. She will be assisting the firm in all aspects of its practice.

## Whipple opens new law office

Ashley Whipple has retired from her position as the lead sex crimes prosecutor for the Gallatin County Attorney's Office and is pleased to announce the opening of her own law office. She will be specializing primarily in criminal defense and family law matters. You may contact Ashley at: Whipple Law Offices, P.L.L.C., 3825 Valley Commons Drive, Suite 5 Bozeman, MT 59718. Phone: 406-581-4651. Fax: 406-522-5394. Email: whipple-lawoffices@gmail.com. Website: www.whipplelawoffices.com.

## Justice O'Connor to appear on Home Ground

The popular public affairs series, with host Brian Kahn, will air an interview with retired Justice Sandra Day O'Connor on Nov. 27 at 1 p.m. on KUFM/Montana Public Radio, and at 6:30 p.m. on KEMC/Yellowstone Public Radio. Justice O'Connor was the keynote speaker at the State Bar's annual meeting in September.

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# Tollefsen retires after practicing for more than three decades

After practicing law for 33 years, Gig A. Tollefsen has announced his retirement effective September 30, 2012. Gig began practicing law in Gallatin County in 1979 with Ben Berg, eventually becoming a partner in the firm of Berg, Coil, Stokes & Tollefsen, P.C. In 1989 Berg, Stokes & Tollefsen, P.C. merged with Lilly, Andriolo & Schraudner to become the Berg Law Firm. At the time of his retirement, Gig was the senior partner with the Berg Law Firm.

During his career, Gig became a respected defense attorney, trying in excess of 100 jury trials and numerous appeals to both the Montana Supreme Court and the Ninth Circuit Court of Appeals. He was honored as the Best Defense Trial Attorney in Gallatin County in 1996 and served as a director of the Montana Defense Trial Lawyers Association. He was best known for his defense of ski areas, representing many of the major ski resorts in Montana.

In the later years of his career, Gig represented a number of plaintiffs in personal injury matters. He tried several successful cases, securing one verdict in excess of $1 Million.

Gig will retire with his wife, Kim, a long-time Bozeman school teacher, in St. George, UT, where he will pursue his passions for road biking and golf.

# State Bar seeks to fill vacant ABA delegate position

The State Bar of Montana ABA state delegate position is vacant with the recent resignation of Damon Gannett, Billings. He has been the ABA state delegate for a number of years. He was recently elected by State bar members in June 2012 for a 2 year term This is 1 of 2 ABA delegate positions representing MT. Damon has been appointed to the other ABA delegate position representing MT with the vacancy by Robert Carlson, Butte, who is the new Chair of the ABA House of Delegates.

Interested candidates must send a letter addressing their ABA or local bar experience, their willingness to serve the remainder of the current term (September 2014), be available for an interview (in person or by phone) and must be a member of the ABA at the time of appointment. The State Bar of Montana Board of Trustees will select the new delegate at their December 7, 2012 meeting in Helena.

Deadline for the letter of interest is December 3, 2012. All letters should be sent to Chris Manos, Executive Director, State Bar of MT, PO Box 577, Helena, MT. Email any questions to *cmanos@montanabar.org.*

# 2012 IOLTA compliance and pro bono reporting is online

*Mandatory IOLTA compliance certification is due December 3*

Under Rule 1.18(e) ofthe Rules of Professional Conduct, each lawyer/ firm must file an annual certificate of compliance with the IOLTA program. Failure to provide certification may result in suspension from the practice of law in the State of Montana. The pro bono reporting form is proved for attorneys to report pro bono activity conforming to Rule 6.1 of the Rules of Professional Conduct.

We encourage you to file electronically. If you can't file using the online forms, please follow the directions for printing and mailing hard copies at *www.montanabar.org.*

**What do you need to do?**

1. Go to *www.montanabar.org*
2. Follow the link to Pro Bono and IOLTA reporting
3. Complete the pro bono report
4. Complete the mandatory IOLTA compliance certficate

# Solitary Confinement Overused, Cruel and Ineffective

Featuring former Washington Dept. of Corrections Secretary Eldon Vail

**Thursday, November 15 - 7-9 pm**

**University of Montana School of Law, Rm 201**

**Missoula**

Learn how solitary confinement affects prisoners in the National Geographic documentary "Solitary Confinement." Then Eldon Vail will discuss how prisons can move inmates out of solitary confinement and into the general population and about the special needs of mentally ill prisoners.

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ACLU AMERICAN CIVIL LIBERTIES UNION of MONTANA FOUNDATION

## Recent Supreme Court commission and council appointments

Darcy M. Crum, Steven Howard and Mary Sheehy Moe are reappointed to the Commission of Continuing Legal Education for three-year terms which will expire on September 30,2015.

The Honorable Mike Salvagni is reappointed to the Uniform District Court Rules Commission for a term ending October 1,2016.

The Honorable Gregory R. Todd is reappointed to the District Court Council, as the District Court Judge Position 2 member, to a 3-year term expiring June 30, 2015.

The terms of the Peg Allison (Clerk of District Court member), the Honorable Karen Orzech (Limited Jurisdiction member), Senator Jim Shockley (Legislature member) and Jim Powell (Lay member) on the Montana Supreme Court Commission on Technology (Commission) expired or are due to expire soon. The Court thanks Peg Allison, Hon. Karen Orzech, Senator Jim Shockley and Jim Powell for their dedicated service to the Commission, to this Court and to the people of Montana,

(1) The following member is hereby reappointed for a 3-year term commencing the date of this order.

- Peg Allison — as Clerk of District Court member

(2) The following are hereby appointed for 3-year terms commencing the date of this order.

- Hon. Greg Mohr — as Courts of Limited Jurisdiction member
- Rep. Galen Hollenbaugh — as Legislative member
- P. Mars Scott, Esq. — as Lay member

(3) Additionally, with the approaching retirement of Justice James C. Nelson (Supreme Court Justice member) and District Judge Joe L. Hegel (District Judge member), the following are hereby appointed for 3-year terms commencing the date of this order:

- Hon. Justice Brian Morris — as Supreme Court Justice member and chair
- Hon. Randal Spaulding — as District Judge member

## Amended Rules of Procedure for the Commission on Character and Fitness

**Summarized from an Oct. 23 order, AF 11-0244.** At this Court's request, the Commission on Character and Fitness has submitted its proposed amended Rules of Procedure, as made necessary by our July 3, 2012 order adopting use of the Uniform Bar Examination and the NCBE online character and fitness investigation service in Montana. For purposes of clarifying existing procedures, the Commission also has proposed a few additional changes to its rules.

The Court has now reviewed the proposed amended Rules of Procedure of the Commission on Character and Fitness.

The Court adopted the amended Rules of Procedure of the Commission on Character and Fitness and are effective as of the date of this order.

To read the amended rules in full, go to www.montanabar.org and follow the link under "Recent Montana Supreme Court Orders."

## ATJC accepting written recommendations on pro bono service proposal

**Summarized from an Oct. 9 order, AF 11-0765.** On May 22, 2012, this Court created the Access to Justice Commission (ATJC). In our Order, we identified the ATJC's general duties, all of which relate to assessment of, planning for, coordination of, and making recommendations concerning the provision of access to justice for all Montanans. We also identified groups from which the ATJC's membership would be drawn and appointed in a separate order. By order dated September 18, 2012, we have appointed the initial members of the ATJC.

At this Court's June 19, 2012, public meeting on proposed changes to the Montana Bar Examination, we voted to refer to the ATJC, for its consideration and recommendation, a proposal to establish a requirement that applicants to the Montana bar must complete fifty hours of pro bono service within three years before they are admitted to the Bar.

The ATJC shall consider and make written recommendations to the Court, by no later than July 1, 2013, concerning the proposal that applicants to the bar be required to complete fifty hours of pro bono service within three years before

## Discipline

**Summarized from an Oct. 2 order, PR 12-0490.** On August 17,2012, the Office of Disciplinary Counsel filed a petition for reciprocal discipline of Montana attorney Elmer S. Rhodes, pursuant to Rule 27A of the Montana Rules for Lawyer Disciplinary Enforcement. The Court allowed Rhodes time to respond and he has filed a response.

Attached to ODC's petition is a certified copy of a May 24, 2012 order issued by the Attorney Discipline Probable Cause Committee of the Supreme Court of Arizona. In that order, Rhodes was found to have failed to respond to a lawful demand for information from a disciplinary authority or to furnish information or respond promptly to an inquiry or request from bar counsel, in violation of Rules 42 and 54 of the Arizona Supreme Court. The order admonished Rhodes for his attorney misconduct and required him to pay the costs of the proceedings.

In his response to ODC's petition for reciprocal discipline, Rhodes details unfortunate family circumstances that he maintains excuse his failure to respond to the Arizona disciplinary authority and demonstrate he did not do so knowingly.

After review, the Court concludes that discipline identical to that imposed upon Rhodes in Arizona should be imposed upon him in Montana. An Adjudicatory Panel of the Commission on Practice shall, at a time and place to be determined by the Commission, administer a public admonition of Elmer S. Rhodes for his violations of the Rules of the Arizona Supreme Court.

# Four lessons from *Wal-Mart v. Dukes* and their application to Montana class action law[1]

**Robert H. King, Jr.**[2]*

## *I. INTRODUCTION*

In June 2011, the United States Supreme Court issued a landmark decision in *Wal-Mart Stores, Incorporated v. Dukes*,[3] reversing the certification of a nationwide class of approximately 1.5 million current and former female Wal-Mart employees who alleged sexual discrimination under Title VII.[4] A 5–4 majority of the Court held that the proposed class failed to satisfy the "commonality" requirement of Federal Rule of Civil Procedure 23(a)(2), finding that the case presented no significant common question of fact or law that was capable of being answered on a class-wide basis.[5] The Court also held unanimously that the class should not have been certified under Rule 23(b)(2) because the plaintiffs sought individualized monetary relief in the form of back pay.[6]

The *Wal-Mart* decision will have an important impact on the future development of federal class action practice. It should similarly have a large impact on the development of Montana class action law. Montana's Rule of Civil Procedure 23(a) and (b) set forth the requirements for certification of class action claims in Montana state court. The language of Montana Rule 23(a) and (b) is identical to the Federal Rule of Civil Procedure 23(a) and (b), and the Comment to the Montana Rule makes clear that it was intended to follow the federal example.[7] Montana courts have traditionally found federal caselaw "instructive" in interpreting Montana's version of the Rule.[8] In its first post-*Wal-Mart* class certification opinion, the Montana Supreme Court cited with approval *Wal-Mart*'s holding pertaining to the impropriety of individualized monetary awards in a Rule 23(b)(2) class, but the Court failed to apply this holding appropriately to the case before it or to appreciate the significance of the remainder of the *Wal-Mart* decision.[9] Montana law thus has yet to fully embrace or understand the lessons to be learned from *Wal-Mart*.

## *II. FOUR LESSONS FROM WAL-MART*

### *A. Lesson 1: Courts Must Determine that Each of Rule 23's Requirements Have Been Proven, Even if that Analysis Overlaps with the Merits*

In 1974, the United States Supreme Court found in *Eisen* that "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."[10] Some courts read *Eisen* expansively to mean that no inquiry touching the merits of the underlying claims was permissible at all at the class-certification stage and that the allegations of the complaint had to be accepted as true for certification

**Cont., next page**

1 * B.A. Dartmouth College 1975 *magna cum laude*; J.D. University of Michigan Law School 1978 *magna cum laude*. Admitted to practice: Montana (2011), California (1989) (currently inactive), and Illinois (1978). Mr. King is a partner in the firm of SNR Denton US LLP in its Chicago, Illinois office and has been engaged in class action defense nationwide for over thirty years. Other lawyers in SNR Denton on occasion do legal work for Wal-Mart Stores, Inc.; Mr. King has never personally represented Wal-Mart Stores, Inc. The views expressed in this article are the author's alone, and do not necessarily reflect the views of SNR Denton, its lawyers or its past or present clients.

This is an abridged and slightly modified version of an article with the identical title which will appear in volume 72 of the Montana Law Review in the fall of 2012. A fuller discussion of the issues raised by *Wal-Mart* and their application to Montana law can be found in the article.

2

3 . *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) [hereinafter *Wal-Mart*].

4 . *Id.* at 2544.

5 . *Id.* at 2546, 2555.

6 . *Id.* at 2561.

7 . *See* Mont. R. Civ. P. 23 comm. nn. (2011) (explaining that recent changes were made in part to the Montana Rule "to conform to the recent changes in the Federal Rules."); *see also* Mont. Sup. Ct. Or., *In Re Revs. to the Mont. R. of Civ. P.*, No. AF 07-0157 (Apr. 26, 2011) (effective Oct. 1, 2011).

8 . *McDonald v. Washington*, 862 P.2d 1150, 1154 (Mont. 1993); *Sieglock v. Burlington N. Santa Fe R.R. Co.*, 81 P.3d 495, 497 (Mont. 2003).

9 . *See Diaz v. Blue Cross & Blue Shield of Mont.*, 267 P.3d 756, 765 (Mont. 2011).

10 . *Eisen*, 417 U.S. at 177.

**Cont., from previous page**

purposes.[11] Other courts read *Eisen* somewhat less expansively to mean that courts could not consider competing evidence (beyond the pleadings) when the dispute overlapped with the merits.[12]

The *Wal-Mart* majority clarified that *Eisen* represents no bar to the consideration of the merits of the underlying claim if necessary to assess whether Rule 23's requirements have been satisfied. It also made clear that evidence—as opposed to mere allegations—is necessary for a plaintiff to establish compliance with Rule 23's requirements, and the district court must actually decide that the Rule 23 requirement has been proven, even if that requirement overlaps with a merits issue.

Although the Court had previously recognized that "'*sometimes* it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,'" the *Wal-Mart* majority declared that "*[f]requently* that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim."[13] There was nothing unusual about that consequence in the *Wal-Mart* majority's view because "touching aspects of the merits in order to resolve [other] preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation."[14]

As the *Wal-Mart* majority explained, *Eisen* was not to the contrary because there, "the judge had conducted a preliminary inquiry into the merits of a suit, not in order to determine the propriety of certification under Rule 23(a) and (b) . . . but in order to shift the cost of notice required by rule 23(c)(2) from the plaintiff to the defendants. To the extent the quoted statement goes beyond the permissibility of a merits inquiry for any other purpose, it is the purest dictum and is contradicted by our other cases."[15]

The *Wal-Mart* majority also made clear that "Rule 23 does not set forth a mere pleading standard."[16] A party seeking class certification must affirmatively demonstrate compliance with the rule—in other words, that "there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."[17] The *Wal-Mart* majority's analysis of plaintiffs' inability "to prove" satisfaction of Rule 23(a)(2)'s commonality requirement strongly suggests that the evidence proffered must be admissible evidence. The *Wal-Mart* majority found that plaintiff's sociological expert's testimony was both not credible and perhaps inadmissible under Federal Rule of Evidence 702 and *Daubert*.[18] The Court eluded to the importance of basing class certification decisions upon admissible evidence by noting that, while the district court had concluded that *Daubert* did not apply to expert testimony at the class-certification stage,[19] "[w]e doubt that is so . . . ."[20] Requiring admissible evidence to substantiate compliance with Rule 23's requirements would be consistent with requirements for similar preliminary findings under Federal Rule of Civil Procedure 12(b)(1) and (b)(2), which the *Wal-Mart* majority found to be analogous.[21]

Insistence that the proponent of class certification "prove" compliance with Rule 23's requirements implies a corollary obligation upon the district court to actually "find" compliance by resolving, if necessary, competing factual assertions based upon the evidence presented.[22] In other words, if plaintiffs' theory of commonality was that there was a company-wide pattern and practice of discrimination, to certify a class the district court must find that such a company-wide policy actually exists by a preponderance of the evidence, even though the

**Cont., next page**

11 . *See e.g. Szabo v. Bridgeport Machs. Inc.*, 199 F.R.D. 280, 284 (N.D. Ind. 2001) ("since the class determination is made at the pleading stage of the action, the substantive allegations in the complaint are accepted as true for purposes of the class motion."), *rev'd*, 249 F.3d 672, 677 (7th Cir. 2001).

12 . *See e.g. In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001); *Caridad v. Metro-N. Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999).

13 . *Wal-Mart*, 131 S. Ct. at 2551 (emphasis added; citation omitted).

14 . *Wal-Mart*, 131 S. Ct. at 2552 (citing *Szabo*, 249 F.3d at 676–677).

15 . *Wal-Mart*, 131 S. Ct. at 2552 n. 6.

16 . *Id.* at 2551.

17 . *Id.* (emphasis in original).

18 . *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

19 . *Dukes*, 222 F.R.D. at 191.

20 . *Wal-Mart*, 131 S. Ct. at 2554.

21 . *See e.g. Gold River, LLC v. La Jolla Band of Luiseno Mission Indians*, 2011 U.S. Dist. LEXIS 142561, *5 (9th Cir. Dec. 9, 2011) ("where jurisdiction is specifically challenged . . . Gold River has the burden to demonstrate with admissible evidence that this court possesses subject matter jurisdiction over its claims."); *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) ("When a defendant moves to dismiss for lack of personal jurisdiction, the plaintiff 'is obligated to come forward with facts, by affidavit or otherwise, supporting personal jurisdiction."); *Wal-Mart*, 131 S. Ct. at 2552 ("The necessity of touching aspects of the merits in order to resolve preliminary matters, e.g., jurisdiction and venue, is a familiar feature of litigation.").

22 . Pre-*Wal-Mart* courts had struggled in finding the proper terminology to describe the degree of inquiry that was to be applied at the class certification stage. Some courts had said that the district court was to make "findings" that the Rule 23 requirements had been satisfied. *See e.g. Unger v. Amedisys Inc.*, 401 F.3d 316, 319–320 (5th Cir. 2005). Others had stated that district courts must "determine" that the Rule 23 requirements were met. *See e.g. In re Initial Pub. Offering Sec. Litig.*, 471 F.3d at 40–44; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008). Another formulation was that district courts were required to "resolve" whether the Rule 23 requirements were met. *See e.g. Blades v. Monsanto Co.*, 400 F.3d 562, 566–567 (8th Cir. 2005). Although the Ninth Circuit en banc majority viewed these formulations as a matter of semantics rather than substance, the terminology used matters because it may imply a different appellate standard of review. *Dukes*, 603 F.3d at 585. A district court's "findings" of fact are usually reviewed under the "clearly erroneous" standard. *See In re Initial Pub. Offering Secs. Litig.*, 471 F.3d at 41. The Second Circuit's resolution of this issue makes the most sense: a district court's "determination" that Rule 23's requirements are satisfied is a mixed question of law and fact, involving three separate appellate review standards: (1) clearly erroneous, to the extent that the determination is based upon a finding of fact, (2) *de novo* for review of the district court's articulation of the legal standard governing each requirement, and (3) abuse of discretion for review of the ultimate ruling that applied the correct legal standard to the facts as found by the district court. *Id.* The *Wal-Mart* majority did not directly address this issue, but by requiring the proponent of class certification "to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." strongly suggested that the *In re Initial Pub. Offering Secs. Litig.* reasoning is sound. *Wal-Mart*, 131 S. Ct. at 2551.

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plaintiffs will have to prove that fact again at trial to prevail on the merits. As one commentator has explained:

> Class certification asks whether there is reason to think it more likely than not that the company-wide discrimination policy at the heart of [the case] actually exists. Only then are the individual instances of adverse employment actions as to pay and promotion connected together as instantiations of the same underlying wrong.[23]

The *Wal-Mart* majority's analysis of whether plaintiffs met their burden of proving commonality illustrates what the federal district courts are now required to do. Plaintiffs could prove a Title VII pattern and practice case either by showing that the employer used a biased testing procedure, or by providing "significant proof" that Wal-Mart operated under a general policy of discrimination. Wal-Mart had no testing procedure for hiring or promotions, so the first avenue of proof was unavailable. The *Wal-Mart* majority found that plaintiffs had provided "no convincing proof" of a discriminatory company-wide pay and promotion policy.[24] That issue was at the heart of the merits of the case. Still, the Court evaluated the evidence and found that plaintiffs' proof was lacking, making class certification improper.[25]

With regard to the propriety of looking behind the pleadings and requiring the plaintiff to prove—rather than merely allege—compliance with Rule 23's requirements, the *Wal-Mart* majority is essentially in accord with current Montana law. In August 2009, the Montana Supreme Court clarified the standards to be applied at the class-certification stage in *Mattson v. Montana Power Company*,[26] a decision that in many ways anticipated the *Wal-Mart* majority's pronouncement. In *Mattson*, the Montana Supreme Court held that district courts were not to "take the Plaintiffs' allegations in support of the class action as true" and were instead to allow discovery and hear evidence in order to answer "whatever factual and legal inquiries are necessary under Rule 23."[27]

However, the Montana Supreme Court's recent decision in *Diaz v. Blue Cross & Blue Shield of Montana*,[28] seems to have slipped back into the same sort of confused understanding of *Eisen* that plagued courts prior to *Wal-Mart*. In *Diaz,* the Montana Supreme Court cited with approval *Wal-Mart's* holding that individualized awards of monetary relief were not proper in a Rule 23(b)(2) class. But the Court criticized the district court's assessment that individualized "made-whole" determinations would be required as an improper "delv[ing] into the merits."[29] The Court concluded:

> [t]he District Court, in determining that individualized made-whole determinations were necessary here, erroneously delved into the merits of Diaz and Hoffmann-Bernhardt's claim. In doing so, the District Court failed to recognize that there is no prerequisite for individualized, fact-specific determinations. The primary issue is whether the State's act of exercising its exclusion before conducting a made-whole analysis violates Montana's subrogation laws.[30]

This analysis is not consistent with *Wal-Mart.* It was argued in *Wal-Mart* that the primary issue was whether Wal-Mart had engaged in sexual discrimination. But that did not excuse the *Wal-Mart* plaintiffs from having to prove the existence of a company-wide policy of discrimination for class certification purposes, or alter the fact that individualized back pay determinations would still have to be made, even if discrimination was proven. The district court in *Diaz* had not denied class certification because the named plaintiffs' claims failed on the merits; it denied certification because to determine whether each class member was harmed by the State's practice, it would be necessary to examine whether each class member had been made whole prior to the State's exercise of its exclusion. Examining the nature of the claim pleaded to determine what must be proven for the plaintiffs to obtain the relief requested is not "delving into the merits," but rather determining whether Rule 23(a)(2)'s and Rule 23(b)(2)'s requirements are met.

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23 . Richard A. Nagareda, *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149, 162 (2010).

24 . *Wal-Mart*, 131 S. Ct. at 2556.

25 . In affirming, in part, the district court's class certification order, the Ninth Circuit en banc majority noted the highly deferential "abuse of discretion" standard that has traditionally limited the scope of appellate review. *Dukes*, 603 F.3d at 579. The *Wal-Mart* dissent also observed that "[a]bsent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality." *Wal-Mart*, 131 S. Ct. at 2562 (Ginsburg, J., dissenting). The words "abuse of discretion" do not appear at all in the *Wal-Mart* majority opinion on commonality, and in light of the penetrating review of the evidence engaged in by the *Wal-Mart* majority to find that plaintiffs had failed to establish commonality, a fair question arises as to whether the *Wal-Mart* majority was *sub silencio* announcing a new, stricter standard of appellate review. This seems unlikely, because the *Wal-Mart* majority essentially held that the district court had applied the wrong legal standard regarding commonality. It is well-established that a court abuses its discretion if its decision is premised upon a legal error. *See e.g. Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001).

26 . *Mattson v. Mont. Power Co.*, 215 P.3d 675 (Mont. 2009).

27 . *Id.* at 694–695. The *Mattson* Court's statement that the district court should "hear evidence" at least implies evidence that is admissible under the Montana Rules of Evidence. Montana Rule of Evidence 101(a) provides that "[t]hese rules govern all proceedings in all courts in the state of Montana with the exceptions stated in this rule." Class certification proceedings are not among the exceptions listed. Although not directly addressed by the *Mattson* Court, presumably the Court would agree that the plaintiff seeking class certification has the burden of establishing each Rule 23 requirement by a preponderance of the evidence, as this is the standard endorsed by most federal courts. *See e.g. In re Initial Pub. Offering Secs. Litig.*, 471 F.3d at 41; *Novella v. Westchester Co. N.Y. Carpenters' Pen. Fund*, 661 F.3d 128, 148–149 (2d Cir. 2011).

28 . *Diaz v. Blue Cross & Blue Shield of Mont.*, 267 P.3d 756.

29 . *Id.* at 766.

30 . *Diaz*, 267 P.3d at 766.

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Thus, while the Montana Supreme Court has clearly understood and adopted *Wal-Mart*'s directive that the courts delve behind the pleadings in determining compliance with Rule 23, it appeared not to fully embrace *Wal-Mart*'s lesson that courts should not shy away from determining Rule 23 issues that may overlap with the merits. While the issue in *Diaz* in reality did not involve such overlap, if it had, *Wal-Mart* teaches that the district court should nonetheless determine actual compliance with Rule 23 in ruling upon class certification. In the Montana Supreme Court's recent decision in *Chipman v. Northwest Healthcare Corporation*,[31] the Court appeared to come into full conformance with *Wal-Mart's* teaching when it acknowledged that "[c]onducting a 'rigorous analysis' will frequently entail some unavoidable overlap with the merits of plaintiffs' underlying claims," citing *Wal-Mart*.[32]

### *B. Lesson 2: Commonality Under Rule 23(A)(2) Turns on Whether a Common Question Central to the Validity of Each Class Member's Claim Can be Answered on a Class-Wide Basis*

Rule 23(a)(2) provides that certification of a class is appropriate "only if . . . there are questions of law or fact common to the class."[33] In keeping with the then-current view of the commonality requirement, the *Wal-Mart* district court characterized the "common question" requirement as "permissive" and "minimal"[34] because all that was required was a single common question of law or fact to satisfy the rule.[35] The Ninth Circuit en banc majority confirmed that the requirement was "permissive."[36] Relying upon federal case law, the Montana Supreme Court had adopted this "permissive application" of the commonality requirement in *McDonald v. Washington*.[37]

One of the most significant aspects of the *Wal-Mart* decision is that it breathes new life into the commonality requirement, departing from the prior "minimalist" approach. The *Wal-Mart* majority stated that the commonality requirement of Rule 23(a)(2) "is easy to misread since '[a]ny competently crafted class complaint literally raises common questions,'"[38] including, in the context of the *Wal-Mart* case, "do our managers have discretion over pay? Is that an unlawful employment practice?" But *Wal-Mart* makes clear that "[r]eciting these questions is not sufficient to obtain class certification."[39] Something more substantive is required to satisfy the Rule 23(a)(2) requirement. "Commonality requires the plaintiff to demonstrate"—not just allege—"that the class members 'have suffered the same injury'. . . . This does not mean merely that they have all suffered a violation of the same provision of law."[40]

The *Wal-Mart* majority explained "[q]uite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once."[41] To satisfy the Rule 23(a)(2) commonality requirement:

> Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

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31 2012 MT 242 (2012).

32 *Id.*, ¶ 44.

33 . Fed. R. Civ. P. 23(a)(2).

34 . *Dukes*, 222 F.R.D. at 145, 166 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)).

35 . *See e.g.* James W.M. Moore et al., *Moore's Federal Practice* vol. 5, § 23.23[2], 23–72 (3d ed., Matthew Bender 2011) (stating that the Rule 23(a)(2) inquiry was "easily satisfied.").

36 . *Dukes*, 509 F.3d at 1177.

37 . *McDonald v. Washington*, 862 P.2d 1150, 1155 (Mont. 1993).

38 . 131 S. Ct. at 2551 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, at 131–132 (2009)).

39 . 131 S. Ct. at 2551.

40 . *Id.* (quoting *Gen. Tel. Co. of S.W. v. Falcon*, 457 U.S. 147, 157 (1982)). Some federal appellate courts had similarly recognized that any group of generalized allegations might be labeled as common or typical, but should be deemed to satisfy the requirements of Rule 23(a). For example, the Sixth Circuit had warned "at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue the resolution of which will advance the litigation." *Sprague v. Gen. Motor Co.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc). To like effect is the Fifth Circuit's observation that commonality and typicality should not be satisfied by "lifting the description of the claims to a level of generality that tears them from their substantively required moorings to actual causation and discrete injury." *In re Fiberboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

41 . 131 S. Ct. at 2551.

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> What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.[42]

As applied to the *Wal-Mart* case, "proof of commonality necessarily overlapp[ed] with respondents' merits contention that Wal-Mart engage[d] in a *pattern or practice* of discrimination" because "the crux of the inquiry is 'the reason for a particular employment decision.'"[43] "Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*"[44] As shown in the preceding section, because the *Wal-Mart* plaintiffs had been unable to come forward with "significant" or "convincing proof" that Wal-Mart operated under a company-wide policy of discrimination, they had failed to satisfy Rule 23(a)(2)'s commonality requirement.

The *Wal-Mart* majority's holding with regard to Rule 23(a)(2)'s commonality requirement is at odds with the Montana Supreme Court's prior "permissive application" to commonality. But the Montana Supreme Court did not adopt such an approach based upon anything idiosyncratic to Montana Rule 23. To the contrary, it adopted the approach because it was the prevailing approach under Federal Rule 23 at the time. Now that there is definitive guidance from the United States Supreme Court, the prior "permissive application" of Rule 23(a)(2) should be abandoned.

The question arises, however, whether the Montana Supreme Court's most recent decision in *Diaz* represents a rejection of the *Wal-Mart* majority's commonality holding. In *Diaz*, the Montana Supreme Court cited with approval *Wal-Mart*'s holding that individualized monetary awards were not appropriate for Rule 23(b)(2)'s certification.[45] But when addressing Rule 23(a)(2)'s commonality requirement, the Court completely ignored the *Wal-Mart* majority's holding on commonality, stating instead that "[c]ommonality is not a 'stringent threshold and does not impose an unwieldy burden on plaintiffs. . . . [A]ll that is necessary . . . is an allegation of a standardized, uniform course of conduct by defendants affecting plaintiffs.'"[46] There is nothing, however, in the *Diaz* opinion that indicates that the Montana Supreme Court considered and rejected the *Wal-Mart* majority's new commonality analysis. Briefing on the case was completed before the *Wal-Mart* decision was handed down, so none of the parties called the new test to the Court's attention. It seems far more likely that the *Diaz* commonality analysis is simply a carry-over from pre-*Wal-Mart* caselaw, and not a reasoned decision to either reject or adopt the *Wal-Mart* majority's holding.

Montana courts should follow the *Wal-Mart* majority's holding regarding commonality. Rule 23(a) is titled "Prerequisites." Requiring a question of law or fact common to the class as a prerequisite for class treatment makes sense because, at bottom, the purpose of Rule 23 is to determine whether a case may be tried on a representative basis for the defined class. If a proposed "common question" is not capable of being answered on a class-wide basis, or if answering the question will not significantly advance the ultimate resolution of the litigation, such a question should not satisfy the requirements of Rule 23(a)(2).

The Montana Supreme Court appears to now agree. In a recent post-*Diaz* decision, *Chipman v. Northwest Healthcare Corporation,*[47] the Court affirmed the district court's certification of a class under Rule 23(b)(1). It expressly acknowledged that prior to *Wal-Mart*, Montana had imposed a "low burden" on plaintiffs' ability to satisfy commonality, and that accordingly Rule 23(a)(2) had been given a "permissive application."[48] The Court recognized that *Wal-Mart* "significantly tightened" the commonality requirement.[49] The Court declared that "[f]ollowing this Court's long history of relying on federal jurisprudence when interpreting the class certification requirements of Rule 23, we apply the *Wal-Mart* reasoning to the present case."[50] It thus appears that whatever doubt was created by the *Diaz* decision has now been eliminated by the Court's explicit embrace of *Wal-Mart*'s commonality test in *Chipman.*

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42 . *Id.* (quoting Nagareda, *supra* n. 35, at 132).

43 . *Wal-Mart*, 131 S. Ct. at 2552 (emphasis in original) (quoting *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)).

44 . *Wal-Mart*, 131 S. Ct. at 2552 (emphasis in original).

45 . *Diaz*, 267 P.3d at 765.

46 . *Id.* at 763 (citations omitted).

47 2012 MT 242 (2012).

48 *Id.,* ¶ 47.

49 *Id.,*¶¶ 47-49.

50 *Id.,* ¶ 52.

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The Montana Supreme Court's adoption of the *Wal-Mart* majority's commonality holding should also overturn the Montana Supreme Court's holdings that Rule 23(a)(2) is satisfied if there is a "common core of salient facts coupled with disparate legal remedies within the class."[51] The notion that the existence of a "common core of salient facts" was sufficient to satisfy Rule 23(a)(2) first crept into Montana jurisprudence in the Montana Supreme Court's decision in *Sieglock v. Burlington Northern Santa Fe Railway Company*.[52] The source of the *Sieglock* Court's "common core of salient facts" criterion was the Ninth Circuit decision, *Hanlon v. Chrysler Corporation*, a decision affirming the approval of a settlement class of owners of minivans with defective liftgates.[53] The Montana Supreme Court quoted with approval from the *Hanlon* decision for the proposition that "commonality will also be satisfied when there is a 'common core of salient facts coupled with disparate legal remedies within the class.'"[54] The *Hanlon* opinion expressly followed the "permissive" construction of Rule 23(a)(2) that had existed prior to *Wal-Mart*.[55] The Ninth Circuit did not cite a single federal precedent supporting the proposition that "a common core of salient facts" satisfied Rule 23(a)(2). It found commonality satisfied in that case because the class claims "stem from the same source: the allegedly defective designed rear liftgate latch installed in minivans manufactured by Chrysler between 1984 and 1995."[56]

But this conclusion could be re-stated from the *Wal-Mart* perspective as follows: there was a common question of fact (were the liftgate latches defectively designed?) that apparently could be answered on a class-wide basis (*e.g.*, it was a design defect common to all vehicles, since they were all manufactured to the same specifications). Thus, properly understood, *Hanlon* does not support the existence of a separate "common core of salient facts" test for satisfying Rule 23(a)(2)'s requirement, and that line of analysis should be abandoned under Montana law. *Wal-Mart* teaches that whether there is a "common core of salient facts" among class members is irrelevant. The correct inquiry is whether there is a question of fact (or law) common to the class that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[57] That is the test that should be adopted by the Montana Supreme Court.

### *C. **Lesson 3:** Rule 23(b)(2) Does Not Authorize Certification of All Equitable Claims and Cannot Be Used as a Vehicle for the Recovery of Individualized Monetary Awards*

Both federal and Montana Rule 23(b)(2) provide that a class action may be maintained if Rule 23(a) is satisfied and "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so the final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[58] A Rule 23(b)(2) class is referred to as "mandatory class" because once certified, no notice is required to be sent to the class members, nor are class members permitted to "opt out" of the class.[59] This derives from the "indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none."[60] By contrast, Rule 23(b)(3) permits class certification if Rule 23(a) has been satisfied and "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[61]

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51 · Sieglock v. Burlington N. Santa Fe R.R. Co., 81 P.3d 495, 498 (Mont. 2003) (quoting Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998); see also Ferguson v. Safeco Ins. Co. of Am., 180 P.3d 1164, 1168–1169 (Mont. 2008).

52 · Sieglock v. Burlington N. Santa Fe R.R. Co., 81 P.3d 495.

53 . *Hanlon*, 150 F.3d at 1019.

54 . *Sieglock*, 81 P.3d at 498 (quoting *Hanlon*, 150 F.3d at 1019).

55 . *Hanlon*, 150 F.3d at 1019 ("The commonality preconditions of rule 23(a)92) are less rigorous than the companion requirements of Rule 23(b)(3). Indeed, Rule 23(a)(2) has been construed permissively.").

56 . *Id.* at 1019–1020.

57 . *Wal-Mart*, 131 S. Ct. at 2551.

58 . Fed. R. Civ. P. 23(b)(2); Mont. R. Civ. P. 23(b)(2).

59 . *Wal-Mart*, 131 S. Ct. at 2558.

60 . Nagareda, *supra* n. 35, at 132.

61 . Fed. R. Civ. P. 23(b)(3); Mont. R. Civ. P. 23(b)(3). Under both rules, in determining whether a class action is a superior method, the court is to consider: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action."

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The United States Supreme Court had previously explained that Rule 23(b)(2) was designed to permit "class actions for declaratory or injunctive relief," whereas "Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages . . . ."[62] The Court had also expressed serious doubt that class certification under Rule 23(b)(2) would be appropriate when monetary relief is sought.[63] However, in the absence of definitive Supreme Court guidance, lower courts had permitted certain judicial glosses to be placed upon Rule 23(b)(2).

Some courts had assumed that notwithstanding Rule 23(b)(2)'s explicit reference to injunctive or declaratory relief, certification of classes for other forms of "equitable" relief, such as disgorgement or unjust enrichment, was permissible.[64] Several courts (including the *Wal-Mart* district court and en banc Ninth Circuit majority) had justified certifying back-pay classes, at least in part, because back pay "is recoverable as an equitable, make-whole remedy in employment class actions notwithstanding its monetary nature."[65] Before the Supreme Court, the *Wal-Mart* plaintiffs argued that their back pay claims were appropriate for Rule 23(b)(2) treatment because a back pay award is "equitable in nature."[66]

Another judicially created gloss on Rule 23(b)(2) had developed based upon the Advisory Committee Note to the rule that a 23(b)(2) class "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages."[67] Seizing upon that language, some federal circuit courts of appeal, like the pre-*Wal-Mart* Ninth Circuit, had adopted a test to determine whether monetary relief was predominate that focused on plaintiffs' subjective intent in bringing the lawsuit. If the injunctive or declaratory relief sought would have alone been sufficient to induce plaintiffs to bring the suit, the fact that other monetary relief was sought would not "predominate."[68] Other federal circuit courts of appeals had developed an "incidental damages" standard, under which monetary relief predominates over other forms of relief "unless it is incidental to requested injunctive or declaratory relief."[69]

Thus, notwithstanding Rule 23(b)(2)'s express language which limited certification under that section to classes seeking final injunctive or declaratory relief, judicial authorization of Rule 23(b)(2) classes for "equitable" monetary relief and "non-predominate" or "incidental" damages had crept into federal class action precedent.

In *Wal-Mart*, the unanimous Court rejected the argument that Rule 23(b)(2) applies to all forms of equitable relief. While back pay may be an equitable remedy, the Court found that fact was irrelevant.[70] "The Rule does not speak of 'equitable' remedies generally, but of injunctions and declaratory judgments. As Title VII makes pellucidly clear, back pay is neither."[71] The unanimous Court thus made clear that it will also not countenance "back-door" attempts to obtain monetary relief in a 23(b)(2) class by characterizing such relief (*e.g.*, "disgorgement" or "restitution") as "equitable" in nature.[72]

The unanimous *Wal-Mart* Court also held that claims for monetary relief may not be certified under Rule 23(b)(2), "at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief."[73] The Court recognized that "[o]ne possible reading [of Rule 23(b)(2)] is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize

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62 . *Amchem Prods., Inc.*, 521 U.S. at 614.

63 . *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994).

64 . *See e.g. Mehling v. N.Y. Life Ins. Co.*, 246 F.R.D. 467 (E.D. Pa. 2007) (approving class settlement that included disgorgement of profits). Not all lower courts had agreed that other forms of equitable relief was permitted in a Rule 23(b)(2) class. *See e.g. Owner-Operator Indep. Drivers Assn., Inc. v. New Prime, Inc.*, 213 F.R.D. 537, 545 (W.D. Mo. 2002) (denying certification under Rule 23(b)(2) for disgorgement because it did not "qualify as injunctive relief" and "is not relief contemplated by Rule 23(b)(2)."), *aff'd*, 339 F.3d 1001 (8th Cir. 2003)); *Cason v. Nissan Motor Acceptance Corp.*, 212 F.R.D. 518, 522 (M.D. Tenn. 2002) (denying Rule 23(b)(2) certification for disgorgement because it was a monetary remedy, not injunctive or declaratory relief).

65 . *Dukes*, 222 F.R.D. at 170 (citations omitted); *see also Dukes*, 603 F.3d at 618; (citations omitted); *But see Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 825 (7th Cir. 2011) (the Seventh Circuit rejected the notion that Rule 23(b)(2)'s "injunctive" relief should be read to mean all forms of "equitable" monetary relief).

66 . *Wal-Mart*, 131 S. Ct. at 2560.

67 . Fed. R. Civ. P. 23(b)(2) advisory comm. nn. to 1966 amends.; 39 F.R.D. 69, 102.

68 . *See e.g. Molski*, 318 F.3d at 950.

69 . *See e.g. Allison v. Citigo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998); *see also Randall*, 637 F.3d at 825 (holding that monetary relief is "incidental" if it only requires a "mechanical computation" under the "clean-up" doctrine of equity).

70 . *Wal-Mart*, 131 S. Ct. at 2560.

71 . *Id.*

72 . Other courts had previously rejected attempts to certify 23(b)(2) classes for "disgorgement" or "restitution" using a similar analysis. *See e.g. Owner-Operator Indep. Drivers Assn., Inc.*, 213 F.R.D. at 545 (denying 23(b)(2) certification of a class seeking "disgorgement" of profits); *Casson*, 212 F.R.D. at 521 (denying 23(b)(2) certification of a class seeking "disgorgement" of profits); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 331 (4th Cir. 2006) (denying 23(b)(2) certification of a class seeking "restitution").

73 . *Wal-Mart*, 131 S. Ct. at 2557.

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the class certification of monetary claims at all."[74] But the Court did not reach that broader question because it determined that "at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule."[75] As the Court explained:

> Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.[76]

Combining individualized and class-wide relief under Rule 23(b)(2) was also contrary to the structure of Rule 23(b). Rule 23(b)(1) and (b)(2) classes are "mandatory classes" with no notice or opt-out required because of the class-wide nature of the relief sought.[77] Rule 23(b)(3) "allows class certification in a much wider set of circumstances but with greater procedural protections" for absent class members, including the "predominance" and "superiority" requirements, notice, and a right to opt-out of the class if they desire.[78] The Court noted that "[g]iven that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3)."

The Court observed that it had previously held that in a class action predominately seeking monetary relief, the absence of notice and opt-out violates due process.[79] "While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here."[80]

Although the Court expressly declined to hold that there was no circumstance under which monetary claims could be certified under Rule 23(b)(2), there are several indications in the unanimous portion of the Court's opinion that suggest that it would so rule if presented squarely with the question. The Court expressly rejected the respondents' argument that the "negative implication" from the Advisory Committee note is that a (b)(2) class "*does* extend to cases in which the appropriate final relief relates only partially or nonpredominately [sic] to money damages" because "it is the Rule itself, not the Advisory Committee's description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text and that does obvious violence to the Rule's structural features."[81] In language which would seem to foreshadow the rejection of any predominance test, the Court declared "[w]e fail to see why the Rule should be read to nullify [the protections of Rule 23(b)(3)] whenever a plaintiff class, at its option, combines its monetary claims with a request—even a 'predominating request'—for an injunction."[82] Indeed, the Court noted that a "predominance" test would create "perverse incentives" for class representatives (or their counsel) to "place at risk potentially valid claims for monetary relief" in order to make it more likely that monetary relief would not "predominate."[83]

Prior to *Wal-Mart*, the Montana Supreme Court had not been confronted with a case that certified a Rule 23(b)(2) class for "equitable relief" that was not declaratory or injunctive relief. However, Montana should adopt the unanimous *Wal-Mart* Court's position that Rule 23(b)(2) is limited to declaratory or injunctive relief. *Wal-Mart's* construction of Rule 23(b)(2) according to its plain meaning comports with long-standing principles of statutory construction. When the terms of a statute or rule are clear and unambiguous, a court's function is to "enforc[e] the terms of the statute as Congress has drafted it."[84] Rule 23(b)(2) speaks in terms of injunctive and declaratory relief, which are equitable remedies. But as the Fourth Circuit noted in a pre-*Wal-Mart* decision, "if the Rule's drafters had intended the Rule to extend to all forms of equitable relief, the text of the Rule would say so."[85] Under the maxim of statutory construction, *expressio unius est exclusio alterius* (the inclusion of one excludes others), a court should not read into Rule

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74 . *Id.*

75 . *Id.*

76 . *Id.*

77 . *Id.* at 2558.

78 . *Id.*; *see also* Fed. R. Civ. P. 23(c)(2)(B) (requiring "the best notice that is practicable under the circumstances" and a right to withdraw from the class).

79 . *Id.* at 2559; *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

80 . *Wal-Mart*, 131 S. Ct. at 2559.

81 . *Id.* (emphasis in original).

82 . *Id.*

83 . *Id.*

84 . *Sigmon Coal Co. v. Apfel*, 226 F.3d 291, 305 (4th Cir. 2000); *see also Bus. Guides, Inc. v. Chromatic Communs. Enters., Inc.*, 498 U.S. 533, 540 (1991) (applying the plain meaning rule to Federal Rule of Civil Procedure 11).

85 . *Thorn*, 445 F.3d at 331.

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23(b)(2) all equitable remedies when the language of the rule includes only declaratory and injunctive relief.[86] Montana follows similar rules of statutory consideration and thus should adopt this *Wal-Mart* holding.[87]

Prior to *Wal-Mart*, the Montana Supreme Court had not been called upon to address whether claims involving monetary relief can be certified under Montana Rule of Civil Procedure 23(b)(2), or if so, under what circumstances. The Montana Supreme Court's decision in *Ferguson v. Safeco Insurance Company*[88] could be misunderstood as a case involving a Rule 23(b)(2) class that permitted the award of a class-wide disgorgement award. In fact, it did not. In *Ferguson*, a putative class sought a judicial declaration that Safeco had "breached its insurance contract and adjustment duties by a programmatic assertion of subrogation without first investigating and determining whether the insureds ha[d] received their 'made whole' rights."[89] The putative class also sought injunctive relief compelling the return of subrogation amounts previously recovered by Safeco to their source (not the class) until complying with the "made whole" standard.[90] No monetary relief going to the class was sought.

The Montana Supreme Court's recent decision in *Gonzales v. Montana Power Company*,[91] which reversed a district court's refusal to certify a punitive damage class, could also be misinterpreted to sanction monetary relief in a (b)(2) action because the opinion does not recite under what subsection of the rule certification was sought. However, review of the district court certification order clearly confirms that the certification in question was under Rules 23(b)(1) and (3), and not Rule 23(b)(2).[92]

In *Diaz*,[93] the Montana Supreme Court's first class certification decision citing *Wal-Mart*, the Court appeared to adopt *Wal-Mart*'s holding that cases requiring individualized awards of monetary damages are not appropriate in Rule 23(b)(2) actions, but whether the holding was properly applied is open to question. The *Diaz* Court recognized that, under *Wal-Mart*, Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages, or when each class member would be entitled to a *different* injunction or declaratory judgment against the defendant."[94] The *Diaz* Court quoted with approval *Wal-Mart*'s explanation that "'[t]he key to the [Rule 23(b)(2)] class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"[95]

The Montana Supreme Court found that, just as in *Ferguson v. Safeco Insurance Company*, the *Diaz* class was certifiable under Rule 23(b)(2) because a single question affects all class members: "Can the State, in compliance with the subrogation laws, programmatically exercise [subrogation] before conducting a made-whole analysis?"[96] The *Diaz* Court reasoned that, like *Ferguson*, "[a]ny individualized determinations regarding whether class members have been made whole will not occur in the context of this class action claim."[97]

But in an apparent effort to comply with the *Wal-Mart* holding rejecting individualized monetary awards, the *Diaz* Court appears to have misunderstood the *Diaz* record. As Justice Rice's dissent points out, the *Diaz* plaintiffs' pleadings did "not challenge the State's internal mechanism for applying the made whole doctrine. Rather it is the Plaintiffs' claim, repeatedly stated, that the State

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86 . *See e.g. Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying maxim to the Federal Rules of Civil Procedure).

87 . *See e.g. Shelby Distributors, LLC v. Mont. Dept. of Revenue*, 206 P.3d 899, 902 (Mont. 2009) ("We first attempt to construe a statute according to its plain meaning. If the language of the statute is unambiguous, no further interpretation is necessary."); *Dukes v. City of Missoula*, 119 P.3d 61, 64–65 (Mont. 2005) (applying *expressio unius est exclusio alterius* doctrine to enforcement of the Montana Scaffold Act).

88 . *Ferguson v. Safeco Ins. Co.*, 180 P.3d 1164 (Mont. 2008).

89 . *Id.* at 390–391.

90 . *Id*. at 1170.

91 . *Gonzalez v. Mont. Power Co.*, 233 P.3d 328 (Mont. 2010).

92 . *See Or. Granting Certification of Class Action Except for Fraud and Granting Leave to File Sixth Amend. Compl., Gonzalez v. Mont. Power Co.*, Cause No. DV–98–253 (Mont. 2d Jud. Dist. Oct. 2, 2009).

93 . *Diaz*, 267 P.3d 756.

94 . *Id.* at 765 (emphasis in original).

95 . *Id*. (quoting *Wal-Mart*, 131 S. Ct. at 2557).

96 . *Diaz*, 267 P.3d at 765.

97 . *Id.* at 766.

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has 'illegally withheld' benefits, should be made to calculate the amount withheld for 'each member of the class,' should 'immediately pay' such benefits plus interest, and should pay punitive damages."[98] The *Diaz* complaint specifically sought "a declaratory judgment that the [State's] withholding of benefits violates the 'made whole' law."[99] The complaint also sought orders "*requiring the [State] to calculate the amounts they have unlawfully withheld* and to pay those amounts to the plaintiffs," as well as "all other *damages* allowed by Montana law."[100] Thus, as Justice Rice pointed out in his dissent, the *Diaz* case—at least as pleaded—did seek individualized monetary awards that *Wal-Mart* held were inappropriate for Rule 23(b)(2) certification.

The *Diaz* Court's reliance on *Ferguson v. Safeco* is also arguably misplaced. The *Diaz* Court characterized the *Ferguson* case as seeking "an injunction requiring the insurer to return *to her* any amounts it had illegally subrogated until it completed the requisite made-whole adjustments."[101] In fact, *Ferguson* involved Safeco's alleged improper collection of subrogated amounts from third parties[102]; the plaintiff requested in addition to class-wide declaratory relief, an "injunctive order compelling the *return* of subrogation amounts until such time as adjustments under the 'made-whole' standard had been completed by Safeco."[103] The "return" of such subrogated amounts was to the source from which the amounts had been received (*i.e.*, third-party insurers), not a return to the plaintiff or the class.[104] In *Ferguson*, unlike *Diaz*, individualized "make whole" awards were never sought.[105]

It therefore appears that while the Montana Supreme Court has signaled a willingness to adopt the *Wal-Mart* holding that individualized monetary awards are not appropriate for Rule 23(b)(2) certification, the application of this holding will require greater attention in future cases. Rather than ignore requested monetary relief and recast a case into one never pleaded, the proper course of action is to recognize that class certification should be denied in such cases, and Rule 23(b)(2) certification should be restricted to cases actually seeking only final declaratory or injunctive relief.

### *D. **Lesson 4:** Class Certification Cannot Be Used to Strip a Defendant of Its Right to Litigate Its Defense to Individual Monetary Claims*

Before the *Wal-Mart* decision, some courts confronting difficulties in determining precisely which Title VII claimants in a Rule 23(b)(2) class would have been given a better job absent discrimination resorted to a formulaic approach to calculate a lump sum amount that represented the employer's total back pay to the class.[106] As the Ninth Circuit put it, "'[w]hen the class size or the ambiguity of promotion or hiring practices or the illegal practices continued over an extended period of time calls forth [a] quagmire of hypothetical judgment . . . a class-wide approach to the measure of back-pay is necessitated.'"[107] In such cases, courts had recognized that it was "not a choice between one approach more precise than another. Any method is simply a process of conjectures."[108]

In such cases, once a formula was employed to calculate a lump sum back pay award to the class, the additional steps of determining which class members would be eligible to share in the award and in what amount was required. Awarding back pay to all potential victims of discrimination has the effect of generating a "windfall for some employees who would have never been promoted" even

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98 . *Id.* at 769 (Rice, J., dissenting) (citations omitted).

99 . *Id.*

100 . *Id.* (internal quotations and citations omitted) (emphasis in original).

101 . *Id*. at 766 (majority) (emphasis added).

102 . *Ferguson*, 180 P.3d at 1165–1166; Appellants' Br., 25, *Ferguson v. Safeco Ins. Co.*, 180 P.3d 1164 (Mont. 2008) ("Safeco's program recovers subrogation . . . by asserting and collecting subrogation directly from third-party insurers without any analysis of whether Safeco's insured has been made-whole.").

103 . *Ferguson*, 180 P.3d at 1170 (emphasis added).

104 . This is confirmed from review of the plaintiff's briefs before the Montana Supreme Court. *See* Appellants' Br., 26–27, *Ferguson v. Safeco Ins. Co.*, 180 P.3d 1164 (Mont. 2008); Appellants' Reply Br., 6–7, *Ferguson v. Safeco Ins. Co.*, 180 P.3d 1164 (Mont. 2008).

105 . Class relief prayed for in *Ferguson* included punitive damages, (*see* Compl., Prayer for Relief, ¶ 14), but that was not a claim upon which plaintiffs sought certification. The propriety of certification of a Rule 23(b)(2) punitive damage class is all but foreclosed by the *Wal-Mart* decision.

106 . *See e.g. EEOC v. O & G Spring & Wire Forms Spec. Co.*, 38 F.3d 872, 879–880 n. 9 (7th Cir. 1994) (approving district court's use of formula approach); *Hameed v. Int'l Assn. of Bridge Workers, Loc. 396*, 637 F.2d 506, 520–521 n. 18 (8th Cir. 1980) (citing cases approving formula approach to class-wide damages); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452–453 (7th Cir. 1976) (citing cases approving formula approach to class-wide damages); *EEOC v. Chi. Miniature Lamp Works*, 668 F. Supp. 1150, 1151–1152 (N.D. Ill. 1987).

107 . *Domingo v. New Eng. Fish Co.*, 727 F.2d 1429, 1444 (9th Cir. 1984) (quoting *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 261 (5th Cir. 1974)).

108 . *Pettway*, 494 F.2d at 261.

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absent discrimination and "undercompensat[ing] the genuine victims of discrimination by forcing them to share the award with their undeserving brethren."[109] Such "rough justice" was "better than the alternative of no remedy at all for any class member."[110] However, no federal appellate court (other than the en banc Ninth Circuit majority) had approved of the use of a formula in a Title VII case where the defendant objected to such approach.

In its analysis of why the monetary claims for back pay were not suitable for Rule 23(b)(2) certification, the *Wal-Mart* Court recognized:

> [A] class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being 'incidental' to the classwide injunction, [the] class could not be certified even assuming, *arguendo*, that 'incidental' monetary relief can be awarded to a Rule 23(b)(2) class.[111]

In reaching this conclusion, the unanimous Court expressly rejected the notion that class-wide back pay could be awarded based upon a "Trial by Formula," a concept embraced by the Ninth Circuit en banc majority.[112] With regard to the random sampling approach of *Hilao*, the Court specifically disapproved of such a "novel project."[113] Such an approach ran afoul of the Rules Enabling Act, which "forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'"[114] To comply with the Rules Enabling Act, a Federal Rule of Civil Procedure may affect "only the process of enforcing litigants' rights and not the rights themselves."[115] This requirement tracks the United States Constitution's separation of powers, and a broader delegation of power to the judiciary to make or modify substantive rights would constitute an improper delegation of legislative authority, which constitutionally is within the exclusive purview of Congress.[116] Wal-Mart's right to litigate its statutory defense to individual claims thus could not be abrogated by the procedural device of awarding class-wide damages based upon formulas or sampling.

The same concerns that drove the unanimous *Wal-Mart* Court to reject "Trial by Formula" in federal class actions applies with equal force to Montana class action law. Although Montana does not have an exact analog to the Rules Enabling Act, the Montana Constitution, like the United States Constitution, requires separation of powers. Article III of the Montana Constitution directs that the state's governmental power is divided into three distinct branches: legislative, executive, and judicial. That Article provides that "[n]o person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."[117] Article VII of the Constitution clearly limits the Montana Supreme Court's rule making powers to, *inter alia*, "practice and procedure for all other courts."[118]

The promulgation of Montana Rule of Civil Procedure 23 by the Montana Supreme Court was thus not intended to abridge or enlarge substantive legal rights, and as a Constitutional matter, could not do so. This necessarily means that class-wide damages approaches, whether based upon formulas or random sampling, should be rejected in Montana if the use of such devices would frustrate a defendant's right to raise individual common law or statutory defenses to class member's claims. Such a result is also

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109 . *Stewart*, 542 F.2d at 452–453.

110 . *Dukes*, 222 F.R.D. at 177.

111 . *Wal-Mart*, 131 S. Ct. at 2561.

112 . *Id.*

113 . *Id.*

114 . *Id.* (quoting 28 U.S.C. § 2072(b)).

115 . *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 8 (1987).

116 . *See e.g. I.N.S v. Chadha*, 462 U.S. 919, 951 (1983).

117 . *Id.* at art. III, § 1.

118 . *Id.* at art. VII, § 2(3) ("It may make rules governing appellate procedure, practice and procedure for all other courts, admission to the bar and the conduct of its members. Rules of procedure shall be subject to disapproval by the legislature in either of the two sessions following promulgation."). The language of this rule is substantively similar to language originally proposed by the minority report to the Montana Constitutional Convention. The minority report noted that "[t]he second class of rule-making power is restricted to rules of procedure and is intended to include both civil and criminal codes, but is specifically limited and qualified . . . meaning, of course, that the rule-making power is actually reserved to the plenary power of the legislature as the law-making body of the State." Montana Constitutional Convention (1971–1972), vol. I, p. 516.

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compelled by the Montana Constitution's guarantee that no citizen will be deprived of life, liberty or property without Due Process of law.[119] A defendant's Due Process right to challenge individual class members' entitlement to monetary, declaratory or injunctive relief cannot be abrogated by the procedural device of class certification.. As the Montana Supreme Court has recognized, Due Process requires that a defendant be afforded "an opportunity to present every available defense."[120]

## *V. Conclusion*

Class actions are an exception to the general rule that a lawsuit only determines the rights of the parties before the Court.[121] In Montana, this exception is permitted "only if" all of the requirements of Montana Rule of Civil Procedure 23 are met.[122] Because the Montana rule is identical to Federal Rule 23(a) and (b), the *Wal-Mart* decision's lessons should be adopted and applied in the continuing development of Montana class-action law. District courts in Montana should be required to "find" or "determine" that each of Rule 23's requirements have been proven by a preponderance of the evidence, even if that means addressing and resolving an issue that will have to be proven again at a trial on the merits. Applying the *Wal-Mart* majority's clarification regarding determining commonality, class actions should not be certified if a common question capable of generating a common answer for the entire class likely to drive resolution of the lawsuit is absent. Rule 23(b)(2) actions should be limited to claims for injunctive or declaratory relief, and cannot be used for the recovery of individualized monetary recovery. Finally, formulaic approaches to class-wide damages should be rejected if they impede a defendant's right to individually challenge the right of class members to recovery money damages.

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119 . Mont. Const. art. II, § 17.

120 . *Seltzer v. Morton*, 154 P.3d 561, 599 (Mont. 2007) (quoting *Phillip Morris U.S.A. v. Williams*, 127 S. Ct. 1057, 1063 (2007); *see also Lindsey v. Normet*, 405 U.S. 56, 66 (1972).

121 . *Hansberry v. Lee*, 311 U.S. 32, 41 (1940).

122 . Mont. R. Civ. P. 23(a).

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# BETTR Section committee to recommend modified version of Uniform Trust Code

**By E. Edwin Eck**

A committee of the Business, Estates, Trust, Tax and Real Property (BETTR) Section of the State Bar will recommend that the Montana Legislature adopt a modified version of the Uniform Trust Code, which the committee calls "the Montana Uniform Trust Code" (Montana UTC). The Montana UTC clarifies a number of aspects of current law and will provide Montana settlors, trust beneficiaries, trustees, and their advisors with the benefits of a uniform act.

Many states have enacted the UTC. Since the UTC was promulgated by the Uniform Law Commission in 2000, 23 states and the District of Columbia have enacted it. The UTC is more popular than the Uniform Probate Code, which has been adopted by 17 states and the Virgin Islands since it was first proposed in 1969. Unlike the Uniform Commercial Code, the UTC contemplates variations among the states, and the committee adopted many of them. The UTC has been endorsed by the American Bar Association, the ABA Real Property, Probate and Trust Law Section, and the AARP.

Many of Montana's neighboring states and states where retired Montanans spend their winters have adopted the UTC, including Wyoming, North Dakota, Utah, Oregon, Arizona, New Mexico and Florida. Because Montanans are mobile and because some Montanans are settlors of trusts holding real property in UTC states, these Montanans will benefit from the same basic trust code. Adopting the UTC will also reduce some of the costs incurred researching trust law issues.

## Advantages of a Uniform Act

Montana's courts can take advantage of case law from the 24 jurisdictions that have adopted the UTC. Montana's current trust code, on the other hand, is based upon a 1987 version of the California Trust Code, which has not been adopted by any other state. Since Montana adopted its act, California has made significant changes to its trust code. As a result, our courts can look only to California courts for another state's statutory interpretations, and given California's statutory changes, even that is problematic.

Further, Montana will benefit from having an act that is a product of the Uniform Law Conference, which from time to time proposes code revisions in response to new cases and other developments. For example, in 2006 the Fourth Circuit Court of Appeals ruled that a trust did not have an insurable interest in the life of an insured who was the settlor of the trust. The decision had a substantial adverse impact on irrevocable life insurance trusts.

In response, the Uniform Law Commission proposed a new section be added to the UTC that resolved the issue.

Finally, like other Uniform acts, the UTC includes substantial section-by-section comments, which help explain the law. Additional comments are being drafted for those Montana UTC sections that differ from the corresponding sections of the national UTC.

## Most of trust law is default law

Under the UTC, settlors and their advisers have great latitude to write provisions in trust instruments concerning the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary. Most of the UTC consists of default rules that apply only if the terms of the trust fail to address, or insufficiently cover, a particular issue. With 12 specific exceptions set forth in one section, the proposed Montana UTC provides that the terms of the trust instrument prevail over provisions of the Code. The exceptions include the requirements for creating a trust, the trustee's duty to act in good faith and in accordance with the terms and purposes of the trust, and courts' subject matter jurisdiction over trusts.

## Advantages of the Montana Uniform Trust Code over existing law

1) One advantage of the UTC is its recognition that some trust beneficiaries hold more significant interests in a trust than other beneficiaries. For example, the current income beneficiary and the current remainderman have greater stakes in a trust than a remote, contingent remainderman. Reflecting these differences, the UTC introduces the concept of "qualified beneficiaries" who have greater rights than other beneficiaries. The following notices need only be given to qualified beneficiaries:

- notice of a trustee's resignation;
- notice of a trustee's intent to combine or divide a trust; and
- notice of the trustee's proposal to transfer a trust's principal place of administration to another jurisdiction.

2) Under the proposed Montana UTC, if there is a vacancy in the trusteeship and the trust instrument does not effectively designate a successor, the qualified beneficiaries may unanimously appoint a successor trustee. There is no need for a court order.

3) The Montana UTC also effectively eliminates the need for court action in other specified circumstances. For example, a trustee may transfer the principal place of administration of a trust without a court order so long as no qualified beneficiary objects. Existing Montana law requires a court order for all transfers of the principal place of trust administration.

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4) Another advantage is that the Montana UTC provides that a trust has an insurable interest if the insured is the settlor or another individual in whom the settlor has an insurable interest. There is no corresponding provision in existing Montana law.

5) Additionally, the Montana UTC permits the settlor of a charitable trust, a charitable organization expressly designated to receive trust distributions, and other specified individuals to initiate a proceeding to enforce the trust. Existing Montana law precludes the settlor from initiating such a proceeding.

6) Similarly, unlike current Montana law, the Montana UTC gives the settlor standing to petition the court to apply cy pres if the charitable trust's purpose has become unlawful, impracticable, impossible to achieve, or wasteful. Further, existing Montana law requires evidence of a general charitable intent prior to a court's application of the doctrine of cy pres. Because such evidence can be difficult to obtain, the Montana UTC presumes that the settlor of a charitable trust had the requisite general charitable intent.

7) Existing Montana law permits the trustee to terminate a trust if the trust contains less than $20,000 of assets. The Montana UTC increases the threshold to $100,000 of trust assets.

8) The Montana UTC permits a trustee to combine two or more trusts or to divide a trust into two or more separate trusts after notice to the qualified beneficiaries. If no objection is made, the trustee may undertake this action without a court order. Current Montana law requires a court action for such a reorganization of a trust, even if the reorganization is merely for administrative efficiency.

9) The Montana UTC provides that the required capacity to create, amend, or revoke a revocable trust is the same as that required for a will. Further, the Montana UTC applies the same rules for recovery of attorney fees incurred in defending a revocable trust that currently apply in defending a will. The Montana UTC has an express provision voiding a trust if its creation was induced by fraud, duress, or undue influence. There are no comparable, express provisions in existing Montana trust law.

10) The Montana UTC includes an express provision for nonjudicial settlement agreements. No such provision is part of existing Montana trust law. Further, the Montana UTC has a provision that permits a trustee to notify beneficiaries of a proposed action to ascertain in advance whether a beneficiary objects to the proposed action. Existing Montana law does not include these provisions.

11) The Montana UTC clarifies the trustee's obligation to provide notice to beneficiaries. The trustee is obliged to keep qualified beneficiaries reasonably informed about trust administration and the material facts necessary for those beneficiaries to protect their interests. However, the trustee has a lesser obligation to other beneficiaries whose interests are more remote. This will result in some cost savings and privacy protection.

12) Finally, the Montana UTC clarifies the roles of charities and expressly indicates that a charity may serve as trustee of a trust for the charity's benefit.

## Proposed UTC online

You may review the proposed Montana UTC online. Go to http://www.baskettlawoffice.com/utc/. Click on "UTC Committee as a Whole." Then click on "Current Revised Draft."

Many of the principles of Montana's existing law have been retained. Committee members critically reviewed the UTC and concluded that some provisions of existing trust law should be retained. Rather than include UTC exceptions to the effectiveness of spendthrift provisions, the Montana UTC retains the existing principles of Montana law. Further, the Montana UTC continues the same statute of frauds provisions of existing Montana trust law. The BETTR Section committee does not recommend UTC provisions that would permit the oral creation of trusts. Further, the Montana UTC continues existing Montana provisions concerning constructive and resulting trusts. Finally, the Montana UTC does not change Montana's abbreviated judicial procedure for trust proceedings.

You may review the proposed Montana UTC online. Go to http://www.baskettlawoffice.com/utc/. Click on "UTC Committee as a Whole." Then click on "Current Revised Draft."

Members of the Montana Committee that drafted the Montana UTC. All members of the BETTR Section of the State Bar were invited to participate in a review of the UTC. Twenty-four attorneys from around Montana responded to the call. Attorney members of the committee include solo practitioners, members of large Montana firms, government attorneys, general practitioners, academics, litigators, officers of non-law businesses, and attorneys who practice exclusively in the trusts and estate field. In addition, seven trust officers had integral roles on the committee.

Over the course of six months, the committee conducted four day-long meetings. In between meetings, subcommittees met by phone and individual committee members researched and circulated dozens of drafts of possible revisions.

The attorney members of the committee include Kurt Alme (Billings), Eric Anderson (Billings), Valerie Balukas (Helena), Rick Baskett (Missoula), Iris Basta (Helena), Bruce Bekkedahl (Billings), Marc Buyske (Helena), Pat Dougherty (Missoula), Ed Eck (Missoula), Elaine Gagliardi (Missoula), Tim Geiszler (Missoula), Jeff Glovan (Helena), Doug Harris (Missoula), Larry Johnson (Hamilton), Cecil Jones (Dillon), Mike Lawlor (Helena), Stuart Lewin (Great Falls), Dan McLean (Helena), Judy Peasley (Seeley Lake), Julie Sirrs (Missoula), Jim Thompson (Billings), Dirk Williams (Missoula), and Tim Wylder (Great Falls).

The trust officer committee members include Penny Doak (Billings), Bruce Haswell (Helena), Martin Lewis (Helena), Kathleen Magone (Missoula), Sue O'Neil (Missoula), Steve Polhemus (Helena), and Art Sims (Great Falls).

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***E. Edwin Eck*** *is a professor at the University of Montana School of Law.*

# Making an office elder friendly

***Editor's note:*** *This is the first in a new ongoing series in the Montana Lawyer. The State Bar's Elder Assistance Committee will write monthly articles covering current issues in elder law.*

**By Garrett Norcott**

Montanans are an aging population. Over 20% of all residents are age 60 or older. Currently, there are about 200,000 Montana residents that fall into this demographic and the number is expected to increase by about 5% over the next 15 years. Thus, elder law can be a great niche practice with enormous growth potential. The more an attorney knows about accommodating aging Montanans, the easier it will be to tap into this growing market. Below are a few courtesies to consider.

## Scheduling

When scheduling first-time consultations or client meetings, be aware of the person's physical health and mental well-being. It is not uncommon for those 60 and above to have a routine medication regimen. Medication can cause a person to be less alert or drowsy. Schedule consultations and meetings with the client's well-being in mind.

## Getting to your office

It may be difficult for some clients to locate your office for the first time. Ensure that your webpage provides detailed and accurate directions. Further, ensure the outside of your office has appropriate signage that clearly identifies the location of your office.

Take the time to learn how clients will travel to your office. Also learn whether those coming to your office use a wheelchair, walker or cane. Identify nearby methods of public transportation and parking garages. Be aware of inclement weather and make it known to clients that you are willing to do house-calls or visit nursing homes and hospitals.

## Your office

Figure out whether the hallways and doorways in your office are wide enough to accommodate wheelchairs and walkers. If they are not, be prepared to help in anticipation of the client's arrival. Avoid plush sofas and overstuffed chairs, which can be difficult for some elderly people to climb out of.

Use chairs with straight backs and hard cushions that have arms strong enough to support a person leaning on them. Simply keeping a couple of used dining room chairs from Goodwill around your office is a quick fix. When it comes to office décor, my experience has been that law office art is notoriously bad. Consider updating a few pieces with western or historical themes.

It is no secret that as we age, our vision and hearing begin to dwindle. In order to accommodate these dwindling senses, make sure that your office is well lit and that background noise is minimized. Have a live person answer the phone that is prepared for hearing impaired callers. For clients that are deaf or severely hard of hearing, try using Montana Relay by dialing 711. Another handy option is a personal amplifier, which can be found at a number of electronic stores or pharmacies.

Make sure you have water and other beverages available for clients. Also be aware of the temperature and the comfort level of your client.

## Documents

When it comes to drafting documents or client communication, drop the legalese. Use a larger font, 14 point or bigger. Use color, charts, diagrams, etcetera, to explain a large array of information.

The above are nothing more than common courtesies. Accommodating client needs goes a long way. By taking the time to think about the needs and comfort of aging Montanans, attorneys can capitalize on a growing legal market.

***Garrett Norcott*** *is legal counsel at the Montana Department of Commerce and a member of the Bar's Elder Assistance Committee.*

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# "A lawyer shall always pursue the truth."

***Editor's note:*** *The State Bar's past presidents' words of wisdom will continue in a new ongoing series in the Montana Lawyer. Stay tuned to this page for a regular "Blast From The Past."*

**By Chris Tweeten**

Just to reintroduce myself, I was President of the State Bar from 2008-2009. Prior to that, I served on the Board of Trustees for a dozen years and on the Executive Committee for four. My day job was Chief Civil Counsel for the Montana Attorney General.

Some things have changed since then. I left the AG's office in 2010, and now I spend my time representing a few clients and teaching part-time at the Law School in Missoula. As if that were not enough change, my wife and I have even sold our house in Helena and moved to Missoula.

You may have thought you were well rid of me after the 2009 annual meeting, but the bar leadership has conspired with the Montana Lawyer to bring some of the past presidents back to write in this space from time to time. I have the honor of writing the first blast from the past. So on with it.

We in the profession worry about civility. But how about that Presidential election? And the Senate and Governor's races? And the race for AG. Name-calling, half-truths, fact-checkers throwing up their hands in horror (or just throwing up), even though one of the presidential campaign managers has stated flatly that the campaign doesn't care whether the fact-checkers out them or not. Even the race for Supreme Court Justice has not been safe from unfair political cheap shots, albeit from so-called third-party groups.

It's a sad state of affairs, made even sadder by the fact that, in all but the Senate race, all of the candidates in these races are lawyers. Doesn't truth matter anymore? Don't lawyer-politicians have an obligation to care about whether their public statements, and those of their surrogates, are misleading?

After all, the Rules of Professional Conduct speak to a lawyer's obligation to avoid dishonesty even in their activities outside the practice of law. The very first words in the Preamble of the Rules address the importance of a lawyer's honesty: "A lawyer shall always pursue the truth."

Other provisions of the rules extend on the Preamble's simple admonition. Rule 8.2(a), for example, provides: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a … candidate for election or appointment to … legal office." More generally, Rule 8.4(c) provides: "It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, ... or misrepresentation…." Dishonesty and misrepresentation seem to be the currency of election advertising these days, don't they?

I am not suggesting that the Commission on Practice take on the role of cop for the truth of election conduct of candidates who are lawyers. Nor am I suggesting that all the lawyer candidates in this year's elections have engaged in misconduct. But isn't it sad that the principles of honesty and integrity that we as lawyers hold so dear have gone by the wayside for some lawyer candidates? And doesn't this reflect badly on the legal profession as a whole?

So, however unrealistic, even self-delusional, it may be, I am issuing this challenge to lawyers who would be candidates: Remember who you are. Remember the solemn oaths you undertook when you were admitted to the bar. Remember the obligations imposed on you as a member of an honorable, learned profession. Knock off the lying, deceitful, dishonest, shameful, misleading advertising. Tell the truth. Who knows, the voters may actually like you for it.

*I'm Chris Tweeten, and I approved this message.*

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