

**Inside:** Case briefs | Bakken patent boom | Assessing economic damages

# MONTANA LAWYER

State Bar  
— of —  
Montana

Oct. 2012 | Vol. 38, No. 1



## Annual Meeting 2012

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# Justice O'Connor and me

**In** 1986, Justice Sandra Day O'Connor spoke at the University Of Montana School Of Law as part of the Jones Tamm Lecture series. Justice O'Connor had been a Supreme Court Justice for five years, and this was her first speaking engagement in Montana after being appointed to the Court. I was privileged to attend.

It was an exciting time for women in the legal profession. Women attorneys were still in the minority. I graduated from law school in 1979. Only ten percent of my class were women. When Justice O'Connor was appointed to the bench two years after my graduation, one more wall had been broken down in women gaining equality in the legal profession.

I arrived in Missoula with camera in hand. Oh, how I wanted a picture of Justice O'Connor. No such luck – no pictures allowed. Later that day, I was outside the Missoula Holiday Inn. My camera was in my purse. Lo and behold, who should walk out the front door, but Justice O'Connor with her husband. She looked extremely fit wearing shorts, a pink blouse and tennis shoes. She exuded confidence. I was so close; I could have reached out and touched her. Not only would I maybe be able to take her picture, but perhaps I could have a picture with me in it! I tried to muster up the courage. I couldn't do it.

Last month, Justice O'Connor returned to Montana to be the keynote speaker for the annual meeting of the State Bar in Billings. She provided a few remarks and then took questions from the audience. Questions ranged from whether she had ever "skipped" through the halls of the Supreme Court to her take on the recent Supreme Court ruling on Obamacare. I will not attempt to reiterate her responses, but she never missed a beat and continues to exude the confidence I remember from 26 years ago. (I will say that she quickly replied that she has never skipped through the halls of the Supreme Court.)

Justice O'Connor was an inspiration for my generation of women in the legal profession and she continues to be an inspiration for future generations of women attorneys. Today, approximately 50% of law school graduates are women. One third of the United States Supreme Court Justices are female. We have come a long way from when Justice O'Connor graduated from law school in 1952, and only 2% of law graduates were women. Although Justice O'Connor graduated number three in her class at Stanford Law School, she was unable to find a job with a law firm in California. The only offer made to her by a firm was to be a legal secretary. Finally, she took a position as a deputy county attorney – an unpaid position.

Over the last thirty years as a Montana attorney, I have



**After waiting more than two decades,** State Bar President Pam Bailey had her picture taken with Justice Sandra Day O'Connor.

been privileged to know several women attorneys who have been "firsts" in our profession. Sherri Scheel Matteucci was the first women to be president of the Yellowstone Area Bar Association, president of the Montana Bar Association, and, the United States Attorney in Montana. Judge Diane Barz was the first women to serve on the Montana Supreme Court. Judge Carolyn Ostby is the first women to serve on the federal judiciary in Montana. All of these firsts have significantly advanced gender equality in our profession.

About that picture I so wanted: I got off the elevator at the Crowne Plaza in Billings where this year's annual meeting was held. Lo and behold, who came off the next elevator but Justice O'Connor and Judge Jack Shanstrom. I knew that this opportunity may never present itself again. Thanks to Judge Shanstrom I got my picture. Being president of the State Bar has its privileges!



# Annual CLE Seminar

## ■ TRIALS: Tips, Tactics & Practical Tales

Michael P. Cash, Esq.

- ♦ Pre-trial tips to shut down your opponent at trial
- ♦ High impact openings and closing arguments that move the jury to action
- ♦ Tips and tactics illustrated with tales from real-life trials
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## ■ View from the Bench

District Judge (Federal) Dana L. Christensen  
U.S. District Court

## November 16, 2012

7 CLE hours

Doubletree by Hilton Missoula - Edgewater

Missoula, Montana

A limited block of rooms have been reserved for MDTL program participants. Call 406.728.3100 and ask for the MDTL room block.

## Seminar Schedule

7:30-8:00 am	<b>Registration</b>
8:00 am - 12:30 pm	<b>TRIALS: Tips, Tactics &amp; Practical Tales</b> Michael P. Cash, Esq.
12:30-2:00 pm	<b>MDTL Luncheon Meeting</b> Lunch on own if not attending
2:00-3:45 pm	<b>TRIALS: Tips, Tactics &amp; Practical Tales</b> Michael P. Cash, Esq.
4:00-5:00 pm	<b>View from the Bench</b> District Judge (Federal) Dana L. Christensen U.S. District Court

## Montana Defense Trial Lawyers



**Michael P. Cash, Esq.**

- Partner in Houston office of Gardere Wynne Sewell, LLP
- Over 20 years experience in commercial litigation
- Tried dozens of cases to jury verdict in state and federal courts
- Argued before appellate courts, including the Texas Supreme Court
- Nationally recognized for trial skills



**District Judge (Federal) Dana L. Christensen**  
U.S. District Court

## Fees

	On or Before Oct. 29	After Oct. 29
<input type="checkbox"/> MDTL Member	\$250	\$315
<input type="checkbox"/> Nonmember	\$335	\$400
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**Registration Policies:** The registration fee includes all sessions and course material. Payment must accompany registration form to receive early registration discount. **Cancellations received in writing by October 29 will be subject to a \$25 service charge. No refunds will be made after October 29.** Course materials will be mailed to pre-paid registrants who were not able to attend the conference. Registration substitutions may be made at any time without incurring a service charge.

## Registration

Name \_\_\_\_\_

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36 South Last Chance Gulch, Suite A • Helena, MT 59601

**Phone 406.443.1160 • Fax 406.443.4614**

**Email [sweingartner@rmsmanagement.com](mailto:sweingartner@rmsmanagement.com)**

**Website [www.mdtl.net](http://www.mdtl.net)**

# Judge Molloy recognized as distinguished alumnus

The Molloy family roots run deep at the University of Montana. From the political science department, to athletics, to law, generations of Molloyes have made an impact on campus. This past Homecoming, the University recognized Hon. Donald W. Molloy with a 2012 Distinguished Alumnus Award in recognition of his many contributions.

Molloy, a 1968 graduate of the College of Arts and Sciences and a 1976 graduate of the School of Law, is possessed with a mix of toughness, intellectual depth and “thick skin,” characteristics he gained rushing the football for the Grizzlies and in the classroom.

Since his appointment to the federal bench by President Clinton, he has committed himself to returning to co-teach the popular class on the Philosophy of Law with long-time collaborator Prof. Tom Huff (retired).



Photo by Todd Goodrich

**The University of Montana recognized Hon. Donald Molloy**, center right, with a Distinguished Alumnus Award during the university's homecoming celebration. Judge Molloy is a 1968 graduate of the College of Arts and Sciences and a 1976 graduate of the School of Law. At center left is UM President Royce Engstrom.



Alan Sullivan was ranked #1 on the *Mountain States Super Lawyers*® 2012 list of attorneys in Utah, Nevada, Montana, Idaho and Wyoming.

Congratulations, Alan!

Alan Sullivan is admitted to practice law in Utah; he is not licensed in Montana.

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## Montana and Member News

### Reinhart Levine joins Great Falls firm



Reinhart  
Levine

FairClaim, a division of Linnell, Newhall, Martin & Schulke, P.C., is proud to announce that Michele Reinhart Levine has joined the firm as an associate attorney.

Michele is an out-going, third-term Montana State Representative for House District 97, (Missoula), and a recent 2012 graduate of the University of Montana School of Law. She enjoys studying and making law. Michele grew up in Livingston. She has a B.A. and an M.S. in environmental studies from Carroll College and the University of Montana, respectively. During law school, Michele was a member of the ABA Negotiation Team, the Women's Law Caucus, and the Environmental Law Group; a Janet Steiger Anti-Trust/

Consumer Protection Fellow (2010) at the Montana Department of Justice; a recipient of the Margery Hunter Brown Research Assistantship Award; and a legal intern for the Missoula County Attorney's Office. Michele's practice areas will primarily include workers' compensation and personal injury law. Reach Michele at [mlevine@lnms.net](mailto:mlevine@lnms.net).

### Myers joins Nebraska legal-aid program

Kelsie A. Myers, formerly of Missoula, Montana, is now employed as staff attorney with the Native American Program of Legal Aid of Nebraska, Omaha, Nebraska. Ms. Myers is based in the Norfolk, Nebraska office at 214 N. 7th St. Suite 10. Her practice with Legal Aid focuses on civil issues arising out of domestic violence in the Omaha, Winnebago, Ponca, and Santee Sioux Tribes in eastern Nebraska.

### La Seur opens new branch office in Billings



La Seur

Bismarck, ND-based Baumstark Braaten Law Partners is pleased to announce that Carrie La Seur has opened a new office for the firm in Billings. The firm's practice focuses on agricultural, American

Indian, and oil and gas law exclusively for landowners and mineral rights holders. La Seur is a Rhodes Scholar and a graduate of Yale Law School who clerked for the Federal Court of Australia from 2002 to 2003. She is licensed to practice in Montana and Wyoming and before several federal courts, and traces her Montana roots to Big Horn, Gallatin, and Stillwater County homesteaders.

Carrie can be reached at (406) 969-1014, [carrie@baumstarkbraaten.com](mailto:carrie@baumstarkbraaten.com), or [www.baumstarkbraaten.com](http://www.baumstarkbraaten.com).

## Letters to the Editor

### A call for support

Fellow attorneys,

I challenge you to meet my recent \$2,000 contribution to the Law Clinic: You are all aware that the Law Clinic has struggled financially for the past several years because of the decrease in IOLTA funding through the Montana Justice Foundation. Even though the Montana Justice Foundation has complete control over the IOLTA accounts, you can directly make donations to the CCLC which are tax deductible. The Law Clinic cannot continue to operate without the help of all local Law Firms.

The Cascade Law Clinic provides a valuable service to attorneys as well as low-income clients. Potential pro bono clients are screened for legal needs as well as income eligibility. Legal documents are prepared for attorney review and filed with the Clerk of Court to make it easier for you to accept pro bono cases. This past year 321 applicants were screened and one hundred eight received attorney representation.

Thank you for your support of the Cascade County Law Clinic.

— Michael R. Tramelli, Great Falls

### Joe Mazurek: Nice guys finish First

We both knew Joe well. Our lives were intertwined with Joe's for many years and in many different ways.

Les and Joe raised their families on the west side of Helena. Their homes were within easy snowball range of each other, and the crisscrossing of their lives included high school camaraderie, babysitting, and the practice of law. In fact, as the managing partner at the Helena office of the Crowley Fleck law firm, Joe hired Jason Loble who later succeeded him in the early and

anguishing time of Joe's Alzheimer's affliction. Les appeared before Joe's Senate committees for many years.

Dorothy worked with Joe during their legislative careers, knew him as attorney general, and was his running mate in the 2000 gubernatorial race. There is nothing like a campaign trail to acquaint you with a person's true character, mostly in situations that resemble untangling Christmas tree lights with a gun at your back. Joe was unflappable.

We have learned so much about Joe during these exceptional decades. Wherever Joe was, you found good things: Exuberance. Hilarity. Courtesy to a fault. Honesty to the core. Reliability. Fairness to all. Kindness. Seeing his face light up when he spotted you across a room could fuel your batteries for a week.

Appearing before Joe's committees in the Senate was a pleasure. Dignity would be the best description of the atmosphere he gave his hearing room. He ran his committees with respect for all, just as he ran the Montana Senate as its president. All who appeared before him felt safe and valued, and all who served with him felt like a critical part of the honorable system that it is.

His tenure as attorney general was marked by strict compliance with the law. As the state's chief legal officer there was never a concern of inappropriate shading of an opinion or a policy, and even if you were not in agreement you would find his work thoughtful and thorough with no sliding of the bar to the left or right.

This year's election antics are making us forget the good side of our remarkable political system. Sometimes, it seems like only the attack dogs win and the nice guys finish last. Joe demonstrated the contrary. He lived his life as a nice guy—and, in a life that was much too short, Joe Mazurek finished first.

— Les Loble (Big Sky) and Dorothy Bradley (Clyde Park)

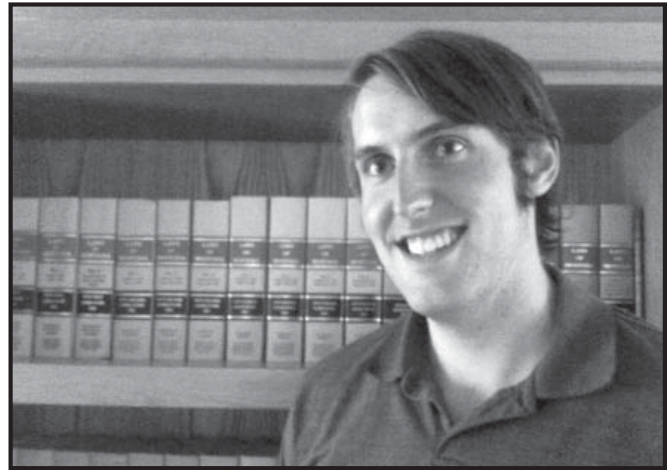


# Bar Vista earns top honor

*Reed administers legal needs assessment for veterans*

Congratulations to Mick Reed. Mick was named the VISTA of the quarter for April to June 2012. This recognition is given to VISTAs whose service progresses their VISTA assignment description, meets priority programming area goals, and expands access to justice for low income Montanans in the field of poverty law, domestic violence, or asset development.

He received this recognition for his exceptional work administering the statewide legal needs assessment surveys and for progress toward creating new materials benefiting the areas that were identified as most needed.



State Bar Vista Mick Reed

## Verify Your Listing for the 2013 Deskbook

Check your current contact information online at [www.montanabar.org](http://www.montanabar.org) (login above the scrolling banner on the homepage) or send an email to [jdiveley@montanabar.org](mailto:jdiveley@montanabar.org). The deadline for all changes is October 31st.

## Road show headed to Kalispell

The program is scheduled for Friday, Nov. 2, in Kalispell at the Red Lion.

For more information contact Robert Padmos at (406) 447-2202 or [rpados@montanabar.org](mailto:rpados@montanabar.org).

## Deadline for comments approaches for discipline rule

The Montana Supreme Court will accept comments until October 15th on the following proposed rule changes:

Revisions to Rule 33 of the Rules for Lawyer Disciplinary Enforcement. Read the orders online on the State Bar's homepage at [www.montanabar.org](http://www.montanabar.org)

## Upcoming events

More information can be found at [www.montanabar.org](http://www.montanabar.org)

- Executive Committee Meeting (Bozeman) - October 12
- Annual Construction Law Institute (Bozeman) - October 12
- CLE Institute Fall Planning Meeting (Helena) - October 26
- Road Show (Kalispell) - November 2
- Executive Committee Meeting (Kalispell) - November 2
- Ethics Committee Retreat Meeting (Missoula) - November 8-9

## Court Orders

### Appointment-Boards/Commission/Committee

**Summarized from a Sept. 18 order (No. AF 06-0263)**

The terms of the Honorable Perry W. Miller, the Honorable Larry G. Carver, the

Honorable Steven T. Fagenstrom, the Honorable Gary A. Olsen and Margaret A. Tonon on the Commission on Courts of Limited Jurisdiction expired on June 30, 2012; all five are willing to continue to serve as members of the Commission for additional terms.

Additionally, Commission member former Chief Public Defender Randi M. Hood has retired from the Commission on Courts of Limited Jurisdiction.

THEREFORE, with the Court's thanks for their dedicated service to the

Commission, to this Court and to the people of Montana,

IT IS ORDERED:

(1) The Honorable Perry W. Miller, the Honorable Larry G. Carver, the Honorable Steven T. Fagenstrom, the Honorable Gary A. Olsen and Margaret A. Tonon are reappointed to serve in their respective positions as members of the Commission on Courts of Limited Jurisdiction for additional 4-year terms commencing the date of this Order and ending June 30, 2016.

(2) Bill Hooks is appointed to serve as the Chief Public Defender member, commencing the date of this Order; his term expires upon his position as Chief Public Defender ending.

(3) With the approaching retirement of Justice James C. Nelson, current Supreme Court Liaison for the

Commission on Courts of Limited Jurisdiction, Justice Jim Rice has agreed to serve in that capacity commencing the date of this Order.

**Summarized from a Sept. 18 order (AF 06-0536)**

The term of District Court Council member Lori Maloney (Clerk of District Court member) expired on June 30, 2012. Pursuant to § 3-1-1602, MCA, the President of the Montana Association of District Court Clerks, Hazel L. Parker, has nominated Lori Maloney for reappointment as a member of the District Court Council. Therefore, with the consent of Lori Maloney,

IT IS ORDERED that Lori Maloney is hereby reappointed to the District Court Council to a 3-year term expiring June 30, 2015.



## Court appoints initial members of the Access to Justice Commission

### Summarized from a Sept. 18 order (AF 11-0765)

On May 22, 2012, this Court created the Access to Justice Commission (ATJC) as a new advisory commission to the Court. The ATJC is charged with assessing, planning, coordinating, and making recommendations concerning the provision of access to justice for all Montanans. Our May 22 Order provided that 18 members, representing a variety of identified organizations and entities, would be appointed to the ATJC to serve staggered three year terms. We requested the State Bar's Equal Justice Coordinator to facilitate the nomination of initial members. Nominations have now been submitted and approved.

IT IS ORDERED that the following 18 individuals, representing the groups and entities after which their names are shown below, are appointed as the initial members of the ATJC for the initial terms indicated:

#### Name Representing, Expiration of Term

- Matthew Dale Office of the Attorney General, September 30, 2015
- Rep. Chuck Hunter Montana House of Representatives, September 30, 2014
- Sen. Rick Ripley Montana Senate, September 30, 2014
- Justice Beth Baker Montana Supreme Court Justice, September 30, 2015
- Hon. Kurt Krueger District Court Judge, September 30, 2014
- Hon. David M. Ortley District Court Judge, September 30, 2015
- Hon. Michele L. Snowberger Court of Limited Jurisdiction Judge, September 30, 2014
- Jennifer Brandon Clerk of a District Court, September 30, 2014
- Sharon Skaggs Clerk of a Court of Limited Jurisdiction, September 30, 2013
- Hon. Richard Jackson Montana-Wyoming Tribal Judges, September 30, 2013
- Association
- Robin Meguire Montana Justice Foundation, September 30, 2013
- Alison Paul Montana Legal Services Association, September 30, 2013
- Randy Snyder State Bar of Montana, September 30, 2013
- Andrew King-Ries University of Montana School of Law, September 30, 2015
- Jon Bennion Business/communications leader, September 30, 2015
- Aimee Grmoljez Business/communications leader, September 30, 2014
- Melanie Reynolds Representative of organizations working with low-income individuals, September 30, 2015
- Andy Huff Representation of Native American communities, September 30, 2013

IT IS FURTHER ORDERED that Andrew King-Ries shall serve as Chair of the Commission until further order of the Court.

## Discipline

### Summarized from a Sept. 18 order (PR 12-0483)

On August 15, 2012, the Office of Disciplinary Counsel (ODC) filed a petition for reciprocal discipline of Montana attorney Philip M. Kleinsmith, pursuant to Rule 27 A of the Rules for Lawyer Disciplinary Enforcement (RLDE). We allowed Kleinsmith time to respond to the petition for reciprocal discipline, and he has filed a response.

Attached to ODC's petition is a certified copy of the Supreme Court of Arizona's March 20, 2012 judgment accepting Philip M. Kleinsmith's agreement to discipline by consent pursuant to Rule 57(a), Ariz. R. Sup. Ct. In that proceeding, Kleinsmith admitted to

having engaged in conduct that violated Arizona's Rules of Professional Conduct 1.1, 1.3, 1.4, 1.5, 1.16, 5.3, and 8.4(d).

The presiding disciplinary judge of the Supreme Court of Arizona reprimanded Kleinsmith and placed him on probation for one year, subject to early termination upon Kleinsmith's completion of and payment for an attorney ethics program. Kleinsmith has attached to his response copies of (1) his own report of compliance with the March 20 Arizona Supreme Court order and his motion to terminate probation, (2) a notice from the Arizona State Bar Counsel that Kleinsmith successfully complied with the terms of his probation and the probation was completed, and (3) a June 18, 2012 order in which the presiding disciplinary judge of the Supreme Court of

Arizona terminated Kleinsmith's Arizona probation.

Having reviewed the documents filed with this Court, we conclude discipline identical to that imposed upon Kleinsmith in Arizona should be imposed upon him in Montana.

Therefore,

IT IS ORDERED Philip M. Kleinsmith is reprimanded for his admitted violations of the Arizona Rules of Professional Conduct.

Given that Kleinsmith already has complied with the terms of his probation in Arizona and that probation has been terminated, IT IS FURTHER ORDERED that no additional discipline shall be imposed upon Philip M. Kleinsmith in Montana for the professional misconduct in Arizona giving rise to this petition.

# State Bar delegation planning research trip to Cuba; RSVP soon if interested

Professionals Abroad, a division of Academic Travel Abroad, in consultation with the State Bar of Montana, is organizing a delegation to visit Cuba for the purpose of researching the country's legal system.

Peggy Probasco and Matt Thiel will lead the delegation, which will undertake a comprehensive study of the Cuban legal system, from the teaching of law, to the criminal justice and judicial systems; civil and family code; business and commercial rights; and resolving domestic and international commercial conflicts.

As you may know, travel to Cuba is restricted by the Office of Foreign Assets Control (OFAC) of the United States Treasury Department. This delegation will be travelling under OFAC regulation 31CFR §515.564 General license for professional research. This license supports our access to the highest level professionals in Cuba. Each member of the delegation must be in compliance with the General License issued by the Office of Foreign Assets Control authorizing full-time professionals to conduct a full-time schedule of research activities in Cuba with the likelihood that this research will be publicly disseminated. To ensure compliance, each participant in the program will be required to provide a resume and sign an affidavit attesting to their status as a full-time professional, paid or unpaid, in the field. During travel, each delegation member will be given a copy of the regulation that will serve as the license to travel authorized by the Office of Foreign Assets Control.

This delegation will convene in Miami, Florida on Feb. 23, 2013, at which time everyone will depart for Cuba. The delegation will return to the United States on Feb. 28, 2013. Delegates will participate in professional meetings and site visits each day; the specific meetings and topics for discussion will be determined by the research interests and composition of the team.

The estimated cost per delegation member is \$4,990 per person/single hotel room; \$4,495.00 per person/double

**For more information**, visit the Professionals Abroad site for this trip at <http://goo.gl/pL5Zn>

hotel room. This cost includes roundtrip international air arrangements between Miami and Havana; group transportation, meetings, accommodations in double-occupancy rooms, most meals, and essentially all other costs associated with participation, as outlined in the final schedule of activities.

For U.S. citizens, expenses associated with this program may be tax deductible as an ordinary and necessary business expense. You should consult with a tax advisor to determine if tax deductibility is applicable to you.

Washington DC based, Professionals Abroad is a division of Academic Travel Abroad, a 60-year-old organization that handles the logistical arrangements for prestigious organizations, such as National Geographic, The Smithsonian, The American Museum of Natural History and many top universities.

Academic Travel Abroad is licensed by the OFAC as a Travel Services Provider for US travel to Cuba.

Due to the extensive planning and communication involved in coordinating a program of this nature, please respond with your intentions regarding this invitation as soon as possible.

Please RSVP to Professionals Abroad at 1-877-298-9677 or via the web at [www.professionalsabroad.org](http://www.professionalsabroad.org). A \$500 deposit is required to secure your place on the team. In the event that you are unable to accept this invitation, an alternate delegate candidate will be invited. You may also recommend a colleague as your alternate for the program.

If you have questions regarding the delegation, contact the program representative at Professionals Abroad, at 1-877-298-9677. For additional program details visit [www.professionalsabroad.org](http://www.professionalsabroad.org).

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## ACLU of Montana program to explore the overuse of solitary confinement

The ACLU of Montana is working to end the overuse of solitary confinement in Montana prisons, especially on juveniles and prisoners with mental illnesses. On Nov. 15, ACLU of Montana will host a program in Missoula to educate students and the general public about what solitary confinement entails, how it psychologically harms prisoners and how that hurts us as a society. Participants will hear from prisoners, corrections officials and psychiatrists in a 50-minute National Geographic documentary "Solitary Confinement." Participants will then hear from Eldon Vail, former Secretary of the Washington State Department of Corrections, about how prisons can move more inmates out of solitary confinement and into the general

population and about the special needs of mentally ill prisoners. Vail has 35 years of experience in corrections and has directly overseen three prisons. There will be the opportunity for questions.

The overuse of solitary confinement is of growing concern across the United States as civil libertarians, prisoners' rights advocates, psychiatrists and corrections officers become increasingly aware of its pitfalls.

This program is open to the general public and will be the beginning of ongoing public education and advocacy efforts on the issue. The program will be in room 201 of the UM School of Law at 7 p.m.

# Assessing economic damages: Generally accepted approaches

By Steven Johnson, CPA

Given the same set of facts, why is it that economic damages calculated by two different independent experts can vary by large amounts? A cynical answer is that experts make assumptions to increase or decrease damages depending upon which side retained them. Given that assumptions are necessary to determine damages, how do you know if an assumption is reasonable? While there is no simple answer to this question, a review of the standard approach to damage quantification can help attorneys determine whether an expert's assumptions are reasonable. Furthermore, understanding requirements of this approach to damages can help attorneys assess the reasonableness of an expert's assumptions.

The standard approach to damage quantification begins with identifying and isolating a harmful act. Economic damages are quantified by the loss in value between what actually occurred and what would have occurred absent the harmful act. Isolating the harmful act identifies the nexus between the harmful act and its consequences. For example, a trucking accident destroys \$100,000 worth of merchandise en route to a retail store that is out of inventory. The accident results in delayed sales of the merchandise. The delayed sales have an adverse effect on customer relations, which resulted in a smaller market share for the retail store. The smaller market share indicates lost future sales. The question is, are economic damages from the harmful act isolated to the lost merchandise, or does a nexus exist between the accident and lost profits on future sales?

Once the harmful act is isolated, for future damages, the expert must opine on what will probably occur. This normally involves examining what has actually occurred since the harmful act and projecting it forward. This projection is typically more objective and requires fewer assumptions than projecting what would have occurred absent the harmful act.

There is often a disparity between experts' opinions on what would have occurred without the harmful act. This is because quantifying what would have occurred in the absence of a harmful act is typically more subjective and requires more assumptions than projecting what will probably occur.

The standard approach to damage quantification requires that the plaintiff must prove its damages with reasonable certainty. Generally accepted quantification methods permit

estimates that are not mathematically certain, but exclude damages that are speculative. In the example, if the retail store was able to identify specific customers that were lost because of the accident, it may be reasonable to include lost profits on future sales from these customers as damages. However, if specific customers cannot be identified, including lost profits from future sales as damages could be speculative.

Given that assumptions are necessary to determine damages, how do you know if an assumption is reasonable?

The standard approach to damage quantification requires that damages cannot be too remote. Reasonable foreseeability is the key to understanding this limitation. In some cases, a party cannot normally recover damages that were not reasonably foreseeable at the time of the agreement. However, economic damages may arise naturally from a breach.

Lastly, the standard approach to damage quantification requires that the plaintiff must mitigate damages. Mitigating damages refers to avoiding costs or minimizing other types of damages. In personal injury cases, the plaintiff's retained earning capacity mitigates or reduces lost wages from the injury. Mitigated damages in commercial cases are usually more complicated. In our example, if the retail store was able to acquire replacement merchandise from a third party in time to supply its customers but failed to do so, the store may have failed to mitigate its damages. Instead of damages consisting of lost

merchandise and purchasing costs from buying replacement merchandise on short notice, they now consist of lost merchandise and lost profit on future sales, which may be significantly greater.

Economic damage computations normally require a method and some assumptions. The standard approach to damage quantification is that damages are the loss in value between what actually occurred and what would have occurred absent the harmful act. This approach identifies the harmful act and its nexus to damages. Understanding this can help an attorney assess an expert's method. Also, knowing that damages must be reasonably certain, cannot be too remote, and that the plaintiff must mitigate damages can help an attorney assess an expert's assumptions.

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**About the Author:** Steven Johnson is a CPA in the Valuation and Litigation Consulting Support department at Anderson ZurMuehlen in Helena.





## Annual meeting in pictures

Another year, another annual meeting, another year of memories. The 2012 annual meeting, the Big Sky Rendezvous, brought hundreds from Montana's legal community to Billings from Sept. 19-21. More than 300 people attended the banquet to see Justice Sandra Day O'Connor converse with the crowd. And in a touching moment of kismet, new State Bar President Pam Bailey shared her story of a decades-long wish to meet her inspiration and have a picture taken with Justice O'Connor. (See president's message, page 3).

Members of the bench and bar touched upon pressing issues in numerous areas of law during two days of "hot topics" CLE. To round out the event, the Montana Supreme Court heard oral arguments in two cases, adding a practical element to the CLE's topical focus.

On the business end, Pam Bailey took over as president with Shane Vannatta becoming immediate past president. Matthew Thiel is chairman of the board. (The previous chairman, Randy Snyder is the bar's president-elect.)

The Resolutions Committee met for the final time; the Past Presidents Committee will take over duties. The Resolutions Committee passed two resolutions: No. 1, supporting continued funding of Montana Legal Services Association; No. 2, thanking the members of the Yellowstone Area Bar Association and, in particular, the members of the Annual Meeting Committee, for their support of the Annual Meeting. Both passed unanimously.

All-in-all it was a successful meeting, and we hope to see everyone next year in Helena.

***Pictured above:** Pam Bailey addresses a full house after taking the podium as the State Bar's new president.*

**Annual Meeting coverage continues through page 21**

# William J. Jameson Award



## J. Martin Burke

The Jameson Award is named in honor of the late U.S. District Court Judge William J. Jameson, a Montana native, University of Montana School of Law graduate, and former president of the American Bar Association who served in the federal judiciary for more than 30 years. This award is the State Bar's Highest honor. It is given annually to a member of the State Bar judged to be the model of the highest professional and ethical standards for fellow attorneys.

### Select excerpts from nomination letters for Martin:

"Martin has mentored thousands of law students and colleagues by setting an example each day. Everything he does, he does with the highest standards. He prepares thoroughly for each class, always thinking of new ways to present complicated and intricate concepts. He has made the Montana Tax Institute one of national prominence. He has encouraged the editors of the Montana Law Review to produce symposia and reviews of the highest quality. He treats others with respect and kindness, regardless of their position in life or their viewpoints. It is because of his honesty, compassion, and charity for others that so many of us have been encouraged to work each day to achieve the high standard that Martin expects of himself and all of us who work with him."

— Professor Elaine Gagliardi and Associate Professor Kristen Juras

"Martin's commitment to service and quality for his state is unequalled except by his humility. He is a smart, charismatic, principled leader who understands the world and can translate that world in a very down to earth manner to the people he has taught. His intelligence, integrity, independency, compassion, common sense, and practicality make an awesome combination when employed in his chosen profession."

— Hon. Deborah Kim Christopher, District Judge, Montana 12th Judicial District

"In considering criteria of this award, I am struck by how similar the skills and perspective called for by this nomination reflect the necessary skills and perspective for diligent and productive service to the School of Law. Martin has been a great resource to me during my tenure as Dean. I have been impressed with Martin's commitment and hard work in addition to his intellect and exemplary character."

— University of Montana School of Law Dean Irma Russell

"Prof. Burke's influence in my professional life has been profound. He is probably the best teacher I ever had (looking back even through childhood), and, more importantly, he is one of the finest people I have known. As a mentor, he continued to take an interest in my life well after my law school graduation, offering me professional advice and assistance on numerous occasions. I am sure my success in tax school, at the Tax Court, and in several jobs I have had since then have been in no small part due to Prof. Burke's personal encouragement to me and the recommendations he has made on my behalf."

— Michael Mahan Lawlor, J.D., LL.M.



**Left to right:** Sunday Rossberg, Immediate Past President Shane Vannatta, and President Pam Bailey.

# Neil Haight Pro Bono Award

## Sunday Rossberg

### From Hon. E. Wayne Phillips, 10th Judicial District Court:

I have had an ongoing parenting dispute case (now up to five and one-half years and five file folders) that has an intractability that is difficult to describe but is endemic in such cases. On recommendation of the child's counselor (because of that intractability to a large degree) I appointed a Guardian Ad Litem (GAL). That GAL withdrew because of an objection from one of the parties. Consequently, on June 13, 2011 I called Ms. Rossberg to ask if she would serve.

The Court has had numerous instances in which Ms. Rossberg had appeared before it. She was always exceptionally prepared, professional, and a fierce advocate for her clients. I figured she would be just the GAL this particular case required. Ms. Rossberg accepted the appointment. I had every intention of Ms. Rossberg being paid by the parties even if the Court had to squeeze turnips.

Ms. Rossberg took on the responsibility of GAL with exceptional dedication and energy. One direct result of her work- which I can only describe as a first class detective effort ala Miss Jane Marple or Nancy Drew- was the uncovering of a past issue of sexual abuse by the father against a previous daughter, age 4-5 at the time. As a consequence of that his rights as a parent had been terminated.

Given that the child of the parties was now of a similar age and had, as early as four, exhibited heightened sexual behaviors completely incongruous with her age, the detective work by Ms. Rossberg resulted in the Court taking aggressive action to protect the child. As all this unfolded at hearings, the Court found out that Ms. Rossberg had chosen to translate the case to a Pro Bono status because, as she stated to the Court, of her grave concern regarding the ability of the parties to pay. She reported at that hearing (late October 2011) that she had already spent over forty hours on the matter.

As the party with these past behaviors has engaged in intelligent (the term is used advisedly), conscious manipulation of the young child, though a third party and in direct violation of Court orders, Ms. Rossberg has spent many, many more hours since October.

All this detail is to attempt to illustrate the incredibly diligent, exceptionally professional work of Ms. Rossberg all done Pro Bono. I would be hard pressed to name an attorney who would give such commitment when paid. This effort appears to me to be the classiest example of what the Pro Bono Award is all about.





**Left to right:** Andrée Larose, Immediate Past President Shane Vannatta, and President Pam Bailey.

# Neil Haight Pro Bono Award

## Andrée Larose

### **From Alexandra Volkerts, Disability Rights Montana:**

Andree Larose has dedicated more than 24 years to representing people with disabilities in all settings from institutional individual abuse and neglect cases, to systemic class action law suits to special education cases. She has been a thoughtful, articulate, respectful and nearly unshakeable advocate to ensure people and children with disabilities were treated fairly, had their rights and dignity preserved and obtained the necessary services and supports they needed to live their lives to their potential. After 20 years with the former Montana Advocacy Program, now known as Disability Rights MT, she went into private practice.

However, even the exigencies of making a living in private practice have failed to stop Andree's dedication to justice for people with disabilities. She continues her pro bono work with numerous individuals with disabilities and civil rights organizations. Perhaps her most notable pro bono case is the Katka case. Raistlen Katka is a young man, now 20, who was tried as an adult, then sentenced to Montana State Prison when convicted of assault at age 16. Although Katka had mental illness, he was kept in solitary confinement consecutively for 1 1/2 years, as well as intermittently at other times. Solitary confinement severely exacerbated Katka's symptoms of mental illness to the point that he attempted suicide several times. Nonetheless, MSP failed to respond with appropriate treatment or to remove him from solitary. When he was 17, Andree became aware of his situation and volunteered to be a private cooperating attorney with the ACLU, as lead counsel

in litigation filed with the Montana Dept. of Corrections (MDOC) to obtain individual and systemic relief for juveniles with mental illness incarcerated at Mt. State Prison (MSP).

Although Andree made several efforts to negotiate his situation and obtain treatment for him in MSP, the mistreatment came to a head in June 2010. Even after previous suicide attempts, prison staff gave him a razor, which he then used to severely slash himself. Only CPR and blood transfusions kept him alive. Andree then made a motion for a temporary restraining order requiring MSP to transfer him to Montana State Hospital for evaluation and treatment, which the district court granted. One month later she represented Katka at a hearing to convert the TRO to a preliminary injunction. At the hearing, a clinical psychologist and psychiatrist testified about his mental illness including PTSD from childhood trauma and major depressive disorder. The psychiatrist explained how solitary confinement affects inmates and in particular inmates with PTSD and depression. The psychologist testified that solitary confinement of adolescents interrupts the normal adolescent brain development and may result in permanent detrimental effects. The District Court granted the preliminary injunction.

After six months treatment at MSH, Katka returned to MSP where he was placed on the mental health unit. He received mental health counseling, educational services and vocational services, all of which had been denied him while he was in solitary.

**CONTINUED, Next Page**

The lawsuit was settled in April 2012 with an agreement which required policy changes at the prison, most notably for juveniles. The existing policies allowed solitary confinement in Maximum Security for a minimal two year period, with extensions indefinitely if the inmate in solitary did not maintain appropriate conduct. This is where Katka was for 1 1/2 years). There are no policies that differentiate between adult and juvenile inmates. Under the settlement agreement, the prison must develop and implement new policies that take into account the differences in youthful offenders and that limit solitary confinement for juveniles to no more than 3 days without additional procedural protections and high-level approval. The settlement also incorporated more protections for inmates with mental illness regarding imposition of solitary confinement.

There is a potential that Andree and ACLU may recover attorney's fees under the private attorney general provisions; however, that is far from certain. [A hearing was scheduled in August 2012 on the issue.] Andree took the case regardless of whether attorneys' fees would be awarded or not. She has devoted at least 1,000 hours of time to this case with the hope, but not the expectation, of recovering fees.

**Katka/Individual Sentencing Proceeding** — As a result of the removal from solitary and the provision of mental health, educational, vocational and other services provided to Katka, he made great improvements in his behavior and was eligible to ask the sentencing court to suspend the remainder of his sentence. However, he needed legal representation to do so. Separate and apart from the ACLU litigation, Andree agreed to represent him pro bono in that proceeding. She traveled from Helena to Miles City and argued successfully that Katka had been substantially rehabilitated. The sentencing court suspended the remainder of his sentence and he has been living in the community with his grandfather since November 2011. He has been working a regular job in the construction industry and has been an exemplary citizen. He now has hope for his future and is working hard to make it happen. He hopes to talk to teens in trouble with the law about his experiences and how they can turn their lives around—away from crime and towards a productive future. There is no chance of recovery of

attorney's fees and costs in this case.

#### **Other Free Legal Services**

**Baxter Right to Die Case.** Andree worked with Disability Rights Montana attorneys in drafting an amicus brief in the Baxter v. Montana case, arguing for stringent protections for persons with disabilities if the Supreme Court were to uphold the "right to die" ruling made by the District Court in that case. The right to die can easily become the duty to die when the person is someone with a significant disability. Andree's time in drafting the brief on behalf of people with disabilities, who often have very little political power or voice in such matters, was pro bono.

#### **Free Special Education**

**Representation/Guidance.** Since going into private practice in 2008, Andree has provided over 100 hours of free consultation to individual parents regarding their children's rights to special education. Andree provided pro bono representation to a young child with autism who was deprived of appropriate educational services, but unfortunately did not prevail in the proceeding. Although not ultimately successful in the individual case, the family did receive improved services from the school district after the case was initiated, and the particular school district has been more cooperative in resolving other special education disputes since that time. Andree devoted approximately 400 hours to that case without recovering any fees or cost reimbursement, which included travel expenses and hotel costs as the case was in a city other than Helena.

**Free Representation in Developmental Disabilities case.** In addition, Andree represented pro bono a child with developmental disabilities who was not placed on the waiting list for developmental disabilities services upon being determined eligible. As a result, the child missed opportunities to be considered for services. The Department of Public Health and Human Services put his name on the waiting list, but declined to take any other action to provide services to him. Andree filed a request for a fair hearing. In that process, the parties settled and Andree obtained an agreement that the first opening for services would be earmarked for this child. He received developmental disabilities services shortly afterwards.

#### **Presentations at reduced rates.**

Andree has given presentations about special education and anti-discrimination laws to parent groups in Montana at significantly reduced rates (50% or less than

normal hourly rate). She gave a presentation at a regional conference about legal issues surrounding restraint and seclusion of children with disabilities by schools. Although she received an honorarium for her presentation, the amount paid only covered about 10% of the time she devoted to preparing and giving the presentation. She has presented at no cost to college students studying to become teachers on two occasions since 2008.

Andree is currently representing an inmate at Montana State Prison with Asperger's syndrome who has been deprived of appropriate special education and related services since being placed in the custody of the Department of Corrections. She has provided over 70 hours of pro bono services in that case so far, and it has not gone to hearing yet. It is currently in mediation.

Andree is active in attending Montana OPI's Special Education Advisory Panel meetings and commenting on systemic issues involving special education, and is not paid for her time in doing so.

**DRM Low Cost Services.** One of her major commitments to providing low cost services to people with disabilities occurs in her collaboration with Disability Rights MT (DRM). Since November 2008, Andree has been on contract with DRM to provide legal representation to DRM clients in special education at hourly rates that are at least half of her normal hourly rate. In this time, Andree has approximately 1,000 hours of legal services under this contract in over 25 cases, plus she has provided legal guidance and support to DRM lay advocates in many more cases than that. In one DRM case involving a teenager with autism, Andree negotiated a settlement that provides three years of compensatory education services to make up for the lack of appropriate services at the student's home school. Recently, in another DRM case, Andree obtained an Order from the First Judicial District allowing public dissemination of the Montana Department of Justice report finding improprieties in the investigation of the rape of developmentally disabled resident of the Montana Developmental Center. I strongly recommend Andree to you as an exemplary attorney who embodies the highest qualities of professionalism with a decades long commitment to ensuring that those with the least access to justice have a dedicated, knowledgeable and committed advocate for their civil, legal and human rights.



**Judge Joe Hegel**, left, and the award's namesake, **Karla Gray**, smile as Judge Hegel accepts his award.

# Karla Gray Equal Justice Award

## Hon. Joe L. Hegel

**From Judy A. Williams**  
**ASMSU - Billings Student Legal Services**

In 1985 I went to work for Montana Legal Services in Billings. One of my responsibilities was referring pro bono cases to lawyers in Eastern Montana, including Miles City. As you might imagine, this was often a "tough sell." There was no formal pro bono program or organization. Basically, I cold-called lawyers and begged them to take cases. Most lawyers would take my call the first time, not knowing who I was. Thereafter, however, I rarely got through or got a returned call.

Joe Hegel was an exception to this "rule." He was unfailingly kind and courteous, either taking or returning my calls. He took far more than his "share" of pro bono cases. Because of that, I was somewhat disappointed when he ran for the seat vacated when Judge Coate retired. I shouldn't have been.

Judge Hegel brought his fine characteristics to the bench. He supported the Bar's efforts to make pro bono work a formalized State Bar project. He attended the very first statewide meetings, journeying from Miles City to Helena and, if memory serves, Bozeman, a number of times. He served on various commissions and/or committees, including the Equal Justice Task force and the Access to Justice Committees (although my memory does not include the exact dates).

On the bench, Judge Hegel is sensitive to the challenges and needs of pro se litigants. He was, and is, enthusiastic about

technology and its ability to assist low-income people with their legal assistance needs. I have warm memories of him defending the Pro Bono Program from attack by private lawyers who asserted that "everyone could pay something" and similar stances. I happened to sit with Judge Hegel at a State Bar Annual Meeting dinner once when he gently, but effectively intervened and rebuffed a private lawyer and his wife who were on a rant in that vein.

Judge Hegel encouraged lawyers to "do the public good" and, in my experience, put matters in which he knew lawyers were donating their time at the front of the calendar and prioritized them for orders. For instance, a case that received much attention some years ago concerned a Rosebud County child who needed a surgery that Medicaid refused to pay for. Randy Bishop, a Billings trial attorney, co-counseled pro bono with Legal Services attorney Bob LaRoche and they tried the case in front of Judge Hegel, who ruled that Montana Medicaid pay for the procedure which, by the way, essentially saved a child's life. Not many lawyers or judges can make that claim! Incidentally, the child is now an adult and doing very well.

As Judge Hegel prepares to retire I realize this nomination is long overdue. Judge Hegel has quietly done the public good during his career in the law. His dedication to access to justice and his involvement in that cause have been a gift to his judicial district and the whole State of Montana. I trust you will agree he deserves to be recognized.





**Attorney and roller derby player Adrian Miller** presents Justice Sandra Day O'Connor with a signed photo of the Magic City Rollers and a T-shirt. Miller's derby name is "Sandra Slay O'Connor."

# It's all in the name

***Editor's note:** State Bar President Pam Bailey wasn't the only one who sought out a photo with Justice O'Connor. Billings attorney and roller derby player Adrian Miller also got a photo op with her idol. Curious about the above shot (thanks Mark Parker) we sent an email to Miller. Here's her response:*

I play roller derby for the Magic City All Stars. I started playing at the same time I started my law career: approximately two years ago. Part of playing roller derby is choosing a name. The name is meant to reflect somewhat who you are and also who you admire. I chose Sandra Slay O'Connor for the obvious reason that I work in the legal field, but also because she is a strong, intelligent woman. Roller derby is a very female empowering sport and I felt the name was a good fit. All roller derby teams are also charitable organizations, and we give our profits to charities around the community each month. We also spend a significant amount of time doing community service.

Roller derby has been great for me. Not only have I met a ton of people in the community, but I also have a great outlet for stress. What could be better for de-stressing than skating fast and hitting people? It is also physically challenging and I enjoy the workout. We play bouts about once a month against regional teams such as Boise, Spokane and Salt Lake City. The fact that I play roller derby seems to amuse many of my colleagues and clients.

Mark Parker found out that I play roller derby and that my derby name was "Sandra Slay O'Connor." He contacted me and told me that Sandra Day O'Connor was coming to Billings for the annual bar meeting. He asked me if I wanted to meet her. I, of course, was thrilled at the opportunity to meet my idol and my roller derby namesake. I had a shirt made for her with the Magic City Rollers logo on front and my name on the back and also gave her a signed photo from my team. When I met her, she was amused that there was a roller derby player named after her. She was also gracious and excited that she got to keep the shirt. It was a wonderful experience, and I could not have been more impressed with Sandra Day O'Connor.

## Distinguished Service Awards

Bernadette Franks-Ongoy, *Equal Justice Task Force*

Rep. Shannon Augare, *Equal Justice Task Force*

Richard P. Bartos, *Equal Justice Task Force*

Debra L. DuMontier, *Equal Justice Task Force*

Ann Gilkey, *Equal Justice Task Force*

Hon. Mary Jane Knisely, *Equal Justice Task Force*

Judy Meadows, *Equal Justice Task Force*

Tammy Plubell, *Equal Justice Task Force*

Klaus Sitte, *Equal Justice Task Force*

Cynthia K. Smith, *Equal Justice Task Force*

Nancy Sweeney, *Equal Justice Task Force*

Hon. Russ Fagg, *Commission on Self-Represented Litigants*

Kim Crowley, *Commission on Self-Represented Litigants*

Shirley Faust, *Commission on Self-Represented Litigants*

Ed Higgins, *Commission on Self-Represented Litigants*

Tim Fox, *CLE Institute*

Jim Lewis, *CLE Institute*

Hon. Jim Nelson, *CLE Institute*

Ted Hess-Homeier, *Ethics Committee*

Joe Sullivan, *Immediate Past President*

## Frank I. Haswell Award

Hon. Gordon Bennett

Virginia Bryan

P. Mars Scott

## 50-Year Pin Recipients

Hon. Richard W. Anderson, Billings

Robert J. Brooks, Butte

James E. Congdon, Missoula

Allen D. Gunderson, Billings

Richard W. Josephson, Big Timber

Neil J. Lynch, Gallatin Gateway

Richard Pinsoneault, Navarre, FL

John N. Radonich, Anaconda

Jack Scanlon, Anaconda

James W. Thompson, Billings

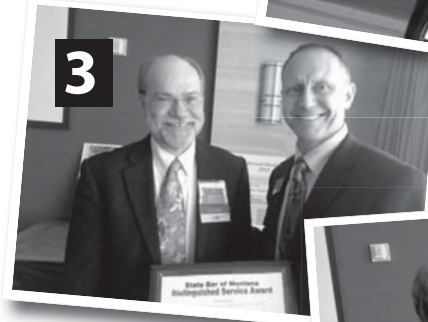
Thomas E. Towe, Billings



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1. Judy Meadows and Shane Vannatta. Judy received a Distinguished Service Award for her work on the Equal Justice Task Force.

2. Joe Sullivan walks to the podium after receiving his Distinguished Service Award.

3. Klaus Sitte and Shane Vannatta. Klaus received a Distinguished Service Award for his work on the Equal Justice Task Force.

4. Nancy Sweeney and Shane Vannatta. Nancy received a Distinguished Service Award for her work on the Equal Justice Task Force.

5. Shane Vannatta and Hon. Mary Jane Knisely, who received a Distinguished Service Award for her work on the Equal Justice Task Force.

6. Shane Vannatta and Ann Gilkey, who received a Distinguished Service Award for her work on the Equal Justice Task Force.

7. Shirley Faust and Shane Vannatta. Shirley received a Distinguished Service Award for her work on the Commission on Self-Represented Litigants.





**From left:** Garrett Scott, Chris Ryan, Amy Sings in the Timber, and Jay Jensen. Yellowstone Bank - Billings Homestead received the Montana Justice Foundation's Leadership Bank Award. Sings in the Timber is the executive director of MJF and Scott, Ryan and Jensen are with Yellowstone Bank.

**The Bar's 50-year pin recipients** in attendance pose with President Pam Bailey and Immediate Past President Shane Vannatta.



**Above:** This little guy was a guest at the Zoo Montana reception. **Right:** The spread there was quite tasty





# Montana Justice Foundation receives \$1.2 million windfall

By Jan Falstad, Billings Gazette

By refusing to accept a class-action insurance settlement against Farmers Group Inc., Montana will receive \$1.2 million in the next month to spend on legal charity.

During news conference Thursday, Sept. 20, in Billings, Monica Lindeen, Montana's commissioner of securities and insurance, said Farmers made customers go through a cumbersome process to claim their refund and that the insurance company's subsidiaries got to keep the money that wasn't claimed.

"We really felt that Montana policyholders were not being treated fairly by the class action settlement," she said. "I'm very excited."

After seven years of legal wrangling, Farmers settled the Fogel v. Farmers Group lawsuit last October by agreeing to pay \$455 million to customers, plus \$72 million to the plaintiffs' attorneys. The company did not admit any wrongdoing.

But nationally, only about half of the company's clients filed the lengthy form to claim a refund, and fewer than one-third of eligible Montanans did. That meant Farmers got to keep \$3.4 million of Montana's unclaimed share.

"In this settlement, the money went back to Farmers, which we thought was frankly ridiculous," said Jesse Laslovich, chief legal counsel for the commissioner.

After Montana objected, Utah, Oregon, Indiana and Iowa joined the effort.

Billings attorneys John Heenan and Randy Bishop first brought the fairness issue to the attention of Lindeen and Laslovich, and they had only a couple of days to object.

"Of all the 50 states, only Montana, through Commissioner Lindeen's leadership, (initially) got involved," Heenan said.

Farmers refused to pay a larger settlement. So the Montana attorneys negotiated with about 20 law firms, mostly in California and Texas.

On Sept. 14, those attorneys agreed to pay \$2 million out of their \$72 million in fees to these five states. Because Montana was the first to object, it will receive the lion's share of the money.

The \$1.2 million will go to the nonprofit Montana Justice Foundation, which gives grants to other organizations providing legal services to Montanans who can't afford to hire an attorney.

The organization's budget has fallen 80 percent since 2007 because of low interest rates.

The foundation, formed in 1979, expects to have \$400,000 to spend this year, so this one-time settlement is triple its current budget.

The foundation's executive director, Amy Sings In The Timber, of Missoula, said the foundation's board, which is meeting in Billings now, will discuss how to spend the windfall.

"We couldn't be more thrilled," she said.

Because Montana has only one million residents, the state often has only a handful of people participating in national class-action lawsuits, Laslovich said. But this Farmers case affected more than 160,000 Montanans who filed a claim by the deadline of December 2011.

In the lawsuit, customers alleged that Farmers was charging excessive management fees for auto, home and business insurance through some of its subsidiaries, called exchanges, from Jan. 1, 2009, through Dec. 31, 2010. The lawsuit claimed the exchanges then paid half of the fees back to Farmers.

Farmers overcharged an estimated 13 million customers by \$9 billion, according to Consumer Watchdog. That means each customer paid an average of \$692 in excessive fees and will receive an average settlement of \$35, according to the consumer organization.

Individual payments will range from \$20 to \$400.

*The organization's budget has fallen 80 percent since 2007 because of low interest rates.*

*The foundation, formed in 1979, expects to have \$400,000 to spend this year, so this one-time settlement is triple its current budget.*

— [www.billingsgazette.com](http://www.billingsgazette.com)

# The Bakken boom is producing not only oil but also creative juices

By Toni Tease

The Bakken — a 200,000-square mile area of subsurface rock extending across parts of North Dakota, Montana and Saskatchewan — represents the largest oil boom this country has seen in decades. The Bakken is named after Henry Bakken, a farmer in Williston, North Dakota, on whose land the formation was initially discovered. The Bakken formation is widely considered to be the largest oil deposit in the lower 48 states. Although estimates of total reserves vary greatly, some estimates place the Bakken reserves as high as hundreds of billions of barrels.

While much of the country is still reeling from the recession, the Bakken has stimulated economic development in the Williston Basin area and beyond. Where people congregate, so do ideas — and the Bakken has been a wellspring not only for economic activity but for intellectual property and innovation.

Although we are not at liberty to share with you the subject of unpublished patent applications filed by our firm, we can tell you about our clients' issued patents. The patents discussed below represent significant innovations in the oil and gas industry:

- U.S. Patent No. 7,216,720 to C. Duane Zimmerman (issued May 15, 2007) entitled "Multi-String Production Packer and Method of Using the Same" provides a production packer for use in coal bed natural gas production in which multiple seams of coal are dewatered and produced simultaneously and a constant head of water is maintained over each coal seam.
- U.S. Patent No. 7,503,686 to Paul Tarmann et al. (issued March 17, 2009) entitled "Apparatus and Method for Mixing Fluids at the Surface for Subterranean Treatments" discloses a mixing device that mixes chemical and carrier fluids for injection down the well bore.
- U.S. Patent No. 7,581,591 to Shane Schwindt (issued September 1, 2009) entitled "Production Casing Ripper" covers a device that cuts a continuous vertical slot in well production casing.
- U.S. Patent No. 7,819,932 to R. Bret Rhinesmith et al.

(issued October 26, 2010) entitled "Method and System for Generating Hydrogen-Enriched Fuel Gas for Emissions Reduction and Carbon Dioxide for Sequestration" involves converting hydrocarbon molecules from a gaseous hydrocarbon feed stream into hydrogen and carbon dioxide, separating the hydrogen and carbon dioxide, and blending the hydrogen back into the gaseous hydrocarbon feed stream to generate a hydrogen-enriched fuel gas.

- U.S. Patent No. 7,866,222 to R. Bret Rhinesmith et al. (issued January 11, 2011) entitled "Mobile Vacuum Sampling System" provides a mobile sampling system for taking samples from a natural gas well that is at low pressure or under vacuum and analyzing those samples in the field.

While much of the country is still reeling from the recession, the Bakken has stimulated economic development in the Williston Basin area and beyond. Where people congregate, so do ideas — and the Bakken has been a wellspring not only for economic activity but for intellectual property and innovation.

- All of these patents are available on the "patents and published applications" page of our website: <http://www.teaselaw.com/patents.html>.

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# Selected case briefs: July 31 – Sept. 11, 2012

## Montanans Opposed to I-166 v.

**Bullock, 2012 MT 168 (Aug. 10, 2012) (6-1) (Baker, J., concurring) (Nelson, J., dissenting)**

**Facts:** Petitioners brought original proceeding against I-166, which states Montana's policy is that corporations are not persons and do not have constitutional rights. I-166 also charges elected officials to prohibit corporate political campaign spending and limit political spending in elections, and further charges the Montana congressional delegation with proposing an amendment to the U.S. Constitution stating that corporations are not human beings and do not have constitutional rights.

Petitioners claim the I-166 ballot statements do not comply with the law, and the Attorney General should not have approved them. They further contend the initiative is unlawful because it is a resolution, not a law, it improperly amends the Montana constitution, and it improperly directs elected officials how to vote.

**Procedural Posture & Holding:** The petition is denied.

**Reasoning:** The AG's review for legal sufficiency is limited, and may not include consideration of the substantive legality of the issue if approved by the voters. MCA § 13-27-312(7). Petitioners seek substantive review. The ballot issue complies with legal requirements, as the AG properly found.

Petitioners also ask the Court to reject or rewrite the statement of purpose and implication language. Instead, the Court determines they meet the requirements of MCA § 13-27-312(2) and (4).

**Concurrence (Baker, J.):** Petitioners allege a constitutional defect in the substance of the initiative by claiming I-166 is beyond the power of initiative and referendum. The judiciary determines constitutionality, not the AG. More importantly, the initiative statutes "reflect a clear preference to defer ruling on the constitutionality of a proposed initiative petition until after the results of the election at which it is submitted to the voters." ¶ 14. If I-166 is approved in November, petitioners may file a complaint for declaratory relief and pursue the normal appeal process.

**Dissent (Nelson, J.):** "First, aside from the fatal legal problem plaguing I-166 (discussed below), this initiative is, at bottom, simply a feel-good exercise exhibiting contempt for the federal government and, particularly, the United States Supreme Court." ¶ 17. While "I share the pain of my fellow Montanans," "[t]he fact is that corporations are 'persons' imbued with certain constitutional rights because the Supreme Court has said so." ¶¶ 17, 18.

Apart from the fact that Citizens United "is the law of the land and Montana is going to have to comply with it," "the Supreme Court did not rely on corporate 'personhood' in its decision." ¶¶ 19, 20. Expenditures on political communication

**Issue:** Whether the materials for I-166 complied with MCA § 13-27-312.

**Short Answer:** Yes.

are a form of speech, and citizens have the right "to inquire, to hear, to speak, and to use information to reach consensus." 20 (quoting Citizens United). In fact, the rule from Citizens United is, "Because voters must be free to obtain information from diverse sources, it is a violation of the First Amendment to control expression by distinguishing among different speakers and the subjects upon which they may speak." ¶ 21. In other words, "this country's law and tradition require more expression, not less," and the government's use of criminal law to command where a person may get information is censorship. Id. I-166 is therefore "little more than source of false hope for many voters and an illegal – not to mention futile – attempt to end-run the Citizens United decision." ¶ 23.

Justice Nelson would grant the petition and order the Secretary of State not to place I-166 on the ballot, or if already printed, not to count the votes.

**In the Matter of K.H. and K.M., 2012 MT 175 (Aug. 14, 2012) (4-1) (Morris, J., dissenting)**

**Facts:** After girls' infant sister was killed, allegedly by mother's boyfriend, state petitioned to have them adjudicated youths in need of care. Mother had history of abusive relationships with men. State's expert testified mother should be with children as much as she wanted, but should be in counseling. GAL testified children should be in home as long as family goes to counseling. Counsel for girls acknowledged they want to stay with mother, but stated his role is to advocate for their best interests, and adjudication as youths in need of care would ensure mother receives treatment.

**Procedural Posture & Holding:** State's petition denied. Children appeal, but state does not. Supreme Court affirms.

**Reasoning:** (1) Mother argues children lack standing because they are not parties. But statute allows court-appointed representation, which is reserved for parties. And legislature has expressed policy that a child is entitled to assert child's constitutional rights. Children therefore have standing. Mother argues appeal must be brought by GAL; however, GAL was not appointed to act as attorney. Court appointed GAL and counsel; counsel therefore may bring appeal on behalf of children. Counsel acted within his capacity by advocating for adjudication in spite of children's expressed desire to remain with mother. (2) Court may adjudicate children as youths in need of care if state proves abuse or neglect. Children assert mother's history of romantic partners who are abusive, and her failure to

**Issue:** (1) Whether children have standing to appeal denial of state's petition to adjudicate them as youths in need of care. (2) Whether lower court erred in dismissing petition. **Short Answer:** (1) Yes. (2) No.



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report any previous instances of abuse to police, prove abuse or neglect. Mother's past conduct is relevant, but evidence is she removed children from unsafe environments, was accountable for her actions, took steps to protect children, and has followed treatment recommendations. Lower court's detailed findings are supported by evidence; no abuse of discretion.

**Dissent:** Agrees that children have standing; however, would reverse denial of petition. While parent's poor relationship choices cannot of themselves warrant termination of parental rights, girls' sister's death at boyfriend's hands "forever changes the calculus." ¶ 59. Mother may believe she is doing the right thing, but evidence suggests otherwise.

## Brilz v. Metropolitan Insur. Co., 2012 MT 184 (Aug. 14, 2012) (7-0)

**Facts:** Brilz was injured in a car accident. She settled with other driver for his policy limits.

### Procedural Posture & Holding:

After settling with driver, Brilz filed state court action alleging bad-faith against Metropolitan. Metropolitan removed to federal court and moved for summary judgment, which was granted. Brilz then filed declaratory judgment action in state court seeking leave to file common-law bad-faith claim under either saving statute or doctrine of equitable tolling. District court denied; Supreme Court affirms.

**Reasoning:** The Court frames the issues in terms of two competing policies in the law. On the one hand, the law favors trial on the merits, a policy reflected in the saving statute, § 27-2-407, MCA, and the doctrine of equitable tolling. On the other hand, the law favors efficiency and finality, as reflected in the doctrines of claim preclusion and issue preclusion.

Here, claim preclusion applies, although issue preclusion does not. A party may be precluded from litigating a matter that has never been litigated if it could have been raised in an earlier action. The Court quickly finds that three of the five elements of claim preclusion are met, and then discusses the remaining two -- whether the issues are the same, and whether final judgment on the merits was entered in the earlier action. Issues are the same when they arise from the same transaction. Here, there is a common nucleus of operative facts, i.e., Metropolitan's adjustment of Brilz's claims. Moreover, "dismissal for inadequate pleading is a 'final judgment on the merits' for purposes of claim preclusion under Montana law," as long as the plaintiff had an opportunity to amend and did not do so. Because all five elements are met, Brilz's common-law claim is precluded.

## Briese v. Mont. Public Employees' Retirement Bd., 2012 MT 192 (Sept. 4, 2012) (6-1) (Rice, J., dissenting) (Nelson, J., concurring)

**Facts:** David was a deputy sheriff for Yellowstone County. In 2001, he designated his wife, Erene, as beneficiary of his benefits

from the Sheriff's Retirement System (SRS). When David petitioned for dissolution in 2004, court issued standard temporary restraining order, which restrains both parties from changing the beneficiaries of "insurance or other coverage . . . held for the benefit of a party." In 2006, while divorce proceedings were pending and without consent of wife or the court, David dropped Erene as the beneficiary and named their two minor children instead. David was killed in line of duty three months later. At the time of his death, David and Erene were separated but not divorced. After learning that having benefits paid to the children rather than to her had adverse tax consequences, Erene asked MEPRA to honor the 2001 designation. It refused, and she appealed to the MPER Board.

**Issue:** Whether TRO routinely issued upon filing divorce petition prohibits changing the beneficiary of benefits under the Sheriff's Retirement System without court approval or the other party's consent.  
**Short Answer:** Yes.

**Issue:** Whether common-law bad-faith claim is barred in state court by claim preclusion after federal court granted summary judgment to defendant on statutory bad-faith claim.  
**Short Answer:** Yes.

**Procedural Posture & Holding:** The board denied death benefits to Erene because David had dropped her as a beneficiary. The parties agreed to have the decision formally reviewed by a hearing examiner under MAPA. The final order held that Erene waived her right to contest the 2006 designation when she applied for benefits on behalf of the children; the issue was moot because once benefits were given to children the parties could not be restored to their previous positions; and the TRO in the divorce proceedings did not apply to beneficiary designations under the SRS. Erene petitioned district court for judicial

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review, which affirmed the board on basis that dissolution TRO did not apply to SRS designation. Supreme Court reverses.

**Reasoning:** A temporary restraining order preventing both parties to a divorce from disposing of property or “changing the beneficiaries of any insurance or other coverage . . . held for the benefit of a party” automatically issues with the summons in dissolution cases. Liberally construing this family law statute, as directed by § 40-4-101, the Court finds that SRS coverage death benefits are similar to life insurance, and holds that the TRO applied to David change of beneficiary. The Court further holds that courts have equitable power to order a return to the status quo when the party violating the TRO has died, and orders the district court to invalidate the 2006 beneficiary designation.

**Dissent (Rice, J.):** MPERB acted as it was directed to by David and its governing statutes. David may have violated the TRO, but MPERB did not. Noting that, “Courts are without jurisdiction to enjoin administrative agencies from performing the duties designated to them,” Justice Rice says MPERB did nothing wrong, and Erène’s administrative appeal therefore should have been dismissed. Erène should have initiated a declaratory judgment action, claiming that David had violated the TRO. Such an action would have survived his death. Under these facts, however, Justice Rice would affirm the district court.

## **Pallister v. Blue Cross & Blue Shield of Montana, Inc., 2012 MT 198 (Sept. 5, 2012) (4-3) (Morris, J., dissenting)**

**Facts:** In this class action, claimants assert that while they were fully insured by BCBSMT or Montana Comprehensive Health Association (MCHA), they were denied benefits based on exclusions in their insurance policies. The exclusions were later disapproved by the Montana insurance commissioner, and the claimants then sought the previously denied benefits. Class was certified, class counsel appointed, and a settlement was negotiated.

**Procedural Posture & Holding:** Objectors appeal lower court’s approval of settlement on various grounds. Supreme Court reverses and remands on discrete issue of allowing objectors to conduct discovery, and vacate approval of settlement.

**Reasoning:** About 3,000 class members were insured by BCBSMT or MCHA when they were injured in separate car accidents between 2001 and 2008. Each of their policies stated that the insurer would not pay for injured insureds’ health care costs if insureds were entitled to receive or did receive benefits from an auto liability policy. Claimants timely filed claims, which were denied. The insurance commissioner rejected the exclusions, and the Court upheld the commissioner’s decision in 2009.

The class here was formed for settlement purposes, thus subjecting it to a higher level of scrutiny. Objectors contend the district court could not determine whether the settlement was fair because it denied objectors’ motion to conduct discovery into the settlement negotiations. Therefore, information central to the fairness analysis was never presented to the district court. Specifically they sought discovery on how class members were

identified, the rationale for compromising class claims, and class counsel’s billing records. The information sought was produced on the morning of the fairness hearing, which did not give objectors a reasonable opportunity to analyze the information. Although no evidence of collusion, “in a settlement only class action case . . . the heightened scrutiny required in such an action mandates that there by sufficient information provided to the class representatives, any objectors, and the district court to enable the parties and the court to reach a well-informed decision of whether the proposed settlement is fair, adequate and reasonable.

**Dissent (Morris, J.):** Rather than allow discovery only where there is evidence of collusion among the parties, the majority “authorizes objectors to undertake an open-ended inquiry of the motives and actions of the settlement parties that fails entirely to take into account the apparent fairness of the proposed settlement.” ¶ 44. Analyzing the strengths and weaknesses of the settlement in extensive detail, Justice Morris concludes that “[t]he Court’s imposition of what amounts to some sort of arbitrary ‘smell test’ on the validity of a class settlement casts a dark pall upon the legitimacy of future class certifications that may come before this Court.” ¶ 108. He was joined in dissent by Chief Justice McGrath and Justice Baker.

## **State v. Otto, 2012 MT 199 (Sept. 5, 2012) (5-0) (Rice, J., concurring)**

**Facts:** Otto pled guilty to misdemeanor DUI in 2003 and 2005, then pled nolo contendere to misdemeanor DUI in 2007. In April 2010, Otto was again charged with DUI. The charge was enhanced to a felony DUI because it was his fourth offense.

**Procedural Posture & Holding:** Otto moved to dismiss the felony charge, arguing that State v. Knox, 2001 MT 232, expanded the rights of which defendants who plead guilty must be advised beyond the requirements of § 46-12-210, MCA. Because he was not so advised, he argued, his three prior convictions could not support the felony enhancement of number four. The district court denied the motion. He pled guilty and appealed his motion to dismiss. The Supreme Court affirms.

**Reasoning:** The language from Knox upon which Otto relies is dicta. “Knox does not stand for the proposition that § 46-212-210, MCA, is constitutionally insufficient or that the advisement of rights set forth in Knox, ¶ 9, is required.” ¶ 18.

**Concurrence (Rice, J.):** This case illustrates why Justice Rice dissented in State v. Maine, 2011 MT 90. Defendants should not be permitted to bring collateral challenges to final convictions, as Otto has done here.

## **Lewis v. Montana 8th Jud. Dist., 2012 MT 200 (Sept. 11, 2012) (4-1) (Rice, J., dissenting)**

**Facts:** Lewis was struck by a car while she was walking. The driver left the scene and has never been found. She sued her insurer under her

**Issue:** Whether three previous DUI-related convictions supported enhancing the most recent DUI to a felony.  
**Short Answer:** Yes.

**Issue:** Whether Rule 35 psychological IME can be ordered when plaintiff has not placed her mental condition in controversy.  
**Short Answer:** No.

uninsured motorist coverage for injuries suffered as a result of the accident. Doctor who examined Lewis on behalf of insurer questioned whether chronic pain may be caused or exacerbated by preexisting mental health issues.

**Procedural Posture & Holding:** Insurer moved for IME; plaintiff opposed because not asserting negligent infliction of emotion distress and not placing mental condition in controversy. District Court granted motion. Plaintiff petitioned for supervisory control. Supreme Court issues writ, and vacates IME order.

**Reasoning:** Defendant's need for discovery under Rule 35 must be balanced against plaintiff's constitutional right to privacy. Court may order independent physical or mental exam only when there is good cause and when party's mental or physical condition is in controversy. A claim for general emotional distress damages is not sufficient.

**Dissent (Rice, J.):** Standard of review is abuse of discretion. Lower court did not abuse its discretion and is not proceeding under mistake of law. Plaintiff's own expert states part of her pain is caused by depression. The issue is whether her physical problems are caused by the accident or by her psychological problems, or both. To prove divisibility of plaintiff's damages, insurer needs expert testimony.

## Ineffective assistance of counsel

The Court issued five decisions in cases involving ineffective assistance of counsel claims. Ineffective assistance is governed by the Strickland test, which requires a showing of (1) objectively unreasonable decisions by counsel, and (2) prejudice to the defendant. In all five, the Court held the petitioner had not met the elements of ineffective assistance. In the following case, however, Justice Cotter dissented, joined by Justice Nelson.

**Sanchez v. State, 2012 MT 191 (Sept. 4, 2012) (5-2) (Cotter, J., dissenting)**

**Facts:** Sanchez was convicted of fatally shooting his girlfriend.

**Procedural Posture & Holding:** On appeal, Sanchez argued a note written by his girlfriend was inadmissible hearsay. *State v. Sanchez*, 2008 MT 27. The Court upheld the conviction, finding that the girlfriend was unavailable to testify only because Sanchez had killed her. Relying on a California case that was later reversed by the U.S. Supreme Court, *Giles*, the Court held that Sanchez forfeited his right to confront witnesses against him by intentionally killing the witness – even though he did not kill the witness in order to silence her. *Id.* ¶ 46.

Sanchez's public defender did not petition for certiorari to the U.S. Supreme Court. Five weeks after the time passed for Sanchez to petition for cert, the U.S. Supreme Court held that a defendant forfeits his Sixth Amendment right to confront witnesses only when he intended to prevent the witness from testifying. *Giles v. California*, 554 U.S. 353, 359 (2008). Sanchez

**Issue:** Whether appellate counsel's failure to file petition for certiorari with U.S. Supreme Court amounted to ineffective assistance of counsel.

**Short Answer:** No.

petitioned for postconviction relief alleging ineffective assistance of counsel against his public defender for failing to petition for certiorari on his behalf. The district court denied the petition, and the Supreme Court affirms.

**Reasoning:** Because there is no right to counsel on discretionary appeals, federal law holds that a petitioner cannot claim ineffective assistance of counsel. The Montana Court does not adopt that rule here, because it finds that Sanchez cannot prevail on his ineffective assistance claim regardless. The Court finds Sanchez was not prejudiced by his counsel's failure to file a cert petition because he did not show a reasonable probability that the U.S. Supreme Court would have granted cert in his case. Moreover, even if the note should not have been introduced, it was harmless error, as there was overwhelming evidence of Sanchez's guilt.

**Dissent (Cotter, J.):** Justice Cotter would find that when a defendant has counsel, that attorney is obligated to provide effective assistance (citing the Rules of Professional Conduct). She believes Sanchez satisfied both prongs of the Strickland test. Sanchez's counsel admitted his performance was deficient. As for prejudice, the U.S. Supreme Court has granted cert in three cases where the lower court relied on the California *Giles* decision. ¶ 37. Thus, "the odds that the Supreme Court would have granted Sanchez's petition are anything but 'slim.'" *Id.* Finally, the error is not harmless, as "[n]o other evidence properly admitted at trial proved the same facts as the note written by" Sanchez's girlfriend.

## Other ineffective assistance cases

- *Bomar v. State*, 2012 MT 163 (July 31, 2012) (5-0) First issue failed on first prong of Strickland; second issue failed on second prong. Affirmed denial of petition for postconviction relief.
- *Sartain v. State*, 2012 MT 164 (July 31, 2012) (5-0) Sartain alleges numerous claims of ineffective assistance against both trial counsel and appellate counsel, including failure to raise speedy trial violation, failure to raise evidence tampering, and failure to raise Brady violations. The Court found all of these issues without merit. Sartain also alleged the lower court erred by failing to hold an evidentiary hearing on his petition for postconviction relief; however, the district court has discretion to dismiss a petition for failure to state a claim for relief. The district court did not abuse its discretion.
- *Ariegwe v. State*, 2012 MT 166 (Aug. 9, 2012) (5-0) Ariegwe was convicted of attempted sexual intercourse without consent and unlawful transactions with a minor. He petitioned for postconviction relief, claiming trial counsel rendered ineffective assistance by failing to object to a state's expert and failing to introduce certain evidence. On the first claim, the Court finds that even if it met the first prong of Strickland, it failed the second, as the trial outcome would likely have been the same. On second claim, Court finds no prejudice as well. Denial of petition affirmed.
- *Rosling v. State*, 2012 MT 179 (Aug. 21, 2012) (5-0) (Nelson, J., concurring) Rosling petitioned for postconviction relief,



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arguing trial counsel rendered ineffective assistance by failing to pursue testing of a latent palm print and failing to object to the state's closing. He argued appellate counsel rendered ineffective assistance by failing to raise the lower court's denial of Rosling's motion for mistrial, and by Rosling's alleged absence from a stage of the proceedings. The Court finds that trial counsel's decisions were reasonable, thereby failing the first Strickland prong. The Court further finds that appellate counsel's decisions were also reasonable, also failing the first prong. It affirmed the lower court. In a concurrence, Justice Nelson emphasized that "the issue is not whether counsel's challenged conduct may be characterized as 'strategic' or 'tactical'; rather, it is whether that conduct—strategic, tactical, or otherwise—was 'reasonable' under prevailing professional norms and in light of surrounding circumstances." ¶ 42 (citing *Whitlow v. State*, 2008 MT 140, ¶ 18).

### Medical marijuana

The Court issued three decisions in cases involving medical marijuana:

- *In State v. Stoner*, 2012 MT 162 (July 31, 2012) (5-0), Stoner was charged with criminal manufacture or production, possession with intent to distribute, and possession of paraphernalia after police found marijuana in his home. Stoner obtained a marijuana card after he was charged, then moved

to dismiss the charges on that basis. The district court denied the motion. Although the pre-2011 medical marijuana statute did not clearly state that an individual must obtain a marijuana registry card before being charged with a criminal offense to raise an affirmative defense of medical marijuana use, the Court concludes that such a requirement is implicit, and affirms the lower court. ¶¶ 22-23.

- *In City of Deer Lodge v. Chilcott*, 2012 MT 165 (Aug. 3, 2012) (5-0), the city of Deer Lodge issued a business license to a medical marijuana business. Plaintiffs sought a writ of mandamus to have the license revoked. Because mandamus cannot undo an action already taken, the writ was properly denied. Although the Deer Lodge City Council passed an ordinance prohibiting medical marijuana businesses within 1000 feet of any school, daycare, church, park, baseball field, or youth recreational facility, the ordinance gives city officials discretion to act, and therefore cannot be the basis for a mandamus action.
- *In Montana Cannabis Indus. Assoc. v. State*, 2012 MT 201 (Sept. 11, 2012) (6-1) (Nelson, J., dissenting), the Court reversed a preliminary injunction and remanded with instructions to apply a rational basis test to subsections 3, 4, and 6 of § 50-46-308, MCA, of the Montana Marijuana Act. The Court held there is no fundamental right to pursue particular employment, or to take particular drugs for one's health, or to privately use medical marijuana. Justice Nelson dissented on the grounds that the case is not justiciable, and that strict

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scrutiny applies to Article II rights. He would hold that Plaintiffs have no constitutional right to activities that are unlawful under federal law.

## Criminal cases

The Court decided two cases involving criminal restitution. In the first, the Court held that a driver could be liable for restitution of a cyclist's losses even though the driver was convicted of failure to remain at accident involving personal injury and failure to notify authorities of accident, not of hitting the cyclist with her car. *City of Billings v. Edward*, 2012 MT 186 (Aug. 28, 2012) (5-0). Moreover, the driver's constitutional rights were not violated by the court's failure to reduce restitution by the cyclist's comparative negligence, because the driver did not raise this issue below. *Id.*

If the issue of comparative negligence is properly raised by the defendant, however, the lower court must consider the comparative negligence of the injured person in determining the restitution amount. *City of Whitefish v. Jentile*, 2012 MT 185 (Aug. 28, 2012) (6-1) (*Rice, J., dissenting*). Jentile drove off with police in pursuit, driving 45-40 mph through a residential neighborhood until pulling into his own driveway. The first patrol car stopped, and a second rear-ended the first. Montana Highway Patrol investigated and found the second officer was following too closely behind first. Jentile pled guilty to eluding a peace officer. City moved for restitution for damage to patrol cars, and Jentile moved to dismiss. Municipal court denied motion, and ordered Jentile to pay \$7,327. District court affirmed; Supreme Court reverses and remands with instructions to consider the officer's negligence in determining restitution. Justice Nelson dissents, finding that the lower court did apply comparative negligence and assessed 100% negligence to Jentile.

The Court held that it is an abuse of discretion to prevent a defense witness from testifying about a statement against interest. *In State v. Wing*, 2012 MT 176 (Aug. 14, 2012) (7-0), the sole issue at trial was whether Wing or Halverson was driving the car. Wing's mother testified she had loaned car to Halverson, and Wing was in passenger seat when they drove away. When Wing tried to elicit testimony that Halverson had told Wing's mother he was the driver the night they were arrested for DUI and probation violations, the district court sustained prosecutor's objection of hearsay. Finding the testimony admissible as a statement against interest, the Court reversed and remanded.

In *State v. Fox*, 2012 MT 172 (Aug. 10, 2012) (5-0), the Court held that Fox could not be sentenced for a charge that had been dismissed, and that double jeopardy did not attach to charges not brought in federal court. Fox sexually assaulted two young sisters, CS and HS, over a period of two years. Montana charged Fox with two counts of felony sexual assault, and failure to register as a sex offender. He was convicted in federal court for sexual exploitation of HS, and sentenced to 110 years in federal prison. He moved to dismiss the Montana charges on double jeopardy grounds. The state court dismissed one assault charge on that basis. Fox pled guilty. The court sentenced him

to 50 years on each assault charge, to run concurrently with each other and with the federal sentence, and to five years on the registration charge. Fox argued both sexual assault counts should have been dismissed, and that the court erred in sentencing him for a charge it had dismissed. The Court agrees it was error to sentence Fox on a dismissed charge, but that Fox's motion to dismiss the second sexual assault claim was properly denied. The federal charges were for acts against HS, and the state charges were for acts against CS. Therefore, no double jeopardy.

## Water & property cases

The Court issued two decisions clarifying the kinds of disputes that can be certified to the Water Court under MCA § 85-2-406(2), which allows district courts to certify certain disputes to the Water Court. In *Fellows v. Water Commissioner*, 2012 MT 169 (Aug. 10, 2012) (7-0), the Court reversed the dismissal of Fellows' complaint. The lower court dismissed without prejudice, instructing Fellows to file an amended complaint requesting certification under MCA § 85-2-406(2). Instead, Fellows appealed. The Supreme Court reversed and remanded, holding Fellows should be allowed to prove hydrological connectivity, and then have the dispute certified under MCA § 85-2-406(2). In *Giese v. Blixrud*, 2012 MT 170 (Aug. 10, 2012) (7-0), the lower court dismissed Giese's first and second complaints, but invited plaintiffs to file again and request certification to the water court under MCA § 85-2-402(2)(b). After plaintiffs did that, the court dismissed the petition for failure to state a certifiable claim, as plaintiffs did not make any allegations about their water right claims, and the existence and priority of water claims are the only matters that can be certified to the Water Court. Plaintiffs appealed, and the Supreme Court reversed.

The Court held that lands that emerged by vertical accretion from the Missouri River after statehood are public school trust lands. *Montana DNRC v. ABBCO*, 2012 MT 187 (Aug. 28, 2012) (5-0) (No brief filed by the appellees). It reversed a denial of summary judgment, holding that a landowner does not have a property interest in a highway right-of-way even if she needs it to safely maneuver her vehicles. *Malpeli v. State*, 2012 MT 181 (Aug. 21, 2012) (5-0).

## Estates & foreclosure

The Court affirmed a district court's removal of a personal representative based on his violation of several fiduciary duties. *The Estate of Hannum*, 2012 MT 171 (Aug. 10, 2012) (5-0) (Nelson, J. specially concurring). It vacated a summary judgment in favor of Mountain West Bank, which foreclosed on two loans to Helena Christian School, holding the court did not comply with either the "one action rule," § 71-1-222 MCA, or § 25-9-203, requiring the court to specify the amount of the judgment. *Mountain West Bank v. Helena Christian School*, 2012 MT 194 (Sept. 5, 2012) (5-0).

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

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**ASSOCIATE ATTORNEY:** Halverson & Mahlen, P.C., an established Billings insurance defense firm, seeks an associate attorney. 3-5 years of experience preferred. Applicants must be licensed to practice in Montana and must have strong research and writing skills. Competitive salary and generous benefit/incentive package available, dependent on experience. All applications will be kept confidential. Please send application, writing sample, transcript and resume to Hiring Partner, P.O. Box 80470, Billings, MT 59108-0470. Please learn more at [www.hglaw.net](http://www.hglaw.net).

**ATTORNEY POSITION:** The Montana Department of Commerce seeks to hire an attorney to provide general legal services to the department. 4 years of experience preferred. For a full description of this position refer to: <https://svc.mt.gov/statejobsearch/listingdetails.aspx?id=8212>. Salary starting at \$65,000.00.

**WYOMING ATTORNEY:** Lubing and Corrigan, LLC, a busy Jackson, Wyoming, law firm seeks to hire an attorney with 1-3 years experience. We are a small general practice firm focused largely on civil litigation, with some criminal and transactional practice. Excellent research and writing skills, some courtroom experience, and solid people skills required. Wyoming bar admission or willingness to sit for the first bar exam after hire date is essential. Idaho bar license is a plus. Compensation negotiable and dependent on experience. Please send cover letter, resume, references, and writing sample to: [heather@lubinglawoffice.com](mailto:heather@lubinglawoffice.com).

**LITIGATION ATTORNEY:** Hall & Evans, L.L.C., a prominent and well respected law firm headquartered in Denver, Colorado is currently seeking an experienced, well respected litigation Attorney to join our new regional office in Billings, Montana. We are seeking a candidate with 3-5 years of Montana litigation experience, strong academic credentials, and the ability to travel as needed. Preference will be given to those with trial experience.

#### Required Knowledge, Skills and Abilities:

- Currently licensed to practice law in the State of Montana
- A strong work ethic and proven case management skills
- Excellent communication and analytical skills
- Exceptional research and writing skills
- Top-notch marketing and client development skills

- Competent computer skills in Microsoft Word and Outlook

If you are looking for a challenging experience and would welcome the chance to help establish a new branch office and be part of a growing Firm, then don't miss this opportunity! We offer a competitive compensation and benefits package. We foster a culture that is collaborative and we honor work/life balance. We work hard and play hard! Our new office location is in the First Interstate Bank building in downtown Billings. For more information on Hall & Evans, LLC, please visit our website at: [www.hallevans.com](http://www.hallevans.com).

#### How to Apply:

Interested candidates should respond with a cover letter, complete resume, salary history and your salary requirements, personal & professional references and a writing sample. Responses can be emailed to: [employment@hallevans.com](mailto:employment@hallevans.com) or mailed to: Hall & Evans, LLC, Attn: Human Resources, 1125 17th Street, Suite 600 Denver, CO 80202-2037.

**ESTATE PLANNING /BUSINESS PLANNING ATTORNEY:** Great Falls firm looking for motivated, people-oriented, attorney to join growing estate planning and business planning practice. Our practice is built on long-term relationships with our referral sources and clients. This is a great opportunity for a recent law graduate or a lawyer with excellent communication skills who enjoys being part of a collaborative work environment. Please send cover letter and resume to Scott, Tokerud & McCarty, P.C., Attn: Jon S. McCarty, Eight 3rd Street North, Suite 507, Great Falls, MT 59401, or email to [jonm@montanaestatelawyer.com](mailto:jonm@montanaestatelawyer.com).

### ATTORNEY SUPPORT/RESEARCH/WRITING

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

**LEGAL RESEARCH AND WRITING:** Fast, accurate and thorough legal research. Effective legal writing—briefs, motions, pleadings, appeals. Document review. Licensed attorney with civil litigation experience. (J.D., UCLA; Admitted in California and New Mexico.) Very reasonable rates. Local references. [HLWashburn@aol.com](mailto:HLWashburn@aol.com) 406-442-1298.

**CONSERVE YOUR ENERGY** for your clients and opposing counsel. I draft concise, convincing trial or appellate briefs, or edit your work. Well-versed in Montana tort law; two decades of experience in bankruptcy matters; a quick study in other disciplines. UM Journalism School (honors); Boston College Law School (high honors). Negotiable hourly or flat rates. Excellent local references. [www.denevilegal.com](http://www.denevilegal.com). (406) 541-0416

**BUSY PRACTICE?** I can help. Former MSC law clerk and UM Law honors graduate available for all types of contract work, including legal/factual research, brief writing, court/depo appearances, pre/post trial jury investigations, and document review. For more information, visit [www.meguirelaw.com](http://www.meguirelaw.com); e-mail [robin@meguirelaw.com](mailto:robin@meguirelaw.com); or call (406) 442-8317.



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### MEDIATION

**MEDIATION and GUARDIAN AD LITEM:** With 16 years' experience as private practice attorney and 10 years as Lake County Justice of the Peace, I am available for mediation and Guardian Ad Litem duties. Available in the Greater Missoula, Flathead, and Polson areas. Reasonable rates. Chuck Wall, Turnage & Mercer, PLLP, Box 460 Polson, MT 59860 (406) 883-5367 chuckwall@centurytel.net

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

### PARALEGALS & OTHER PROFESSIONALS

**LEGAL SECRETARY:** Kalispell law firm seeking f/t legal secretary. Real estate and estate planning experience preferred. Contact Hash, O'Brien, Biby & Murray at (406) 755-6919, 136 1st Avenue West, Kalispell, MT 59903.

### OTHER SUPPORT SERVICES

**COURT REPORTING:** Baldwin Court Reporting Services is excited to launch a new service by Stacy M. Baldwin, covering Havre and the surrounding areas. With over 15 years of experience and dedication to keeping the integrity of the record you will get the level of service you deserve. Nationally Certified Reporter, conference room available, wireless realtime to your laptop or iPad, 10-day turnaround and expedited transcripts available. To schedule, contact baldwinreporting@gmail.com or (406) 945-0589. You can also schedule online at your convenience at baldwinreporting.com.

**VIRTUAL BANKRUPTCY ASSISTANT:** Virtual bankruptcy preparation can save you time and money. Your bankruptcy petitions will be processed in a skillful and timely manner. I have over 15 years bankruptcy petition preparation experience. Member of the National Association of Virtual Bankruptcy Assistants. Let me help you help your clients. AnnAdlerVBA@gmail.com www.AnnAdlerVBA.com

### OFFICE SPACE/SHARE

**STRIKINGLY BEAUTIFUL OFFICE SUITE:** For lease - 1710 ft<sup>2</sup> just off Electric Avenue downtown Bigfork. Ph. 406-849-5959. For description & photos go to craigslist.org >Montana >Kalispell >Housing >Office/Commercial >Thursday Sept. 20 >BEAUTIFUL UNIQUE OFFICE SPACE w view - 1710 ft<sup>2</sup>

**MISSOULA OFFICE SPACE/SECRETARIAL:** Established commercial/real estate practitioner offers 210 E. Pine Street, Missoula, office rental share and secretarial/legal assistant share. Space is high quality and convenient, with generous parking. Rent is reasonable. Secretary/legal assistant is excellent and experienced. Likely referral

potential. Available January 1st. 543-7259.

**MISSOULA OFFICE SPACE:** Downtown Missoula \$185.00 to \$510.00 monthly lease. 12 clean, private offices currently available. Common reception area with receptionist included! Janitorial service included! Low cost phone service with phone receptionist and internet available. Contact Tracie at 721-3000 m-f. 415 N. Higgins Ave.

**MISSOULA OFFICE:** Professional office for lease in historic building in downtown area. Share use of reception area; two conference rooms; copy and fax machines; library; secretarial space; basement storage; locker room with shower; and private yard. Call Mark Connell, Connell Law Firm at (406) 327-1517.

### CONSULTANTS & EXPERTS

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

**COMPUTER FORENSICS, DATA RECOVERY, E-DISCOVERY:** Retrieval and examination of computer and electronically stored evidence by an internationally recognized computer forensics practitioner. Certified by the International Association of Computer Investigative Specialists (IACIS) as a Certified Forensic Computer Examiner. More than 15 years of experience. Qualified as an expert in Montana and United States District Courts. Practice limited to civil and administrative matters. Preliminary review, general advice, and technical questions are complimentary. Jimmy Weg, CFCE, Weg Computer Forensics LLC, 512 S. Roberts, Helena MT 59601; (406) 449-0565 (evenings); jimmyweg@yahoo.com; www.wegcomputerforensics.com.

**FORENSIC DOCUMENT EXAMINER:** Trained by the U.S. Secret Service and U.S. Postal Inspection Crime Lab. Retired from the Eugene, Ore., P.D. Qualified in state and federal courts. Certified by the American Board of forensic Document Examiners. Full-service laboratory for handwriting, ink and paper comparisons. Contact Jim Green, Eugene, Ore.; (888) 485-0832. Web site at www.documentexaminer.info.

**BAD FAITH EXPERT WITNESS: David B. Huss, JD, CPCU & ARM.** 30 years insurance claims and law experience. Former insurance adjuster and defense counsel. (425) 776-7386.

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## Job Postings and Classified Advertisements

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### INVESTIGATORS

**INVESTIGATIONS, SURVEILLANCE & LOCATES:** Professional and affordable, private investigations led by 29-year Great Falls Police Captain Bryan Lockerby. FBI National Academy graduate. Surveillance, statements, and more. Database for locating subjects. (No criminal defense work.) Cover entire state. Lighthouse Investigations LLC, PO Box 3443, Great Falls MT 59403; (406) 899-8782; [www.lighthouseinvestigations.net](http://www.lighthouseinvestigations.net).

**INVESTIGATIONS & IMMIGRATION CONSULTING:** 37 years investigative experience with the U.S. Immigration Service, INTERPOL, and as a private investigator. President of the Montana P.I. Association. Criminal fraud, background, loss prevention, domestic, worker's compensation, discrimination/sexual

harassment, asset location, real estate, surveillance, record searches, and immigration consulting. Donald M. Whitney, Orion International Corp., P.O. Box 9658, Helena MT 59604. (406) 458-8796 / 7.

### EVICCTIONS

**EVICCTIONS LAWYER:** We do hundreds of evictions statewide. Send your landlord clients to us. We'll respect your "ownership" of their other business. Call for prices. Hess-Homeier Law Firm, (406) 549-9611, [thesshomeier@msn.com](mailto:thesshomeier@msn.com). See website at [www.montanaevictions.com](http://www.montanaevictions.com). BILL TO: Hess Homeier Law Firm, 445 S. 5th West, Missoula MT



#### Litigation Attorney Wanted

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