MONTANA LAWYER

State Bar of Montana

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Annual Meeting Helena

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MONTANA LAWYER

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Feature Stories

Regular Features

Corrections

- In the August Montana Lawyer, in the article, "Primer on compelling production of patient health care information," all references to section 50-12-[insert part], MCA, should be revised to be 50-16 – [insert part].

From the cover

Top: State Bar members mingle before the banquet and keynote address. *Photo Courtesy of Rosie Costain.*
Left: Ed Sedivy, a 50-year member, poses with his daughter Lynda White.
Middle: Name badges await their owners before a meeting.
Right: New State Bar President Randy Snyder plays a song on his mandolin after being sworn in.

MONTANA TRIAL LAWYERS ASSOCIATION

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Douglas A. Buxbaum, Missoula

Using Video in Complex Litigation
Sydney E. McKenna and Justin R. Starin, Missoula

Bad Faith: Trial Techniques – Discovery, Cross Examination, Proof of Damages, Closing
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Don't Get Railroaded: FELA Cases
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The Path From Ridley to SB 297: How Can You Ethically Protect Your Clients' Interests?
James P. Molloy, Helena

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Prof. Gregory S. Munro, Missoula

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MONTANA TRIAL LAWYERS ASSOCIATION

Challenge to make a difference

Lewis & Clark Journal Entry, June 13, 1805 (Meriweather Lewis):

I had proceded on this course about two miles with Goodrich at some distance behind me whin my ears were saluted with the agreeable sound of a fall of water and advancing a little further I saw the spray arrise above the plain like a collumn of smoke which would frequently dispear again in an instant caused I presume by the wind which blew pretty hard from the S. W. I did not however loose my direction to this point which soon began to make a roaring too tremendious to be mistaken for any cause short of the great falls of the Missouri. . . . immediately at the cascade the river is about 300 yds. wide; about ninty or a hundred yards of this next the Lard. bluff is a smoth even sheet of water falling over a precipice of at least eighty feet, the remaining part of about 200 yards on my right formes the grandest sight I ever beheld. . . . from the reflection of the sun on the spray or mist which arrises from these falls there is a beatifull rainbow produced which adds not a little to the beauty of this majestically grand senery. I retired to the shade of a tree where I determined to fix my camp for the present and dispatch a man in the morning to inform Capt. C. and the party of my success in finding the falls and settle in their minds all further doubts as to the Missouri.

The lights were bright, the food wonderful, the speakers enlightening and the elegant accommodations of Helena's Red Lion Colonial Hotel were grand. We celebrate another successful, annual convention greeting, educating and honoring . . . ourselves. The awards were highly deserved. Jameson, pro bono, professionalism awards went to colleagues whose work and dedication were exemplary. I wish I had their dedication. Every year is unique – the reception at the Holter Museum of Art amid Baroque music just doesn't get any better. Thanks to the volunteer speakers, State Bar staff and to each of you who attended. Sure easier to talk about the last CLE than argue over a client's boundary.

I drove past our Bigfork Fire Department on Sept. 11 and saw the honor guard. I'd nearly forgotten, but they didn't. All day in the sun, fully suited up – in front of most every fire hall in every town – reminders that while we serve the country's legal needs, our firefighters, police and military give their lives for our well-being. My comfy chair is pretty easy compared to their job.

A few years back, a local firm advertised free consultations to veterans. I shied away as I've never served (my loss) and haven't the first clue of veterans' needs or entitlements. But I also know – working in a small town where most folk still just walk in for help – I probably don't need to. Landlord-tenant, employment, debtor-creditor, unhappy neighbors, domestic issues, simple wills – those I could do – at least initially. Remember, most "walk ins" usually just have questions they can't answer. The best help is frequently listening and some objective, practical advice. (Remember the folks who leave saying they felt so much better – all you did was listen).

Can we try that? This Veterans Day, let's try a give-back day. I'll ask your local association to place an ad in your local paper. Let's offer 30-minute consultations to our police, firefighters and veterans. You don't have to take a case – you can still refer folks to more qualified specialists. But take some time to just listen. Invite them to call or just let them walk in. A cup of coffee, comfy chair and a professional who cares – goes a long way for a little healing. You don't have to solve, write or do anything but listen (unless you choose to). Maybe a phone call on their behalf gets a little help.

When we give a little of ourselves without expectation, it's our character that shines. We benefit when it's not about us. We help ourselves more than those we counsel.

So I challenge you to make a difference in a public servant's or veteran's life this November 11. Offer to listen. If you do, send me a note and tell me your experience. I'll venture you'll be more lifted up then the person across the table. Beats the heck out of what I just heard about health care or electronic discovery.

Notes from the Trail

Talked to law students September 23. Very bright group, but pretty nervous about finding work. September 30 – met with Association of Legal Administrators (larger firm managers). Great dialogue – should've been visiting with them before. October 1 – 93 new lawyers were sworn in before the Supreme Court and Federal Court. Largest group in a long while. You should have seen the proud parents and family; and more than a few infants cooing in the gallery. I hope you remember your day as I do. That afternoon, I knocked on doors in downtown Helena – only catching a few attorneys, but tasting several coffee varieties (probably better in the morning). A couple hours and I've already seen and learned more than I knew about us. We're a hard-working bunch, we dress pretty easy, office decorations – well, no two are alike. And we're struggling in technology more than I'd have guessed. Thanks for opening your doors and chatting.

Sayings from Jimmy:

Everyone should be quick to listen, slow to speak and even slower to get peeved. Anger doesn't bring about the best in us or a better or more moral result. Keep a tight rein on that tongue.

Thanks for listening. Got a comment? Call, write or ask me to stop in: 406.837.4383 | rsnyder@rsnyderlaw.us

— Randy Snyder, chief deputy

HIPAA, HITECH and the 2013 Omnibus Changes

By Darci Bentson

Maintaining the privacy of an individual's health information is something that is important to all of us. When I asked a few lawyers what they know about HIPAA, the responses were in the realm of "it has something to do with patient privacy" and "I sign papers that relate to HIPAA when I am personally seeking health care." Lawyers who interact with health care providers in a professional capacity certainly know that HIPAA is used as both a shield and a sword because of the natural tension that exists between requests for information and protecting the privacy of health information, particularly in the discovery process. The purpose of this article is to serve as a very basic introduction to the regulatory framework surrounding the privacy of health information.

THE HIPAA BASICS

HIPAA is the acronym that is commonly used when referring to the Privacy and Security Rules under the Health Insurance Portability and Accountability Act of 1996. Pub. L. 104–191. The Privacy rules went into effect in 2003 and the Security Rules (which are oriented toward safeguarding electronic information) went into effect in 2005. 45 C.F.R. Parts 160 and 164, Subparts A, C, and E. The Privacy and Security Rules continue to evolve with the recent unveiling of the HIPAA Omnibus Rule. [1]

As a basic matter attorneys and their clients should know that HIPAA regulated health care providers and health insurers, referred to as "Covered Entities," may not use or disclose an individual's protected health information (PHI), except as otherwise permitted or required by law. A basic tenet of HIPAA is that Covered Entities may use or disclose PHI for purposes related to treatment, payment and operations, without obtaining prior authorization from a patient. HIPAA requires covered entities to have an authorization for all other disclosures, other than certain disclosures that are otherwise required by law. HIPAA also details what a patient authorization must include to be "HIPAA compliant" and permit disclosure by providers of health care information pursuant to the authorization. An authorization may be provided by the individual or his or her personal representative.

Also, each covered entity's disclosures of PHI are governed by what HIPAA refers to as the "minimum necessary" standard. This standard requires that each covered entity develop policies and procedures that reasonably limit its disclosures of PHI to the minimum necessary. Providers are also limited in disclosing information pursuant to an authorization or compulsory process to exactly what is authorized or requested.

Covered entities must also inform individuals of their rights regarding the use and disclosure of their PHI through a Notice of Privacy Practices. It is intended to put patients, and health insurance plan participants, on notice about how they use your health care information. A Notice of Privacy Practice should provide the reader a better sense of the underlying intent of the HIPAA regulations and how health information is used and protected.

COVERED ENTITIES

HIPAA governs Covered Entities, which are generally defined as health plans, health care clearinghouses (an entity that processes health information on behalf of another entity, i.e., a billing service), and health care providers who transmit health information electronically. 45 C.F.R. 160.103. Generally speaking, HIPAA prohibits Covered Entities and Business Associates from using or disclosing protected health information ("PHI") for purposes other than its treatment, payment or health care operations without the individual's authorization. There are many exceptions to this general prohibition, including scenarios that involve mandatory reporting by providers, such as instances of suspected child abuse. Many of these exceptions and general privacy practices are outlined in a Covered Entity's Notice of Privacy Practices.

HIPAA also imposes a number of administrative burdens

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1 In 2009, as the federal government's push towards electronic health records and the associated technology continued to increase, Congress passed the Health Information Technology for Economic and Clinical Health ("HITECH") Act, which was enacted as a part of the American Recovery and Reinvestment Act ("ARRA") of 2009. *Pub. L. 111–5.* In 2010, Department of Health and Human Services ("HHS") issued proposed rules in response to the HITECH act, which existed in their proposed form for two and a half years. *75 FR 40868*. In January of 2013, HHS finally published what is often referred to as the HIPAA Omnibus Rule due to the fact that it is a group of regulations implementing changes required by HITECH to the Privacy, Security and Enforcement Rules and changes required by the Genetic Information Nondiscrimination Act of 2008 ("GINA"). In essence, HIPAA, HITECH and GINA are all Acts of Congress requiring HHS to promulgate rules that govern Covered Entities' (defined below) privacy practices.

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on Covered Entities. For instance, they must establish strict security and privacy safeguards for both electronic and paper records. They must train employees on patient privacy and security requirements and sanction employees for violations of HIPAA. They must enter into agreements with business contractors, called "Business Associates," that receive PHI that impose requirements for safeguarding information and ensure that these contractors comply with HIPAA, and must also prevent retaliation against employees and patients related requests for information and enforcement of HIPAA requirements.

PROTECTED HEALTH INFORMATION

HIPAA applies to PHI and does not apply to de-identified health information. PHI includes information that may seem fairly innocuous and not what some of us would consider private information requiring protection. The steps that Covered Entities take to safeguard and protect PHI at times causes confusion and distrust among parties who are trying to balance privacy and access. However, attorneys need to understand that the mere identity of an individual in connection with a health care provider can be considered PHI. 45 C.F.R. §160.103 and 78 FR 5566, pg. 5598. Also, what a layperson would generally consider identifiable versus "de-identified" data, is not always "de-identified" under the HIPAA regulations.

HIPAA requires the removal of 18 identifiers and recommends very specific methodology in rendering PHI "de-identified." For example, I assisted a client in responding to a subpoena that requested a list of ZIP codes and the number of people in each ZIP code that received a certain procedure over a several year timeframe. To most, that "data" would not likely constitute what we generally think of as private, individually identifiable health information that should be protected. However, considering that nearly all of the ZIP codes represented a geographic region that contained 20,000 or fewer people, the requested data was considered potentially identifiable and thus was still deemed PHI under HIPAA, because it is possible that someone in a small community might be able to piece together the identity of the small number of people in their small town who had that specific procedure. We determined in this particular matter that the only way the requested information could be disclosed was by my client obtaining a signed authorization from all of those patients who were represented in those procedures counts. My client would have violated HIPAA if it would have produced the information as requested in the subpoena. Fortunately, a quick call to the requesting party yielded that it was fine to combine the ZIP codes and aggregate the data so that the likelihood of re-identification was mitigated by using a larger geographic unit and the disclosure could fall within a "safe harbor" outlined by OCR in this type of disclosure of de-identified data. In the end, my client met its HIPAA obligations to protect patient privacy and the requesting attorney got what was needed for the matter. .

BUSINESS ASSOCIATES

One significant change resulting from the Omnibus Rule is the impact to the Business Associates of the Covered Entities. Covered Entities often outsource functions of their business that involve PHI to contractors that are known in the context of HIPAA as Business Associates. A Business Associate is defined as an individual or entity that creates, receives, maintains or transmits protected health information for a function or activity that is regulated by HIPAA. 45 C.F.R. §160.103. For example, if an accountant is performing an audit on behalf of a covered entity and the accountant needs to access protected health information during the audit process, the accountant is considered a Business Associate. Prior to the 2013 Omnibus Rule, Business Associates were held responsible for maintaining the privacy of protected health information via contractual arrangements that were required of Covered Entities prior to disclosing or providing access to PHI to that Business Associate. Now, with the Omnibus changes, Business Associates are directly governed by HIPAA and are subject to many of the same rules and sanctions as the Covered Entities. In addition, Business Associates are responsible for obtaining written assurances (Sub-Business Associate Agreements) from their subcontractors that the subcontractor or "downstream vendor" will protect health information to the same degree that the Business Associate is required to protect health information under the HIPAA regulations. With this one change, the Omnibus Rule has expanded HHS's reach significantly and created a much higher bar for privacy practices and compliance for Business Associates and their subcontractors.

ENFORCEMENT

The Privacy and Security Rules are enforced by HHS' Office for Civil Rights ("OCR"). OCR's enforcement activity is primarily complaint driven but is also prompted via compliance reviews of Covered Entities. The HIPAA Omnibus Rule increased enforcement and penalties by requiring that HHS formally investigate allegations that include the possibility of violations due to willful neglect, reducing HHS' discretion in resolving matters informally and implementing a tiered penalty structure based on culpability and number of violations. Given the sheer volume and complexity of the Privacy and Security regulatory requirements, willful neglect is not a high threshold and penalties can creep into the million dollar range quickly in voluminous or varied violations. Overall, the HIPAA regulations are complex and non-compliance is risky. We need to respect that individuals and entities trying to comply with the HIPAA regulations bear a heavy burden and their abundance of caution in relation to their use and disclosure of patient information is warranted.

PATIENT RIGHTS: THE SWORD

Clearly HIPAA is in place to protect a patient's right to privacy of their health information. There are other patient rights afforded by the HIPAA regulations but these rights often get misinterpreted by patients as giving them an unlimited right to information. For example, patients have a right to copies of their health care information, but they are likely required to pay for those copies. Patients have a right to request an amendment

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to their record, but it is the ultimately within the provider's discretion whether to grant that request for amendment. Patients have a right to request an accounting of disclosures of their information but that accounting is limited to certain types of disclosures made. Patients sometimes confuse an accounting of disclosures with a mythical report that will list every person who has accessed their record. So, although patients have rights under HIPAA, their rights are specific and to some degree limited. The best way to assert a patient's privacy rights is to understand the regulations that govern the requested information and help the Covered Entity see how they can provide the requested information in compliance with the HIPAA regulations.

Covered Entity Compliance: The Shield

While protecting patients' privacy is of utmost importance to Covered Entities, it is important to note that the HIPAA regulations are incredibly voluminous and complex and are just "a needle in the haystack" of regulations that most health care providers and health plans are subject to. The regulatory landscape and the associated risk of non-compliance has become increasingly burdensom for Covered Entities. As technology expands, information is stored and accessed all over the world, and health care operations become more technical and dependent upon Business Associates that have to increase their HIPAA acumen to be able to offer Covered Entities assurances that privacy will be protected, HIPAA compliance becomes more challenging. Even very sophisticated Covered Entities and Business Associates struggle with HIPAA compliance, which is again just one of the many regulations that blanket the health care industry. While it may feel like Covered Entities hide behind HIPAA so that the entity can deny requests for information, one must consider the penalties and public relations problems for a Covered Entity if they breach the privacy of protected health information. Many Covered Entities train their staff to respect patient privacy and suggest a very conservative approach to disclosure, including the motto "when in doubt, don't give it out." Impermissible access, use or disclosure may result in significant consequences to the entity (and sometimes the patient) including "breach notification" to all affected individuals and self-reporting to HHS. Covered Entities are understandably cautious and are wary of violating patient privacy and the accompanying regulations.

SUMMARY

As Covered Entities scramble to comply with the HIPAA Omnibus Rule by September 23, 2013, we can approach requests for information with a better understanding of the regulations and a greater appreciation of the Covered Entities' precarious balancing act in considering requests for information and protecting the privacy of health information.

Darci Bentson is an attorney with Crowley Fleck in Bozeman. She is a member of the Montana State Bar Association Health Law Section Board. Her practice is devoted to health law and advising health care clients regarding regulatory compliance, including advising HIPAA Covered Entities about HIPAA compliance. She can be reached at (406) 522-4532 and would be happy to "talk HIPAA" anytime.

Perspectives on Pro Bono

By Elizabeth Weaver
MLSA AmeriCorps VISTA Pro Bono Enhancement Project

This month, from October 20-26 we mark National Celebrate Pro Bono Week — a week to recognize the difference attorneys make in their communities by donating their time and expertise to increase access to justice in Montana. At Montana Legal Services Association (MLSA), we see the tireless efforts lawyers across the state make each and every day. In the past year, MLSA has tracked the pro bono efforts of 219 attorneys assisting with over 400 cases statewide. We also recognize that many attorneys take pro bono cases outside of MLSA referrals and the true number of low income Montanans who have received pro bono services is likely far higher. These attorneys make a difference not only in individual cases, but also throughout society by supporting access to the rule of law.

Each pro bono case is unique — it comes with its own challenges and rewards. Likewise, each attorney's experience with pro bono is distinct and variable. Attorneys who volunteer through MLSA fulfill the hours suggested by Rule 6.1 of the Rules of Professional Conduct in a variety of ways. Some take full representation cases, some prefer limited scope cases, while others volunteer once a month at their local family law clinic or self-help law center. No matter what level of assistance is provided, the fact remains that every form of pro bono service makes a difference in the life of a community member struggling to interpret an often confusing legal system.

In honor of Celebrate Pro Bono Week, we wanted to hear firsthand from lawyers on the ground about their perspectives on pro bono and how they incorporate their service into their own lives. Each attorney has had a different experience with pro bono service and made it fit into their schedule in different ways.

I first spoke with Jessica Fehr, an Assistant US Attorney based in Billings. Fehr volunteers her time at the Yellowstone Family Law Project (YFLP) clinic, where attorneys provide free legal consultations on a one time basis, review documents and determine if the client needs full representation. For a government attorney, this time-contained way of fulfilling pro bono hours is appealing and fits well with the demands of a full time position with the US Attorney's office. Billings' four hour clinic occurs twice a month and Fehr volunteers on average about once every two months. Fehr notes, "The amazing part about pro bono is that it doesn't have to be 50-60 hours on one case. It can be 15-30 minute consultations but you are still meeting a need. You can find ways to make pro bono fit with what time you have."

Although Fehr has helped countless clients in the clinic setting, she remembers one client in particular. Fehr was in the grocery store when a woman approached her. It turned out the woman had been a client at one of the YFLP clinics. She was a mother of three and going through a nasty divorce that was further complicated by a history of domestic violence. By the time she came to the clinic, she had done most of the work herself with the help of pro se paperwork from the local Self Help Law Center. At the clinic consultation, Fehr reviewed the documents and helped prepare the woman for court. In the aisles of the supermarket, the woman told Fehr that her divorce was now finalized and she and her family were safe. She repeated to Fehr how appreciative she was for the YFLP and Fehr's help. She explained that without the clinic resource, she probably would not have gone through with the divorce. Fehr says it is cases like this that make you feel like you have helped someone.

"It makes me realize how fortunate I have been in my own life," she said.

MLSA staff attorney Beth Hayes agrees with Fehr that pro bono service, no matter the level of that service, is a way to give back to the community. Hayes volunteers once a month for a three hour shift at the Self-Help Law Center in Missoula, participates in the Western Montana Bar Association's Family Law Clinic, and takes on a full representation case as often as her schedule allows. She notes that having a pro bono case can make the days longer and the workload a little heavier, but the duty still remains.

"We all have the same obligation and all have to make it fit with the work we do. If times are tight then yes, sometimes you need to take a pass, but you don't get a pass for forever."

Hayes focuses primarily on housing related issues in her practice and recently took her first pro bono family law case. At the beginning of the case, Hayes said she was a little nervous because her client had unreasonable expectations about the outcome of the case. The client was frustrated, overwhelmed, and scared by a daunting legal system that she did not understand and that would ultimately decide the amount of time she would have to parent her severely disabled daughter. By the second month of the case, Hayes says her client had a much better sense of what was realistic and communication between client and attorney became easier. When the case ended, both Hayes and the client were pleased with the reasonable parenting plan stipulated to by both parties.

"That outcome was as good as it could have been. My client was happy with the results, the adverse party was pleased, and I felt really good because of all the ground she gained in terms of understanding the legal system and adjusting her expectations" Hayes said.

Although both of these women serve clients in need in different ways, both impact clients' lives and make a difference in our communities. These stories are just two of the hundreds we see at MLSA- stories where the lives of both the attorneys and the clients are impacted. So to Hayes, Fehr, and the hundreds of other attorneys statewide who take time out of their busy work and family schedule to assist with a pro bono case-whether MLSA works directly with you or not- we thank you for your service. Whether it is three hours a month at a clinic or 50 hours for a single case, your service to individuals of limited means makes access to justice a reality.

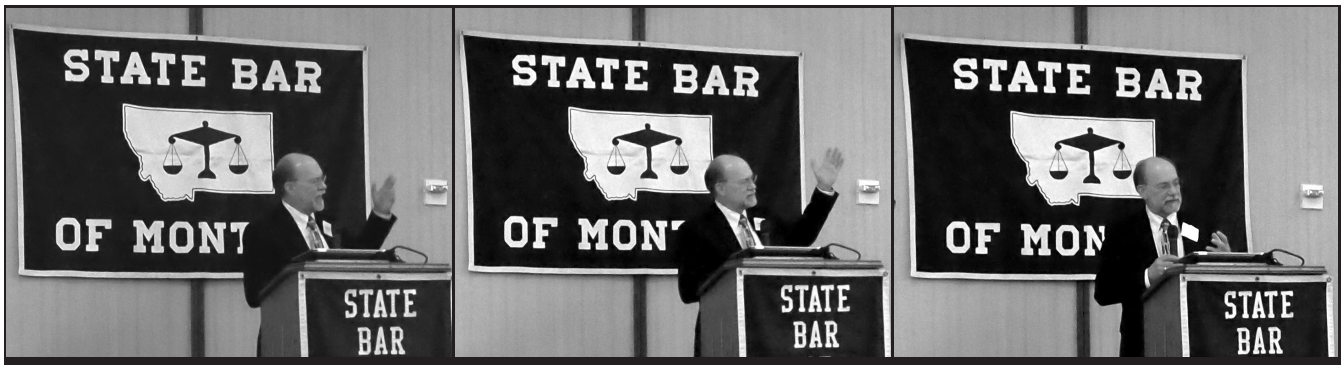
Annual Meeting 2014

More than 250 people gathered in Helena for the State Bar's 39th annual meeting Sept. 18-20. Meetings kicked off Wednesday with Justice Initiatives Committee, Access to Justice Commission, and Executive Committee. That night, bar members mingled at the Holter Museum of Art, for the local bar reception. Delectable food and music made for a delightful evening. On Thursday, the Board of Trustees, Elder Law Committee, Health Care Law Section and New Lawyers' Section met followed by a half day of hot topics CLE. Attendees gathered at the president's reception before watching Klaus Sitte receive the Jameson Award, the State Bar's highest honor, at the banquet. To cap off the night, Bill Neukom, of the World Justice Project, discussed the rule of law and the project's data-driven approach to issues across the world.

Friday featured oral arguments before the Montana Supreme Court. Martin Burke and Beth Brennan provided perspective for the cases — *State of Montana v. Jill Marie Lotter* and *Allianz Global Risks US Insurance Company v. Lincoln County Port Authority* — and a packed house earned CLE credit while watching the bench and bar in action. The Past Presidents Committee approved two resolutions 1) continued support of MLSA, and 2) thanking this year's Annual Meeting Planning Committee/1st Judicial District Bar. The meeting wrapped up with another session of hot topics CLE followed by the Paralegal Section meeting.

Next year, the State Bar celebrates 40 years and will meet at Big Sky.

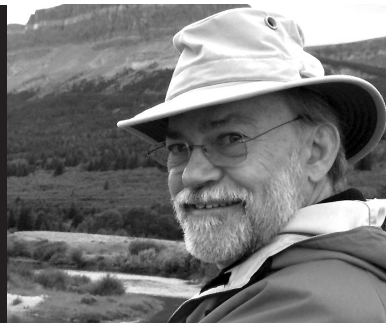
Pictured above: Top — bar members gather at the reception on Thursday, Sept. 19, *photo courtesy of Rosie Costain.* **Left** — Attendees took in art and music at the Holter Museum to kick off festivities on Wednesday, Sept. 18. **Right** — The fish was a big hit at the Wednesday reception.



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. (*Pictured above: Jameson winner Klaus Sitte addresses the crowd at the 2014 annual meeting).*

William J. Jameson

Klaus Sitte



Angie Wagenhals, program coordinator for Montana Legal Services Association, wrote the following letter nominating Klaus. Robert C. Rowe of NorthWestern Energy; Hon. Jim Wheelis, 19th Judicial District; and Irma Russell, dean of the UM School of Law, wrote supporting letters. Several clients also contributed personal stories about how Klaus helped them.

Please accept this letter and supporting documents in nomination of Klaus Sitte for the William J. Jamseson Award. Over the course of his forty year legal career, Klaus has been a dedicated advocate for justice and has tirelessly promoted the legal profession. Klaus' professional conduct and dedication to the legal profession embodies the spirit of William J. Jameson award.

For nearly ten years, Klaus served as Executive Director of Montana Legal Services Association. Prior to his directorial role, Klaus worked as an attorney with Legal Services, striving to bring legal services to the under served. He represented countless clients and advocated for them in every way he could, often going far beyond representation in court. Klaus approached each client with the same warmth, respect, and openness-he was never too busy to give a piece of himself to help out even when he was very busy. As the daughter of one of Klaus' pro bono clients writes, "He has been there for my family since the beginning of our escape [from a violent relationship] and has traveled many miles to secure our safety. I would like to take the time to thank him with all my heart for teaching us the appropriate steps to fight for what we believe in, and to know our own self-worth."

Klaus' dedication to the access of justice has never been restricted by the confines of a normal work day. Throughout his many years of practice he has aided the cause of equal justice under the law in countless ways. Appointed by the Montana Supreme Court, Klaus served for nearly a decade on the Gender Fairness Task force, ten years on the Equal Justice Task Force and currently sits on the Justice Initiatives Committee. As a guest lecturer at the University of Montana and a coach of the University's Negotiation Competition Team, he has influenced and mentored countless young attorneys and law students. In addition to Klaus' dedication to working with law students, he also works with attorneys who have practiced for years as trainer and lecturer with the State Bar of Montana and the Commission on Courts of Limited Jurisdiction.

Former co-worker Annie Hamilton notes when she hears Klaus' name-even to this day- is his professionalism. "When I first became aware of Klaus, I was a young lawyer working for my boss, Bruce Barrett at ASUM Legal Services. I had done some contested pro bono family law and seen the low side of many ''prominent" lawyers in Missoula. Bruce and Klaus were

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The George L. Bousliman award recognizes attorneys who have established a reputation for and a tradition of professionalism as defined by Dean Roscoe Pound: pursuit of a learned art as a common calling in the spirit of public service. Nominees must have demonstrated extraordinary professionalism in at least one of the following criteria:

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

Pictured above: Cindy Thiel (left) and Keith Maristuen (right) pose with Pam Bailey, outgoing president.

George L. Bousliman

Cindy Thiel

P. Mars Scott wrote the following letter nominating Cindy.

Over the last two years, Cindy has demonstrated extraordinary professionalism by enhancing the practice of law in the spirit of public service.

A little over two years ago, Cindy called a few family law attorneys around Missoula to see if they would be interested in meeting periodically to discuss relevant topics related to family law matters. She believed that engaging some of the more

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Keith Maristuen

Angie Wagenhals wrote the following letter nominating Keith.

Keith embodies Dean Roscoe Pound's definition of professionalism: pursuit of a learned art as a common calling in the spirit of public service. Keith's professionalism manifests itself through his numerous commitments to his community- his involvement in his local church, his participation with the Havre Kiwanis Club and his leadership of the Hill County pro bono program.

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engaged in an extremely high conflict dissolution that would have brought out the worst in most lawyers.

I was so impressed to see that these two men were able to put the case aside at the end of the day and go out for a meal. It was a revelation to me that that kind of paradigm was indeed-possible. How much less professionalism would we have in this state if not for his refusal to be nasty in the face of extreme negativity?"

Currently, Klaus is the Director of Students at the University of Montana School of Law where he works with aspiring lawyers to instill a dedication to the legal profession and public service. Perhaps the most telling of all of Klaus' many attributes is that, despite his new position outside of Montana Legal Services, he continues to represent clients on a pro bono basis. In fact, one of the letters of support included in this submission is from a client whom Klaus has represented for over twenty years. As stated at the outset, Klaus' dedication to access to justice has never known the confines of an average work day.

A pillar in both the legal and civil communities, Klaus Sitte has served Missoula and the state of Montana with diligence throughout his storied legal career. For this reason, we believe he is a strong candidate to receive the Bar's Jameson Award.

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Keith is active in both the Twelfth Judicial District Bar Association and the State Bar. He serves on the State Bar's Ethics Committee, the Past Presidents' Committee, and the Resolution Committee. In addition, Keith works with Montana Legal Services to coordinate pro bono services in the twelfth judicial district-placing pro bono cases with attorneys in the Havre area and taking on a large number of the pro bono referrals himself.. When working with clients, he take precautions to make sure the client understands what is happening and takes the time to listen to their concerns and requests. His Legal Assistant Tammy Pike explains: "Keith provides his clients with a general understanding of the process and the laws associated with their case in laymen's terms. He keeps his cases moving to resolve matters expeditiously and strives to work with the parties to obtain a settlement comparable to both parties. "

When Keith is not practicing the law, he engages with the community through a variety of causes and organizations he supports. As an active volunteer for the Kiwanis Club, he can be found manning the Kiwanis pancake breakfast at festivals and helping with prep work for the food booth at the Great Northern Fair. His love of giving also has led him to volunteer at the Special Olympics for many years and work with the youth clubs at local Havre High School, where he believes involvement helps molds the minds of today's youth. Keith believes there is a duty to the older members of the community as well, so he often presents to senior groups about estate planning and information they should know.

In recognition for his 35 years of service to the State of Montana, the legal profession and pro bono clients, Montana Legal Services Association would like to recommend Keith Maristuen for the George L. Bousliman Award. He has advocated for the residents of Hill County for years and remains a central figure for pro bono services in the 12th Judicial District. As an organization, we depend on Keith's insight and experience to serve those without access to the legal system. We can think of no one who uses the learned art of the law to better serve the public interest. Thank you for your consideration of this nomination.

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seasoned family law practitioners in frank and honest discussions about current family law issues would result in a stronger, more competent and more professional approach to dealing with family law issues in Missoula County. Cindy set the agenda, sent out notices, made sure everyone had lunch, and led the discussions. Originally, the meetings were just a couple of attorneys sitting at her conference table having lunch discussing recent rulings by our district court judges, or new procedures at the clerk's office, or other such everyday topics of general interest to family law practitioners. However, the topics soon became more involved and intricate. Attorneys began developing a consensus as to how to address the questions, and the information that was being shared at these meetings was important to the practice. It became apparent that these meetings were important, "must attend events" for family law practitioners because the exchange of ideas and the dialogue that was occurring was highly relevant to the everyday family law practice and was setting a standard of care for legal professionals in the Missoula County.

What started as a small, informal get together has grown into full blown, somewhat fonnal, well organizedj well attended legal conferences that are worthy of CLE credits. Cindy had the foresight to expand the discussions to include bigger picture topics and to bring in outside speakers to address these topics. The round table sessions have included discussions on child support calculations; how bankruptcy affects family law; pro bono representation; how to better conduct settlement conferences; issues involving property distributions; legislative proposals; parenting plans for special needs children; and issues related to retirement account distributions, among others. The attorneys who attend these meetings are better prepared at settlement conferences resulting in more settlements because there are fewer issues to negotiate.

Not only did Cindy have the vision that bringing attorneys together on a regular basis would enhance and develop the practice of family law in Missoula, but she also took the extremely important step of acting on her assumption. Without this type of meaningful and effective leadership by Cindy, and her dedication to make sure every monthly session is worth everyone's time, the practice of family law would not be as professional and competent in Missoula as it is today. Cindy's foresight and actions are the very essence of what the George L. Bousliman Professionalism Award stands for -- encouraging other lawyers to maintain and develop their knowledge of the law and proficiency in their practice.

Cindy Thiel is most deserving of the George L. Bousliman Professionalism Award.

Neil Haight Pro Bono

Tom Lynaugh

Hon. Russell C. Fagg, 13th Judicial District wrote the following letter nominating Tom. Angie Wagenhals of Montana Legal Services Association, and Roger Holt of Parents, Let's Unite for Kids wrote supporting letters. (Pictured above: Tom and Pam Bailey share a hug at the awards ceremony).

It is my distinct pleasure to write a letter of support for Tom Lynaugh to receive the Neil Haight Pro Bono award. Tom has chaired the Family Law Project in Billings since its inception. Throughout this time, it has been Tom's initiative as he has called the meetings, run the meetings, and been the primary impetus for the assistance provided to the many clients, perhaps in the hundreds, served by the Family Law Project over that time period.

Tom is a self-effacing and humble person. Throughout this time, Tom has not only chaired the committee, but also served countless, again perhaps hundreds, of hours in the Family Law Project clinics where clients are screened, evaluated, and either

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Karla M. Gray Equal Justice

Justice Beth Baker

Andrew King-Ries wrote the following letter nominating Justice Baker. Chief Justice Mike McGrath, Amy D. Christensen of Hughes, Kellner, Sullivan & Alke; and Ed Higgins of Montana Legal Services Association wrote supporting letters. Judy Meadows, recently retired from the Law Library of Montana, coordinated the nomination and also wrote in support. (Pictured above: Justice Baker, right, and Pam Bailey.)

I am writing to nominate Justice Baker for this year's Montana State Bar Karla M. Gray Equal Justice Award. Justice Baker's commitment to access to justice for all Montanans and her passion for making equality under the law a reality make her an outstanding candidate for the award.

Justice Baker's commitment to access to justice for all Montanans and her passion for making equality under the law a reality make her an outstanding candidate for the award.

The Karla M. Gray Equal Justice Award honors a judge who has demonstrated dedication to improving access to

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Montana courts by:

- Personally accomplishing noteworthy work improving access for all people, regardless of income, to the Montana court system.
- Taking part in local accesss-to-justice efforts, including program development, cooperative efforts between programs, and support for community outreach efforts to improve understanding of access to the courts.
- Actively supporting citizen involvement in the judicial system.
- Actively committing to increasing involvement of volunteer attorneys in representing the indigent and those of limited means.
- Making other significant efforts that exhibit a long-term commitment to improving access to the judicial system.

As a lawyer and now as a member of the Supreme Court, Justice Baker has worked tirelessly to improve access to the judicial system. Justice Baker served for ten years on the State Bar of Montana's Access to Justice Committee and currently serves as an ex officio director of the Montana Justice Foundation. Justice Baker now serves as the Montana Supreme Court's representative on the Court's Access to Justice Commission. Her leadership has been instrumental in the creation and furtherance of the Access to Justice Commission.

As the chair of the Access to Justice Commission, it has been my pleasure to work closely with Justice Baker. I am constantly impressed by Justice Baker's dedication to access to justice, her creativity in thinking about how to address this critical issue for our society, and her compassion and respect for everyone with whom she works. For these reasons, I hope you will recognize her hard work and commitment by honoring her with the Karla Gray Equal Justice Award.

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sent to the Self-Help Law Center, or given a referral to an attorney. Of course, throughout this time, Tom has probably taken more cases than just about any attorney in Billings, through the Family Law Project.

In Summary, Tom is a doer. Tom puts his money where his mouth is. Tom is somebody I personally look up to in his service to humanity. I believe Tome would be a perfect selection for the Neil Haight Pro Bono award. Without question, Tom is a dedicated and committed leader in the delivery of civil legal services to fellow Montanans. Tom is the key person in our Family Law Project program, and has been since its inception. Tom has also contributed significant legal work, and himself delivered volunteer civil legal assistance to countless Montanans.

Thank you for your consideration of these comments in support of Tom for this well-deserved award.

State Bar award winners:

William J. Jameson Award
Klaus Sitte

George L. Bousliman Award:
Keith Maristuen, Cindy Thiel

Karla M. Gray Equal Justice Award
Hon. Beth Baker

Neil Haight Pro Bono Award
Tom Lynaugh

Frank Haswell Writing Award
Mark Parker

Distinguished Service Awards
Mike Alterowitz, Deb Anspach, Vicki Dunaway, Susan Gobbs, Jim Johnson, Jim Lewis, Beth McLaughlin, Scott Moore, Monica Tranel, Shane Vannatta, Tara Veazey.

50-year Members
Richard Andriolo, Gary Beiswanger, Calvin Christian, Keith McCurdy, M. Gene McLatchy, H. James Oleson, Thomas Olson,Richard Renn, Edmund Sedivy, Victor Valgenti.

Pictured on this page, Pam Bailey appears with award winners.

1. Monica Tranel, Distinguised Service Award -- Board of Trustees

2. Tara Veazey, Distinguised Service Award - Justice Initiatives Committee

3. Susan Gobbs, Distinguished Service Award - CLE Institute

4. Mark Parker, Haswell Writing Award for *"Gideon, schmideon –what about my needs?"*

5. Beth McLaughlin, Distinguished Service Award - Justice Initiatives Committee

6. Vicki Dunaway, Distinguished Service - Board of Trustees

7. Shane Vannatta, Distinguished Service Award - Board of Trustees, Executive Committee, Professionalism Committee

Rule 611(c)

Where you lead, I will follow

By Cynthia Ford

"Where you lead, I will follow
Anywhere that you tell me to
If you need, you need me to be with you
I will follow where you lead…"

— Carole King, "Where You Lead"

The tendency of the led to follow the leader is exactly the point of MRE 611(c), which provides:

> Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

This rule is identical in substance to FRE 611(c), which in its restyled version reads:

> Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's [NOTE THE DIFFERENCE IN APOSTROPHE PLACEMENT FROM MRE VERSION] testimony. Ordinarily, the court should allow leading questions:
> (1) on cross-examination; and
> (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

The objection which enforces this rule is, of course, familiar to all of us: "Objection, Your Honor, Leading." An inquisitive reader of an earlier column suggested this subject, with a particular emphasis on two specific issues: the purpose behind the "no leading on direct" rule and how to tell a leading from a non-leading question. My experience teaching Evidence and coaching the University of Montana Trial Team, as well as my own trial experience, confirms that these are valid concerns worthy of our attention this month.

THE PURPOSE BEHIND THE "NO-LEADING ON DIRECT" RULE

The Federal Advisory Committee Note to FRE 611(c) explains that:

> The rule continues the traditional view that **the suggestive powers of the leading question are as a general proposition undesirable.** [Emphasis added]

The Montana Commission Comment to MRE 611(c) notes that the Montana version is identical to the then-current FRE 611(c), and expresses Montana's agreement with the purpose of the rule:

> It recognizes the traditional view that leading questions, that is, **questions which suggest the desired answer, are generally undesirable on direct examination, for the witness " ... may acquiesce in a false suggestion**". McCormick, Handbook on the Law of Evidence 8 (2d ed. 1972). [Emphasis added]

The U.S. Supreme Court, affirming a decision in an admiralty case which disregarded the thrust of one of the key witnesses, noted:

> A refusal to credit the uncorroborated testimony of the director-partner, who obviously was not disinterested in the outcome of the litigation, would not be considered clearly erroneous. … This is especially so when such testimony is prompted by leading questions as was the case here.[5] [FN 5: "At one point the judge interrupted the direct examination of the witness to point out he could not 'give any credit to a witness answering leading questions.']
>
> *Guzman v. Pichirilo*, 369 U.S. 698, 702-03, 82 S. Ct. 1095, 1098, 8 L. Ed. 2d 205 (1962).

My own explanation is that when you have a witness "friendly" to your side of the case, that witness will necessarily be like Carole King, happy to go anywhere you suggest. The lawyer is providing the information, and the witness is just replying "Yes" or "Exactly" or "That's right." It is certainly true that this method of examination is the quickest, most efficient, and easiest for both the lawyer and the agreeable witness. It is equally true that the lawyer cannot testify. First, the Montana Rules of Professional Conduct forbid an attorney from testifying at trial.[1] Moreover, because the lawyer did

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1 Rule 3.4(e) states that a lawyer "shall not … assert personal knowledge of facts in issue except when testifying as a witness…" Rule 3.7 is entitled "Lawyer as Witness" and generally provides that "a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness" although there are some limited exceptions to this prohibition.

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not herself perceive the event at issue, she cannot provide the proper information to the court. MRE 602 requires that every non-expert witness have "personal knowledge of the matter." The witness on the stand, not the lawyer at the podium, has personal knowledge and must communicate it to the jury as his own memory and wording dictate.

HOW TO TELL LEADING FROM NON-LEADING QUESTIONS: "YES OR NO" IS NOT ENOUGH

If the questioning is on direct examination of a witness friendly to the proponent, the objection should be sustained if the question is, in fact, leading. A bit mysteriously, neither the state nor federal version of Rule 611(C) provides any definition of either type of question. Luckily for Montanans, our legislature has enacted a statute which defines evidentiary terms:

> 26-1-101. General definitions. (1) "Direct examination" is the first examination of a witness on a particular matter. "Cross-examination" is the examination of a witness by a party other than the direct examiner.
>
> (3) A "leading question" is a question which suggests to the witness the answer which the examining party desires.[2]

The Montana Supreme Court recently elaborated on the statutory definition, looking to California for guidance, and concluded that the fact that a question can be answered simply "Yes" or "No" does not make it leading. The touchstone, instead, is whether the examiner indicates to the witness how she is to answer, suggesting that "yes" is the correct answer or that "no" is not.

In *State v. Lindberg*, 347 Mont. 76, 196 P.3d 1252, 2008 MT 389, the defendant was convicted of several illegal sexual activities with young members of his girlfriend's household. One of these was a sexual intercourse without consent charge involving alleged victim H.B. who was 20 at the time of trial. After he was convicted, Lindberg claimed ineffective assistance of counsel for failure to object to leading questions posed on direct to H.B.:

> ¶ 12 … During her first testimony, H.B., then approximately twenty years of age, struggled when recounting Lindberg's alleged acts and repeatedly broke down in tears. The District Court recessed for the day, and resumed the next morning with her testimony. However, H.B. continued to have difficulty completing her testimony. The District Court allowed her to be excused and received testimony from A.T. and B.B. before again having H.B. return to the stand. At this point, the State began using leading questions to elicit testimony from her. Lindberg's counsel objected twice throughout the examination. On the first occasion, Lindberg's counsel objected on the grounds that all the questions used were leading questions. The District Court overruled the objection. Later in H.B.'s testimony, Lindberg's counsel again objected stating "Your honor, I would[3] object. Continuing leading—a lot of leading questions here." The District Court denied the objection stating: "This one's not." At the very end of her direct examination, the State asked H.B. the following question: **"At any time during the 1995 through 1998 incidents did the defendant penetrate your vagina?" H.B. responded "Yes."** Lindberg's counsel did not object to this question.
>
> ¶ 13 After H.B. concluded her testimony, Lindberg's trial counsel moved to strike it completely on the grounds that it had been developed through the use of leading questions. The motion was denied. Lindberg's counsel also moved for a mistrial on the same grounds. However, when the District Court requested authority in support of Lindberg's motion, Lindberg's trial counsel could not provide any. The District Court denied the motion for a mistrial.

Lindberg asserts that the only evidence that he penetrated H.B. came in response to a leading question from the prosecution to which his trial counsel did not object. (*See* ¶ 12). Without this leading question and H.B.'s response, Lindberg argues he would have been entitled to a directed verdict on the sexual intercourse without consent charge because penetration is a necessary element of that offense, and, aside from H.B.'s answer to the leading question, no other evidence was provided. Lindberg also notes that the jury seemingly recognized the State's difficulty in proving the elements of sexual intercourse without consent. During its deliberations, the jury sent a question to the court asking "Did [H.B.] actually speak the word 'penetration' or was it posed as a yes or no question?" Additionally, the jury asked if it would be possible to have a transcript of H.B.'s testimony. However, the District Court declined to provide an answer or a transcript, requiring the jury to rely on its own memory and notes. (Emphasis added.)

347 Mont. at 80- 89.

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2 At the time the MRE were written, the Commission noted that 611(c) was consistent with existing Montana law: "Section 93-1901-5, R.C.M. 1947 [26-1-101], provides:
A question which suggests to the witness by the answer which the examining party desires is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the court, under special circumstances making it appear that the interest of justice requires it."

3 My own grammatical view is that when someone says, "I would like to object" the judge should respond, "Then do so." The use of the subjunctive does not technically indicate that the speaker is objecting. Perhaps I am getting old and cranky? At any rate, I recommend that you stick with the clearer and more direct "Objection" or, at most, "I object."

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On appeal, the Supreme Court discussed the definition of a "leading question" and then applied it to the penetration question asked of H.B.:

> A review of the trial transcripts demonstrates that the prosecutor did indeed employ some leading questions in his examination of H.B. Lindberg's ineffective assistance of counsel claim as to the leading question matter centers solely, however, on the notion that the specific question **"At any time during the 1995 through 1998 incidents did the defendant penetrate your vagina?"** is a leading question, and that his counsel's performance was deficient in failing to object to it. **We are unconvinced that, from an objective standpoint, this is in fact a leading question** which would have been disallowed by the District Court upon proper objection.
>
> ¶ 45 Section 26–1–101(3), MCA, defines a "leading question" as "a question which suggests to the witness the answer which the examining party desires." M.R. Evid. 611 provides: "Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness' testimony." … whether or not leading questions will be allowed is a matter within the trial court's discretion.
>
> ¶ 46 *In People v. Williams*, 16 Cal.4th 635, 66 Cal.Rptr.2d 573, 941 P.2d 752 (1997), the California Supreme Court stated that **"[a] question calling for a 'yes' or 'no' answer is a leading question only if, under the circumstances, it is obvious that the examiner is suggesting that the witness answer the question one way only, whether it be 'yes' or 'no.' "** Williams, 66 Cal.Rptr.2d 573, 941 P.2d at 774 (quotations omitted). **The fact that the specific question to which Lindberg now objects on appeal is one which could be answered with a "yes" or "no" does not, ipso facto, make the question a leading question.** In order to establish deficient performance and prejudice, **Lindberg must show that the prosecution instructed or suggested to H.B. how the question should be answered,** and further that, had the objection been timely made, the District Court would have concluded that the question was leading and would be disallowed. Lindberg has failed to establish either matter. **Because the question was arguably not leading and because the allowance of leading questions is in any event a matter within the trial court's discretion**, we cannot say from a standpoint of objective reasonableness that counsel's performance in failing to object to this question was deficient, or that Lindberg was prejudiced by counsel's failure to object.
>
> (Emphasis added)
>
> 347 Mont. at 90-91.

In an earlier case, before the adoption of Rule 611(c), the Montana Supreme Court also held an objected-to question to be non-leading and thus allowable. The defendant was charged with assault with a pistol during a mining altercation in Jefferson County. The prosecutor called the victim:

> Defendant's first assignment of error is based upon the ruling of the court upon the question propounded by the county attorney to the prosecuting witness: **"Q. Were you afraid he might shoot you if you didn't?"** Appellant insists that the question propounded to the witness was leading and suggested the answer desired. One of the ingredients of the crime of assault in the second degree is as to whether the complaining witness was actually put in fear of immediate bodily injury, and that the circumstances of the case were such as ordinarily will induce such fear in the mind of a reasonable man. We do not see how a question could be framed to elicit the answer of the witness as to his fear of immediate bodily injury, which would be less objectionable than the question propounded to the witness in this case. If the question had been put in the alternative, as to whether or not the witness was actually afraid of the defendant doing him bodily harm if he did not obey the orders of the defendant, the courts generally would approve such a question. The question propounded could be answered "Yes" or "No," but the witness said, in answer to the question, "That is what I thought, if I didn't." **The question was not leading**. (Emphasis added)
>
> *State v. Karri*, 84 Mont. 130, 276 P. 427, 428-29 (1929).

So, "You were at the scene, yes or no?" is not leading. "You were at the scene, weren't you?" is leading. But both forms of this question seek preliminary information, so even the leading version should probably go without objection, because it helps develop the witness's testimony.

When you get to the guts of the case, though, you have to be much more careful and your opponent should be alert to, and make, the objection "Leading." Both of these questions are leading and the objection should be sustained:

"You saw the defendant, David Dastardly, there, didn't you?"

"And he raised the gun and shot Vanessa Victim?"

The lawyer here is clearly not just suggesting the answer, but in fact giving it.

The non-leading way to get the information is much slower and less efficient, but complies with the personal knowledge requirement of Rule 602:

"Did you see anyone at the scene?" "Yes."

"Whom did you see?" "A guy named David Dastardly, who

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was talking to a woman."

"How did you know who he was?" "We used to play city league softball on the same team."

"Are you sure of your identification of David?" "Absolutely."

"What happened next?" "David pulled out a gun and shot the woman."

TIPS FOR LEADING AND NON-LEADING QUESTIONS

The easiest way to comply with both the statutory definition and the purpose of Rule 611(c), is to get from the witness his or her own recollection of the matter in his or her own words. You should use journalistic wording in your questions to do just that:

"Who…."
"What…."
"When…"
"Where…."
"Why…."
"How…"

If we were making a movie, on direct the spotlight should be on the witness. The lawyer's only role is a short question, out of the view of the camera. The jury's attention is on the witness, who is the person who knows "Who [did] What When, Where and Why." If we were to graph out the Q and A, it should be like this:

Q. _____

A. _____

_____

_____

The questions are short, just enough to get the witness to understand what part of the story she should tell now. The answers explain to the jury what the witness saw or heard or tasted or felt or smelt (personal knowledge). Therefore, the witness answers at length, describing what she knows to the jury.

One of my favorite trial-teaching scenes is from the pilot episode of the (sadly discontinued) TV series "Conviction." A budding prosecutor is sent to court on her first solo trial. Within her first few questions of her first witness, the judge says "Sustained." She turns to him and says "Your Honor, there was no objection." He responds that he objected, and then instructs the bailiff: "Tell her." The bailiff says "No leading on direct." She says "Of course" and immediately resumes leading. The judge interrupts again, and the bailiff says, "Just ask 'What happened next'". The lawyer tries that, and it works. She is stumped for her next question, quiet for a minute, and then tries again: "What happened next?" It works every time, for her and for us.

The opposite is true when we can lead, either because we are doing a true cross-examination or because we have a special circumstance direct: the witness is having trouble communicating the basics, or the witness is an adverse party or associated with the adverse party (his mom), or the witness manifests hostility. Now, the lawyer is on center stage, and the witness is relegated to agreeing (or not) with the substantive statements the lawyer makes as part of the question. Cross should graph out like this:

Q. _____, right?[4]
A. Yes.
Q. And you agree that _____?
A. Yes.
Q. _____, correct?
A. Yes.

The cardinal rule when leading is to LEAD! Don't turn the reins over to the witness, who is by definition the friend of your opponent. As soon as she can disagree with you, she will. Worse, as soon as you give her a chance to run, she will. The predicates of the questions which you can and should ask on direct can be fatal on cross.

Example:

Q. You weren't there at Joan's house that night, were you?

A. No.

Q. You were across the river, right?

A. Yes.

Q. Your own house is across the river from Joan's?

A. Yes.

Q. About one hundred feet away?

A. Yes.

Q. And it was dark?

A. It was.

Q. How could you see Joan shoot Vivian? [Ouch! Here it comes!]

A. Well, I had just finished serving in the SEALS, and I had bought my own night-vision binoculars. I was outside trying them out. I am not proud of this, but I was kind of spying on Joan because I thought she was pretty attractive. I had crept right up to the riverbank on my side and climbed a tree so I was looking right at her dock. I could see what happened clear as a bell.

Don't you wish you had just left it at "It was dark?"

WHY CAN WE LEAD ON CROSS?

Rule 611(c), both in Montana and the federal system, explicitly allows leading questions on cross-examination: "Ordinarily leading questions should be permitted on cross-examination." The federal drafters explained that this simply

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4 The questions on cross can be longer, because they are actually assertions. Even so, beware the temptation to make them too long and/or complex. Every part you add to a single question raises the chance the witness could disagree. More importantly, if you have several good points, it is more persuasive to make them one at a time than to pile them all together.

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continued a long-standing tradition:

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

Advisory Committee Note to F.R.E. 611(c) (1972). The Montana Commission Comment is slightly more helpful on the question of why leading is allowed on cross:

> The subdivision also recognizes that leading questions should ordinarily be allowed on cross-examination **because the purpose of cross-examination is to discredit testimony and this is where leading questions are most effective**. The use of the word "ordinarily" in the second sentence is intended to allow a court to deny use of leading questions when cross-examination is in form only, such as cross-examination of a party by his counsel after being called as an adverse witness or of a friendly witness. The use of leading questions is ultimately a question for the trial court under Rule 611(a). (Emphasis added)

My own explanation is that when you are doing cross-examination, you "ordinarily" have not called the witness in your own case, probably because her testimony is not helpful at the least, and harmful in the worst case scenario, to your case. The witness has given her story, and knows that you are trying to poke holes in it. Even if she isn't particularly associated with your opponent (she's not his mom, sister, wife, friend etc.), she has some pride in the accuracy of her version of the facts. She will naturally be wary of any suggestion you, her enemy, make. If the information in your leading question is not strictly true, she will not be inclined to agree. In essence, she is sitting on the witness stand with her arms crossed, waiting for a chance to disagree with you. Instead of being the compliant Carole King, your witness is Alanis Morissette, singing "Narcissus:"

> Dear narcissus boy,
> I know you've never really apologized for anything.
> I know you've never really taken responsibility.
> I know you've never really listened to a woman.

Better not ask her a non-leading question, allowing her to launch. Even if you lead, of course, you had better be absolutely accurate in every part of your question so you can make her agree with you, because for sure she won't if she doesn't have to. Therein lies the guarantee of accuracy in her answers, based on her own personal knowledge and not the suggestion of the questioner.

Thus, one of the very easiest objections to overcome is when you are on cross and your opponent objects to your question as "Leading, Your Honor." You only have to observe: "I'm on cross-examination" and the judge should overrule the objection.

HOW STRICT IS THE RULE?

The Rule itself is rife with possibilities for escape: "except as necessary to develop the witness' testimony;" on cross-examination; when the party calls a hostile witness, an adverse party, or a witness associated with an adverse party. The FRE Advisory Committee Note to the original version submitted by the Supreme Court to Congress acknowledged the laxness of the rule and specifically allowed leading questions to adverse parties and witnesses associated with them:

> Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774–778. **An almost total unwillingness to reverse for infractions has been manifested by appellate courts**. See cases cited in 3 Wigmore §770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of **suggestion rather than command**. [Emphasis added]

When the Court's version got to Congress, the House Judiciary Committee extended the Court's permissive language further, to clarify that the ability to use leading questions applied in both civil and criminal cases, and to "hostile witnesses" as well as to adverse parties and those associated with them. (On the other hand, the House added language to ensure that leading questions could not be used when a witness was friendly to the questioner, even if the examination itself was technically a "cross-examination," such as where one party had been called on "direct" by her opponent). The Senate Judiciary Committee was skeptical that the House changes improved the Court's proposed rule, but in the end concluded that the changes were acceptable:

> However, concluding that it was not intended to affect the meaning of the first sentence of the subsection and was I, intended solely to clarify the fact that leading questions are permissible in the interrogation of a witness, who is hostile in fact, the committee accepts that House amendment.

Long before the FRE and, in particular, Rule 611(c) were adopted, the U.S. Supreme Court considered the effect of leading questions in a case arising in Montana. Alfred J. Urlin sued the Northern Pacific Railroad for personal injuries he suffered in a derailment. The jury returned a verdict for $7500 (which in 2013 dollars would be $208,350). The railroad appealed, partly because of allegedly leading questions put to one of the medical witnesses at trial. Without deciding whether

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in fact the question was leading (I don't think it was), the Court overruled the error, saying:

> The first assignment avers error in permitting the medical witnesses who testified in behalf of the plaintiff to be asked **whether the examinations made by them 'were made in a superficial, or in a careful and thorough, manner.**' It is urged that this question was objectionable,… as leading, … It cannot be safely said that in no case can a court of errors take notice of an exception to the conduct of the trial court in permitting leading questions. But such conduct must appear to be a plain case of abuse of discretion.' **We are not aware of any case in which a new trial has ever been granted for the reason that leading questions, though objected to, have been allowed to be put to a witness.**' Green v. Gould, 3 Allen, 466. 'The allowance of a leading question is within the discretion of the court, and is not ground for reversal.' *Insurance Co. v. Groff*, 87 Pa. St. 124. 'Circuit courts must be allowed the exercise of a large discretion on the subject of leading questions.' Parmelee v. Austin, 20 Ill. 35. (Emphasis added)
>
> N. Pac. R. Co. v. Urlin, 158 U.S. 271, 273, 15 S. Ct. 840, 841, 39 L. Ed. 977 (1895).

The Montana jurisprudence is similar. MRE 611(c) contains language generally prohibiting leading questions on direct, but with specific exceptions for hostile witnesses and those identified with adverse parties, as well as when "necessary" to develop the testimony. The Montana cases, discussed more specifically below, show the same inclination as the federal courts to support the trial judge in her discretion on this point. The Montana Commission Comment to 611(c) acknowledged this:

> The cases have also indicated that allowing leading questions where improper is a technical error and will only rarely be grounds for a new trial. Hefferlin v. Karlman, supra; State v. Kanakaris, 54 Mont. 180, 183, 169 P 482 (1917); and State v. Collett, supra. The cases have also recognized some of the exceptions to the rule generally disallowing leading questions on direct examination. In State v. Spotted Hawk, supra, the Supreme Court found that when witnesses were illiterate or unable to speak English, examination should be allowed by leading questions, a view affirmed in State v. Collett, supra at 478. In Hefferlin v. Karlman, supra, the court held it was within the sound discretion of the trial court to permit leading questions to establish a foundation, for it was a preliminary matter. Finally, in State v. Karri, 84 Mont. 130, 136, 276 P 247 (1929), the court held it was proper for the prosecution to ask a leading question which contained specific words which established an element of the crime.

Thus, both state and federal courts recognize the rule against leading on direct, but trial courts' rulings on leading objections are almost always affirmed on appeal.

MONTANA CASES ON 611(C)

In *City of Kalispell v. Miller*, 2010 MT 62, the City charged Miller with obstructing a police officer. Miller had called the City police dispatcher and reported that her lover, Benware, was with her at the bar. In fact, Benware had left the bar after an argument and only 12 minutes before Miller made the call, had been in an automobile accident. Miller allegedly called to prevent the police department from responding to a call from another friend asking for a welfare check on Benware. (Benware was a city employee and Miller was afraid the welfare check might cause Benware to lose her job).

At trial, the City prosecutor called Benware as a witness and asked the Court for permission to treat her as a "hostile" witness under M.R.E. 611(c). The Court granted the request. On appeal, Miller argued that Benware was not hostile to the City and the prosecutor should not have been allowed to use leading questions to examine her. The Supreme Court affirmed the trial judge's decision as within its discretion, commenting:

> ¶ 27 There is no question that Miller and Benware had a close association at the time of this trial however the relationship might have been characterized for the jury[5]. Accordingly, under the text of the rule, interrogation by leading questions would be permitted because Benware was clearly "identified with an adverse party." While the better course on remand would be for the State to establish hostility on direct examination before seeking to treat Benware as hostile, we cannot conclude under the text of the rule that the court's preliminary ruling in this regard was an abuse of discretion….
>
> ¶ 28 …we affirm … the Trial Court's decision allowing Benware to be treated as a hostile witness.

In the *Miller* case, the Court distinguished *State v. Anderson*, 211 Mont. 272, 686 P.2d 193 (1984). Anderson was charged with sexually assaulting three young girls, one of whom was his stepdaughter. The State listed the stepdaughter as a witness, but did not call her at trial. Anderson then called her in his defense case, and asked that she be treated as "hostile." The trial judge denied the motion until the girl's testimony revealed hostility. When she did testify, without leading questions, she absolved Anderson. The Supreme Court affirmed the trial judge's decision to require non-leading questions as within his discretion.

The *Miller* court acknowledged, "the well-known exception to the general provision against leading questions exists when the witness is a child (see *State v. Eiler*, 234 Mont. 38, 46, 762 P.2d 210, 215 (1988) and *Bailey v. Bailey*, 184 Mont. 418, 421,

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5 Another issue in this case is whether the City should have been allowed to introduce evidence that the relationship between the two women, Miller and Benware, was an intimate one. The Court divided sharply on this point, holding 4-3 that this was error and remanding the case for a new trial.

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603 P.2d 259, 261 (1979)),” but distinguished those cases from *Anderson* and found that *Anderson* supported its affirmance of the trial court decision in *Miller:*

> ¶ 26 …In *Anderson*, despite clear precedent that a demonstration of hostility was not required before a child witness could be interrogated with leading questions, we nonetheless acknowledged a trial court’s broad discretion to issue such a ruling and deferred to it. We do so here as well.

In *State v. Eiler*, 234 Mont. 38, 762 P.2d 210 (1988), the victim/witness of the alleged sexual abuse was an 8 year old. The trial judge allowed the prosecution to use leading questions to examine her, and the Supreme Court affirmed:

> In the case on appeal, Dr. Jarvis testified that S.A. and other children who are involved in sexual abuse cases, do not want to talk about the incident. S.A.’s videotaped deposition clearly corroborates Dr. Jarvis’ expert opinion that child victims of sexual abuse are reticent witnesses. The trial court also noted in its memorandum on the competency issue, “it is noticeably difficult for her to testify about her experiences, a circumstance which is understandable and not unusual for a child witness in this type of case.” We find that there was no abuse of discretion by the District Court for allowing leading questions by the prosecution.
>
> 234 Mont. at 46.

State v. Hibbs, 239 Mont. 308, 780 P.2d 182 (1989), involved two child witnesses who were 6 and 7 years old. The Court here held that leading questions by the prosecutor were within the trial court’s discretion, even without the sort of express findings the trial judge made in *Eiler*:

> Hibbs objected to the leading nature of the prosecution’s direct examination of two child victims and argues that the prosecution failed to establish that leading questions were necessary to develop the witnesses’ testimony. However, in *Bailey v. Bailey* (1979), 184 Mont. 418, 603 P.2d 259, 261, this Court set forth an exception to the general rule against leading questions on direct examination where a child witness is involved. **The rationale behind the exception is that questioning a child is a difficult task**. See *State v. Eiler* (Mont.1988), 762 P.2d 210, 45 St.Rep. 1710; *State v. Howie* (Mont.1987), 744 P.2d 156, 44 St.Rep. 1711. As this Court stated in *Eiler*, 762 P.2d at 215, whether or not leading questions will be allowed is a matter for the trial court’s discretion. See also *Bailey*, 603 P.2d at 261. The District Court need not make express findings that leading questions are necessary. We hold that the questioning was proper.
>
> 239 Mont. at 312.

Bailey v. Bailey, supra, was a divorce case, in which custody was disputed. The judge interviewed the parties’ children in chambers and then awarded custody to their mother. The father argued on appeal that the judge erred in asking the youngest child leading questions (the case does not give the age of that child). In affirming the award and the procedure, the Supreme Court quoted from both the Montana Commission Comment and the Federal Advisory Committee note:

> **Leading questions may be asked if necessary to develop testimony**, Rule 611(c), Mont.R.Evid., and whether or not they will be allowed is a **matter for the trial court’s discretion**. See Commission Comment to Rule 611(c). **One of the well known exceptions to the general provision against leading questions is when the witness is a child**. Advisory Committee’s Note to Federal Rule 611(c), (1972), 56 F.R.D. 183, 275. **Here, where counsel noted at oral argument that the youngest child was rather withdrawn**, the asking of leading questions is not an abuse of discretion. (Emphasis added).
>
> 184 Mont. 421.

CONCLUSION

That was interesting, wasn’t it?

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

ABCs of body disposal: Anatomical gifts, burial and cremated remains

By Twyla Sketchley

When clients engage in estate planning, they give little thought to the disposition of their remains after death or to ensuring their directions, be they religious, moral, ethical, or eccentric, are followed by their loved ones. This article will address the importance of the estate planning discussion regarding a client's remains as well as options for those individuals with specific disposition requests. This article will also provide a brief summary of the laws that affect the disposition of human remains regardless of a client's wishes.

Nearly every Last Will & Testament contains a sentence directing the disposition of the deceased's remains and the payment of the last expenses within the requirements of the law. Seldom do these sentences offer direction to the personal representative or loved ones regarding disposition. Occasionally, a Will might direct the deceased's remains be dealt with in a "Christian manner." However, due to the plethora of Christian beliefs regarding the disposition of human remains, that statement provides little, if any, guidance and may require family members to guess at its meaning. Attorneys can and should do more to explore disposition considerations with clients and assist a client in ensuring their requested arrangements are followed after a client dies.

Each state regulates the disposal of human bodies and remains within its borders, including the authority to make disposition arrangements. The disposition of human remains can include individuals making an anatomical gift of their bodies, which is donating the body or body parts for specific purposes, including transplantation.[1] Human remains, before or after an anatomical gift, can be buried or cremated. Burial of human remains can be in a cemetery or burial ground.[2] Cremation must be done in accordance with MCA § 37-19-701 et. seq.

Individuals can direct their own disposal by making preneed, prepaid arrangements and those arrangements must be honored unless otherwise revoked in compliance with Montana law.[3] In addition, the individual can designate someone to make decisions regarding the disposition of their remains either in their properly executed Last Will & Testament, or in a separate writing.[4] If there is no written designation of someone to dispose of remains, Montana law provides a preset hierarchy of those who can authorize the disposition of a deceased's remains.[5]

When discussing the disposition of human remains with a client, an attorney should discuss who the client believes would most likely honor the client's wishes. This is particularly important in cases where a client has specific desires that may be considered extraordinary. Extraordinary wishes are dependent upon a client's situation. These wishes may be contrary to family tradition, require adherence to particular religious tenents, support an important belief of the client during the client's lifetime, or include non-traditional remain disposal.

ANATOMICAL GIFTS

More than 119,000 people are awaiting organ transplants.[6] Of those, nearly 20 will die each day without receiving a life saving organ donation.[7] According to the federal government, one anatomical gift can save up to 8 lives.[8] For clients who want to give of themselves, even in death, anatomical gifts may be a good way to dispose of their remains. Anatomical gifts can be made for the purposes of "transplantation, therapy, research, or education."[9] Individuals can donate their organs or bodies to a variety of entities, including medical schools, research institutes, organ and tissue banks, and even individuals for transplants.[10] Montana State University has a specific body donation program for medical education.[11] Clients should always be encouraged to tell their families of their wishes to become an organ donor.

There are also international body donation programs like that associated with Body Worlds. Body Worlds is an educational exhibition program that uses donated human bodies or human body parts to show body function, disease processes and body systems.[12] Bodies donated to Body Worlds are subjected to a chemical preservation process called plastination so that they can be displayed without decay or deterioration.[13] The donation of a body to Body Worlds is

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1 MCA § 72-17-201
2 MCA § 37-19-803
3 MCA § 37-19-903
4 MCA § 37-19-904
5 Ibid.
6 http://organdonor.gov/index.html
7 Ibid.
8 Ibid.
9 MCA § 72-17-201
10 MCA § 72-17-202
11 http://www.montana.edu/mbdp/FAQ.html
12 Body Worlds Prelude, http://www.bodyworlds.com/en/prelude.html
13 The Plastination Process, http://www.bodyworlds.com/en/plastination/plastination_process.html

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extraordinary in any context. Therefore, Body Worlds provides potential donors with extensive information about the process and why donation is important.[14] To ensure that disposition is made in this manner, clients should make this disposition in writing and designate someone to carry out the donation after death.

After an anatomical gift is made, human remains may be left and require proper disposal. This can be done by burial or cremation. While burial in a traditional cemetery is what most people consider "normal," cremation is becoming more popular[15] due in large part to the increasing costs of a funeral versus a cremation.[16]

BURIAL OPTIONS

While more people may be turning to cremation as their preferred means of body disposal, burial is still the most common disposition of human remains. When most people think of a funeral, they are thinking of a traditional burial, including the pageantry by which the deceased is honored. This includes a coffin, a burial plot in a cemetery, a vault in which the coffin is placed, embalming the body, a formal viewing or a wake prior to the funeral, a formal funeral, transportation to the cemetery, the internment, a clergy member eulogizing the deceased, flowers, and a grave marker.[17] This celebration may also include a multi-media presentation, written programs, and even memorial t-shirts or other objects given to mourners to commemorate the deceased's life.

As the United States has become more environmentally conscious, so has burial process. Growing in popularity are "green" burials or natural burials.[18] Green burials are promoted as more kind to the environment and a more natural state for the disposition of remains that even cremation. Green burials require a deceased to be buried, without being embalmed, in a bio-degradable coffin, wearing only natural fibers and without the vaults in which coffins are placed in traditional cemeteries. While there are no "green" cemeteries, yet, in Montana,[19] some family burial grounds would be considered "green" if decedents are buried, without embalming, wrapped in natural fibers and in coffins made of natural biodegradable materials. Some religious traditions may also require what is considered a "green" burial.[20]

Another form of burial, above ground burial, is done in an above ground vault. While this form of burial is now rare, a good example, and one that attracts hundreds of thousands of tourists a year, is the above ground cemeteries of New Orleans.[21] Folklore states that above ground burial was required because New Orleans was below sea level, preventing in-ground burial. However, this is likely untrue. Most New Orleans burials are now required to be in-ground although there are some rare exceptions for vaults owned and used in certain above-ground cemeteries still used in the city.[22]

CREMATION OPTIONS

Over the past several years, cremation has become more popular. Cremation occurs when human remains are reduced to ashes.[23] This can be done using heat, as is required in Montana,[24] or with the use of a chemical process known as Alkaline Hydrolysis.[25] Cremation facilities are strictly regulated by the State.[26] The restrictions placed on cremation and crematories prohibit cremation of a decedent by funeral pyre[27] or in the Viking tradition of the deceased being set afloat on a flaming ship.[28] These rigid restrictions protect communities from the public health hazards and horrors associated with inappropriately disposed human remains, most recently illustrated by the famous Tri-State Crematory case from Noble, Georgia.[29]

While the method by which human remains can be cremated is limited in Montana, the way in which those remains can be disposed, once reduced to ash, is limited only by the imagination of the deceased, his/her family and modern technology. Cremated remains can be buried in a traditional cemetery with a traditional funeral or placed in a mausoleum or columbarium.[30] They can also be held by the family and even divided between members in ways that are meaningful to a deceased's loved ones.

For a more creative burial of cremated remains, a client can choose space burial.[31] Space burial was made famous by L. Gordon Cooper, Jr., one of the original Mercury 7 astronauts, and Gene Roddenberry, the creator of Star Trek.[32] According to Celestis, Inc., the company providing space burial, a symbolic portion of cremated remains is launched into space in a special capsule while a deceased's family and friends watch the launch.[33] Space burial is dependent upon the availability of spacecraft launches on which the Celestis company can place cremated remains.[34] Because space burial is an extraordinary disposition of human remains by anyone's account, Celestic, Inc. has a prepaid contract as well as advanced planning

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14 Body Donation, http://www.bodyworlds.com/en/body_donation.html
15 Ashes to Ashes: The Growing Popularity of Cremation, http://lightbox.time.com/2013/06/13/ashes-to-ashes-the-growing-popularity-of-cremation/; Cremation is the Hottest Trend In the Funeral Industry, http://www.nbcnews.com/business/cremation-hottest-trend-funeral-industry-1B8068228;
16 http://efuneral.com/the-average-cost-of-a-funeral/
17 How To Guide for Funeral Planning http://www.funeralwise.com/plan/how_to/
18 http://www.greenburials.org/
19 http://www.greenburials.org/FAQ.htm#Where_can_I_find_green_cemeteries_in_the_United_States
20 Funeral Customs Index, http://www.funeralwise.com/customs/
21 New Orleans Cemeteries, http://www.nolacemeteries.com/types.html
22 http://www.experienceneworleans.com/deadcity.html
23 http://en.wikipedia.org/wiki/Cremation
24 MCA § 37-19-101(11)
25 http://alkalinehydrolysis.com/
26 MCA § 37-19-701 et. seq.
27 Definition of funeral pyre, http://dictionary.reference.com/browse/funeral+pyre
28 Modern Viking Funeral, http://www.creative-funeral-ideas.com/viking-style-funeral.html
29 http://www.timesfreepress.com/news/2012/feb/12/horror-in-noble/
30 MCA § 35-21-801 et. seq.
31 http://www.celestis.com/
32 Space Burial, http://en.wikipedia.org/wiki/Space_burial
33 http://www.celestis.com/faq.asp
34 Ibid.

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directions to ensure space burial is carried out.[35]

Another creative, even eye-catching, way to dispose of cremated remains is the creation of a diamond from a deceased's ashes.[36] These diamonds are created by subjecting cremated remains of human or pet to pressure and force, similar to that in nature.[37] Once the diamond is created, it is cut and can be set in jewelry. Family members can choose from a variety of colors and sizes, with advance prices set for each selection.[38] The costs of diamond creation are in addition to the costs of cremation.

For individuals looking for a lasting monument for their cremated remains, but find diamonds to be too flashy and space burial beyond their reach, there is always the coral reef.[39] Cremated remains are mixed with concrete and shaped to help create a coral reef habitat.[40] Family members can add their own special markings and memorials to the concrete habitat, by placing handprints or inscriptions in the concrete prior to its placement in the ocean or gulf.[41] This too would be considered an extraordinary disposition of remains so should be designated in writing and prearranged.

Often clients merely want their cremated remains scattered in a particular place of meaning to them or their families. Scattering a deceased's ashes implicates issues of public health and possible desecration of human remains. If a client wishes to have their cremated remains scattered on land, the family must determine the ownership of the land on which the ashes are to be scatter. If the land is privately owned, permission must be granted by the landowner. It is best to get this permission in writing.

While many people approach scattering ashes in public places with a "don't' ask, don't tell" policy, scattering cremated remains in a public place may require special permitting and be subject to various restrictions, if it is allowed at all. Municipalities and states have a patchwork of rules and restrictions regarding scatterings so family members must consult with the local governing authority before scattering human remains. National parks can allow human remains to be scattered.[42] However, each park has its own permitting requirements and restrictions.

Scattering ashes in a body of water raises additional issues. Depending on the body of water, this regulation may associated with pollution implications as well as public health, including preventing communities from ingesting human remains. Before scattering ashes in a body of water, families should contact the government entity controlling the water to determine if cremated remains can be safely scattered and if so, how and where. In federally regulated waters, families may need to seek the permission of the Environmental Protection Agency.[43]

The disposition of human remains after death holds significant meaning to individuals, families and societies. For those clients with specific wishes regarding the final disposition of their remains, it is vital they are made aware of the options available to them, how to make the desire known to their families, how best to ensure those wishes are followed, and what the costs of the particular arrangements might be. While some may consider these discussions gruesome or grisly, clients with particular disposition requirements find them helpful and reassuring, laying to rest their fears of the unknown.

Twyla Sketchley *is the Chair of the State Bar of Montana Elder Assistance Committee. She is licensed in Montana and Florida. Her firm is located in Tallahassee, Florida and is focused on elder law, probate and guardianship.*

35 http://www.celestis.com/advance_planning.asp
36 http://www.lifegem.com
37 Ibid.
38 http://www.lifegem.com/secondary/LGPrices2006.aspx
39 Several groups create and manage memorial reefs, http://www.neptunesociety.com/memorial-reef, http://www.eternalreefs.com, http://www.greatburialreef.com
40 http://www.eternalreefs.com/about-eternal-reefs/faqs/
41 Ibid.
42 36 C.F.R. 2.62(b)
43 http://www.cremationsolutions.com/Scattering-Ashes-Laws-Regulations-c108.html

Statewide electronic filing quickly becoming a reality

By Ed Smith

As 2014 approaches, the Montana Judicial Branch is poised to begin e-filing in pilot courts. Through the hard work of several committees, elected officials, private attorneys and court employees, the project which began with an appropriation for $1,535,000 from the 2007 Legislature is now on the verge of becoming a reality with the initial development of a web browser-based electronic filing manger (EFM). This EFM will serve as the basis for a system that will eventually enable practitioners to e-file at every Montana court level—limited courts; district courts, and Supreme Court—all from a single web portal using a single sign-on name and password.

The EFM is being developed by LT Court Tech, a Thomson Reuters business. The Office of Court Administration (OCA), which is overseeing the implementation of this statewide project, awarded LT Court Tech the contract for e-filing in the fall of 2012 after the business submitted the winning bid among several vendors responding to the Judicial Branch's request for proposal and subsequent competitive bid process. The duration of the contract is for three years within which the company is charged with designing and developing a statewide e-filing system based on its product, C-Track E-Filing, which will be integrated with existing case management systems currently used at the various levels of courts in the state.

CONCEPT OF OPERATION

In January 2012 the Montana Supreme Court's Commission on Technology approved a concept of operation for statewide e-filing. According to the approved concept, e-filing will not be mandatorily imposed on the courts. Rather each court wanting to utilize e-filing will apply to the OCA with district court judge(s), clerks of district court, and limited court judges, as the case may be, signing formal agreements for their court. Using this approach, courts can come "on line" when ready to do so and will make a formal commitment to e-filing at that time.

Secondly, the concept of operation does not provide for a public access component. In other words users will not be able to sign on and conduct broad searches for any electronically filed case or document in the system. When users search the EFM, only those cases for which the user is a party or attorney will be returned in the search result. In this way, cases with confidential information and confidential documents will be protected from public viewing and from at large "data miners" seeking to obtain personal information remotely by searching the internet. Access to court records will remain as it is today, through the local clerks of court who are the statutory custodians of court records. In the future, individual courts may consider creating public access portals like the one developed by the Clerk of the Supreme Court that allows for public access searches of Supreme Court cases since 2006. However such public access components for individual courts are not part of this project.

PILOT COURTS

A key element of the OCA's implementation strategy calls for e-filing to be deployed in two separate phases, using pilot courts for designing, testing and refining the system. In August the Supreme Court's Commission on Technology (COT) approved pilot courts for these initial phases of e-filing. The first pilot court will be the Montana Supreme Court followed by all levels of courts in the Fourth Judicial District. The Yellowstone County Justice Court, all levels of courts of the Tenth Judicial District and the district courts of the Fifth Judicial District then will follow.

As a timeline, the OCA has a goal to begin e-filing at the Supreme Court by the end of this year or early 2014 and then on to the Fourth Judicial District and other pilot courts thereafter. Things are already beginning to move quickly as the initial design for appellate e-filing at the Supreme Court has largely been accomplished through work done over the summer and the OCA has scheduled an introductory meeting with stakeholders in the Fourth Judicial District for October 21, 2013.

However before e-filing at the pilot courts can begin, the Supreme Court will have to authorize temporary rules to govern e-filing during the pilot phases. A set of model rules for e-filing was submitted to the COT at the time it approved the concept of operation for e-filing. These rules have been preliminarily vetted by the E-filing Pilot Committee, a subcommittee of the COT's E-Filing and Remote Access Task Force and will continue to be reviewed by the working groups in the various pilot courts before being presented to the Supreme Court for final review and adoption.

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PHASE 1 AND PHASE 2

The first phase of e-filing at the pilot courts will encompass prosecutor-initiated cases. For example, Phase 1 case types will include: criminal (DC); juvenile criminal (DJ); abuse and neglect (DN), and involuntary commitment (DI and DD) cases. The focus on prosecutor-initiated cases allows the OCA to leverage existing government networks—both employee and technical—to facilitate efficient feedback from somewhat defined user groups such as city and county prosecutor's offices, the attorney general's office; and the state public and appellate defender's offices. This is not to say however, that e-filing will be limited to only government attorneys. Rather any attorney of record, in government or in private practice, will be allowed to e-file during the pilot phases in those case types where e-filing is allowed. Self represented litigants will not be eligible to e-file during the pilot phases.

After successful completion of Phase 1, the focus will switch from prosecutor-initiated cases to general civil cases during Phase 2 of the pilot implementation. The project plan anticipates a majority of core functionality of the EFM will have been worked out during Phase 1 of the project which should allow the work in Phase 2 to focus on modifications necessary to integrate civil case types into e-filing. Notably, Phase 2 implementation will include a payment component to facilitate the electronic payment and receipt of filing fees.

Statewide e-filing is an exciting prospect and while much has been accomplished already, most of the hard work of implementation lay ahead. As the project moves forward the Judicial Branch looks forward to working with members of the Montana Bar, judges, clerks of court and all stakeholders to make this system the best, most comprehensive and effective e-filing system it can be in order to better serve our citizens.

***Ed Smith** is clerk of the Montana Supreme Court and the chairman of the Montana Supreme Court Commission on Technology's E-Filing and Remote Access Task Force*

Montana/Member News

Justice Nelson wins ABA Commission on Sexual Orientation and Gender Identity Stonewall Award


Nelson

Achieving greater diversity in the legal profession depends upon recognition of the contributions of individuals from many different backgrounds, including those people of varying sexual orientations and gender identities. The purpose of the Stonewall Award is to recognize those lawyers, members of the judiciary and legal academia who have effected real change to remove barriers on the basis of sexual orientation or gender identity in the legal profession and the world, nation, state and/or locale, and to recognize those who have championed diversity for the LGBT community, both within the legal profession and impacting the greater human universe.

The 2014 winners are: Hon. James C. Nelson, Montana State Supreme Court (retired); Elaine Kaplan, United States Office of Personnel Management; Professor Stephen Whittle, Manchester Metropolitan University

The 2014 Award will be presented at the ABA Midyear Meeting on the evening of Feburary 8, in Chicago, Illinois.

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Court Orders

IN THE MATTER OF A MEMORIAM FOR JUSTICE JOHN CONWAY HARRISON

Summarized from a Sept. 18 order:

On March 27, 2013, this Court appointed the John C. Harrison Memoriam Committee (the Committee) for the purpose of preparing an appropriate memoriam on his life and service to the Montana Supreme Court and to the people of Montana. The Committee consists of the Hon. Jim Nelson, Chair, and Pamela Hunthausen, Flint Murfitt, Esq., Larry Epstein, Esq., Randy Gray, Esq., and Jean Bowman, Esq.

In accordance with this Court's Order the Committee has prepared, and has submitted to this Court, a Memoriam recognizing the importance of Justice Harrison's life and service to this Court, to the State Bar of Montana, and to the people of this State.

The Committee also moved that this Court set a date, time and place for a public proceeding in which the Committee will present the Memoriam to this Court, and that upon presentation, this Court enter an order accepting the Memoriam and requiring that it be published in a volume of the Montana Reports.

Therefore, good cause shown:

IT IS ORDERED that on the 29th day of October, 2013, at one o'clock p.m ., the Committee shall appear before this Court in the Courtroom for the purposes of presenting the Memoriam and honoring Justice John Conway Harrison.

State Bar News

Verify your contact information in the 2014 Deskbook & Directory

Don't be caught off guard. All changes to your contact information for the next edition of the Deskbook are due by **November 18, 2013.**

Send in your current information to Jill Diveley at:

Email: jdiveley@montanabar.org

Fax: (406) 442-7763

Mail: State Bar of Montana, P.O. Box 577, Helena, MT 59624

Attention all firms (2 or more attorneys only please): The law firm section at the back of the Deskbook is by request only, so if you would like to be included or if you have an update from last year's please send the information to jdiveley@montanabar.org by **November 18, 2013.**

Don't forget to include all affiliated attorneys and staff.

Continuing Legal Education

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

October

Oct. 16 — School U:An Educational Conference for Those Who Lead, Teach and Advise. Crowne Plaza, Billings. Sponsor: School Law Section. 5.5 CLE

Oct. 18 — 9th Annual Construction Law Institute. Sponsor: Construction Law Section. Hilton Garden Inn, Bozeman. 6.75 CLE.

November

Nov. 8 — New MT Uniform Trust Code. Billings. Sponsor: Business, Estates, Trusts, Tax & Real Property (BETTR) Law Section. 1/2 day on new Trust Code, other half to be determined.

Affordable Care Act simplified

By Jim Edwards and Richard Miltenberger
Mountain West Benefits

The Affordable Care Act (a/k/a "ObamaCare"), provides an opportunity for law firms to lower the cost of providing benefits and to leverage the nuances of the law to their advantage. Not all employers are going to use the law to their benefit, but they should: this article will attempt to simplify things so that you will be able to make sense out it and make plans for its implementation beginning January 1, 2014.

Some of the key features of the law are the requirement that all individuals purchase health insurance, and then making marketplace changes that simplify that purchase, and, most importantly, the law provides for a subsidy to most families so they can afford to buy coverage. Other elements of the law include coverage enhancements and the elimination of exclusions related to pre-existing conditions; the health insurance marketplace is also being revamped so that the traditional ways in which health insurance companies rated small groups and individual applicants. Other key features include the implementation of a new health insurance exchange which will be called the Montana Health Insurance Marketplace. This is not the actual health insurance company or policy, but will be much like Travelocity so as to enable health insurance shoppers to compare policies & premiums.

The law does little to lower the actual retail cost of policies, but for individuals who qualify for subsidies their out-of-pocket cost to purchase the health insurance may be much lower. Under the Act, the amount an individual will pay out of pocket for their health insurance policy on the Exchange is tied to their income and its relationship to the Federal Poverty Level (FPL) for example, a person who is single and earns $20,108 per year, has an income that is 175% of the FPL. The maximum amount this individual will have to pay for single insurance coverage is 5.15% of her income, which amounts to $86 per month.

For a family of four, earning $47,100 annually, that income equates to 200% of the FPL. This family will pay no more than 6.3% of their income towards insurance when purchased on the exchange; this means their premium share will be no more than $246/month. There are four levels of coverage available on the Exchange, the best being platinum which is designed to cover 90% of health care expenses. Next is the gold; the third level is silver, and the final level of coverage is bronze, this level of coverage is intended to pay for 60% of the individuals health care expenses. Since the amount of the subsidy is tied to the second least expensive silver policy offered on the exchange, it is possible for a person to lower their out-of-pocket premium by simply moving down to the less expensive bronze coverage level.

Perhaps the most onerous provision of the ACA has been delayed until January 1, 2015; this is the implementation of the employer "play-or-pay" penalties. A law firm with 50 or more employees — which either offered no health insurance or what the law deems as unaffordable or insufficient insurance, was to be subject to either a tax penalty. This has been delayed until 2015, with some hoping it will never go into effect. The measurement of the fine, and even the determination of the number of employees can get rather complex, and as this article is intended to provide a general review of the affordable care act, we will not attempt to explain this large employer element in detail.

Many law firms in Montana have employees who are part time, or for other reasons are not currently insured. Be sure your employees are aware of the opportunity to avoid the penalty and get coverage—if they are eligible for a subsidy, it may be best for them to obtain coverage on the Exchange. If there is not a subsidy available at their income level, be sure they know how and when to enroll on your employer plan. Coverage bought on the Exchange will not be tax advantaged, so higher paid employees will probably want to maintain employer based coverage. The State Bar has a program in place that is "self-funded" and so escapes most of the new taxes of the ACA; as an employer plan it is tax free to the firm and to the employee. Make sure you learn about your choices and educate your employees. Two good online resources are enrollamerica.org and montanabusinesshealthnetwork.org. Use the new law to the advantage of your firm and help your clients understand it; it can improve the health of your employees, and your bottom line.

Jim Edwards is an advisor to the Montana State Bar health trust. Send him your questions at info@askmwb.com

Montana/Member News

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Althauser joins Montana Legal Justice

Montana Legal Justice, PLLC in Missoula is proud to welcome attorney Meri Althauser. Meri graduated with honors from the UM School of Law in 2011 and was an associate with Phillips Haffey PC before joining Montana Legal Justice. Together with partner Julie Brown, Meri offers almost exclusively unbundled and sliding-scale legal services for clients who do not qualify for free legal services but who cannot afford full-priced legal fees. Practice areas include family law, adoptions, guardian ad litem, landlord-tenant, simple estate planning, small business issues, contracts, human rights issues, and chapter 7 bankruptcy. Meri and Julie also handle appeal work, limited-scope research issues, and will consider all types of legal matters for qualification for their affordable services. Please call Montana Legal Justice for more information at 406.356.6546.

MEMBER NEWS, next page

MEMBER NEWS, from previous page

Semmens joins Jackson, Murdo & Grant

Jackson, Murdo & Grant, P.C. has announced that John M. Semmens has joined the firm as an associate. John was born and raised in Great Falls. He received a B.A. in History from Carroll College and his law degree from the University of Montana School of Law. While in law school, John completed his clinical requirements by clerking for U.S. District Judge Donald W. Malloy. John also studied general securities and retail broker operations as a legal intern for D.A. Davidson & Co. After graduation, he spent a year clerking for Justice Beth Baker of the Montana Supreme Court before joining Jackson, Murdo & Grant in the practice of law.

Kimmet joins Karell Dyre Haney


Kimmet

Karell Dyre Haney PLLP is pleased to announce that Candace L. Kimmet has joined the firm as an associate attorney. Candace received her BS degree from the Wharton School of the University of Pennsylvania in 2007 with a concentration in finance and her law degree from the University of Pennsylvania Law School in 2010. During law school, she interned with the Honorable Richard J. Sullivan in the Southern District of New York and at a private law firm in New York City. After graduating from law school, Candace worked as an attorney at Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York City, where she was involved in a wide variety of commercial transactions, including mergers and acquisitions, securitizations, investment fund formations and structured financings. Before joining Karell Dyre Haney, Candace clerked for the Honorable Russell C. Fagg, Montana Thirteenth Judicial District. Her primary practice areas include real estate and commercial law. Candace can be reached at (406) 294-8489 or ckimmet@kdhlawfirm.com.

Ritter selected as associate judge of Water Court

Chief Justice Mike McGrath announced he has selected Douglas Ritter to serve as the associate judge of the Montana Water Court. Ritter's appointment is effective September 16, 2013. Ritter was selected from a list of three candidates recommended by the Judicial Nomination Commission.

"After interviewing all candidates, it was clear Doug was the person most qualified to move into this position. He has spent a career at the Water Court and fully understands what needs to be done to provide finality to water users." said Chief Justice McGrath.

The Associate Judge position was created by the 2011 Legislature to expedite the adjudication of water rights in Montana. Chief Water Judge Russ McElyea moved from the associate to the chief position when long-time Chief Water Judge C. Bruce Loble retired in July. The Water Court was created by the 1979 Montana Legislature. It has exclusive jurisdiction over the adjudication of all water-rights claims in Montana. More than 200,000 water rights claims will eventually be adjudicated through the Water Court.

Ritter, of Bozeman, was a senior water master with the Water Court. He has been a water master since 1992. Before his time at the Water Court, he was in private practice. He received his law degree from the University of Montana and a bachelor's degree in history from Montana State University. Ritter is active in a variety of community activities including the Eagle Mount adaptive ski program.

Ritter's appointment is effective until July 2016. He will earn $117,600 per year.

Job Postings and Classified Advertisements

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

ATTORNEY POSITIONS

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SENOR COLLECTIONS ATTORNEY: Colorado-based collection law firm seeks a Senior Collection Litigation Attorney to manage daily legal operations in its Montana office. Frequent appearances in Montana Courts for Return Hearings and Trials, Mediation Sessions, and preparing cases for Trial. Oversee a small staff of Montana-based paralegals and administrative staff. Email your resume and salary requirements to jobs@mjfirm.com.

ATTORNEY: Dawson County Domestic Violence Program is seeking a full time attorney to represent victims in Eastern Montana. Salary depends on experience. Send a resume and a sample of your legal writing. Applicants must be admitted to practice in Montana. Send to: DCDV Program, P.O. Box 505, Glendive, MT 59330.

TENURE-TRACK PROFESSOR (posted 9/6): The University of Montana School of Law invites applications for tenure-track Assistant or Associate Professor of Law position teaching Property Law. The position is a ten-month contract beginning fall semester 2014. To view full job descriptions, minimum requirements needed, and to apply, go to http://university-montana-hr.silkroad.com/epostings. **ADA/EOE/AA/Veterans Preference.**

JOBS/CLASSIFIEDS, next page

JOBS/CLASSIFIEDS, from previous page

ATTORNEY - MINOT, ND: Entrepreneurial Attorney wanted to join a mature, successful practice in the middle of the Bakken oil boom with the following qualifications: at least 5 years experience in estate planning; experience in farm and business transition planning; preference given to those with some tax background. Practice is located in Minot, ND. Send resume to attorney.resume@yahoo.com. Please indicate salary requirements. Salary will be commensurate with experience.

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