

MONTANA LAWYER

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ANNUAL MEETING 2013

Also in this edition:

- > Annual Meeting schedule update
- > Medicare 101
- > Patent Law: Bowman v. Monsanto
- > Evidence Corner: Rules
- > Education Advocacy
- > Q&A with ALPS CEO
- > Past president offers tips on retirement

Farewell to an institution

Hon. Jack Shanstrom retires from the federal bench this month

Judge Shanstrom was appointed United States Magistrate Judge for the District of Montana in 1983. He served as a magistrate in Billings, Montana, until he was appointed United States District Judge in 1990 by President George H.W. Bush. He served as chief judge of the district from 1996 until he assumed senior status in 2001. Judge Shanstrom has maintained a regular case load since his transition to senior status, resulting in a combined 30 years of service on the federal bench in the District of Montana. — *U.S. District Court*

Retrospective inside ...



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Corrections

- In the August Montana Lawyer, we inadvertently transposed an MCA reference in the article, "Primer on compelling production of patient health care information." On the last page of the article, second-to-last paragraph, the final MCA reference should read "\$50-16-540."
- Steven Foster was erroneously listed as receiving a 50-Year Pin. Mr. Foster is deceased.
- Absent from the list of Distinguished Service Awards List in the August issue were: Mike Alterowitz, Outgoing Chair of the Ethics Committee; Susan Gecho Gobbs, Outgoing Chair of the CLE Institute.

Citizens United

A guarantee for the best judges that money can buy

By Jim Nelson, Montana Supreme Court Justice (retired)

Senator Jon Tester recently introduced a proposed federal constitutional amendment (<http://goo.gl/aGIwtN>) that would end corporate personhood rights and would, thus, purportedly overturn the U.S. Supreme Court's *Citizens United* decision. The utility of such an amendment may be debated, since *Citizens United* was based on First Amendment free speech law and did not refer to corporate personhood as a basis for the decision.

That said, *Citizens United* ushered in the unprecedented use of dark, institutional mega-money to influence elections and, effectively, to silence the voices of individual small contributors and ordinary voters. The Supreme Court's approach and subsequent court cases have chipped away at contribution limits, imposed upon individuals, corporations, unions, special interests groups, "non-profits," and trade associations. *Citizens United* has resulted in millions of dollars pouring into elections with little or no disclosure of the source of funding and with little, if any, accountability for truth and accuracy of the messages. Candidates are being "marketed" to voters in the same fashion that fast food and frozen vegetables are hawked to consumers.

But, according to the Supreme Court, while contributions directly to a candidate breed corruption, corporate expenditures *on behalf of* a candidate do not have any such corruptive effect.

For those living in a parallel universe that nuance may make sense, but, in reality it is a dichotomy grounded in utter fiction. Worse, this canard presents a clear and present danger for the majority of states, like Montana, where voters elect their judges and justices. *Citizens United* applies to judicial elections, too. Make no mistake; its effects will come to dominate judicial elections.

Montanans, rightly, demand a judicial system that is grounded in two bedrock principles—impartiality and independence. Those principles are threatened when corporate and special-interest money drive judicial elections. The proof

is found in an objective, non-partisan report—*Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*.¹ (<http://goo.gl/wpdVsT>).

This study, released in June, was sponsored by the American Constitution Society for Law and Policy. *Justice at Risk* provides critical data on the effect of campaign expenditures on judicial behavior from 2010-2012. The empirical research underlying *Justice at Risk*, involved a team of scholars guiding the work of numerous research fellows. Over 2,345 business-related supreme court decisions from all 50 states were examined for the two year period, and these data were merged with over 175,000 contribution records that detailed every reported contribution to a sitting state supreme court justice. *Justice at Risk's* findings are disturbing.

For example, during the last decade contributions from business groups, and lawyers and their respective lobbyists, have dominated interest group contributions—with unions, by contrast, contributing a small fraction to judicial campaigns.

While contributions to candidate campaigns from business groups and from those representing the plaintiffs' bar are approximately equal (30% vs. 28%) business groups overwhelmingly dominate interest group spending on television advertising—the most

expensive and effective form of campaign activity.

Certainly, any interest group that is able to marshal campaign contributions might exert influence over judicial elections. However, with their unambiguous agenda favoring business and pro tort-reform, business groups typically focus on electing justices with that pre-disposition. Moreover, *Justice at Risk* shows that business groups regularly disguise their campaign support by channeling funds through nonprofit groups with inspirational but completely opaque names.

On the other hand, the study also demonstrates that the

Citizens United ushered in the unprecedented use of dark, institutional mega-money to influence elections and, effectively, to silence the voices of individual small contributors and ordinary voters.

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¹ This report can be examined on-line at www.acslaw.org/state-courts/justice-at-risk



The end is the beginning

I have seen it happen every year — out with the old, in with the new. The changing of the guard is a sad moment.

Suddenly, you are no longer involved in the day-to-day operations of the State Bar. You will miss your fellow trustees and the State Bar staff. Now it is my turn to begin walking the plank.

In the past year, I have traveled over 20,000 miles as President of the State Bar of Montana. I have had the privilege of meeting with members of judiciary across the state, leaders of state and federal government, law school leaders and students, new admittees to the bar, leaders of the American Bar Association and other state bar associations, and, most importantly, members of our bar across the state. I have discovered that despite being one of the smallest state bars in the United States, we are doing a good job of taking care of the business of practicing law. Rather, an outstanding job.

The problems we face as attorneys in Montana are the same across the country – unrepresented litigants, challenging pro bono efforts, aging demographics of our membership, jobs for our new admittees, attorneys with overwhelming student loan debt, impaired attorneys, the challenges of technology, developing and improving relationships with the judiciary and legislative bodies, etc. I have come to realize that these problems cannot be eliminated; however, we must continue our never ending efforts to find solutions and mitigate the damages these problems cause.

Most local bars in Montana are doing an amazing job in their communities of dealing with the woes we face. It is important for local bars to be connected with the State Bar. This year we started a Local Bar Leadership program and brought the local bar presidents to Helena. We also visited with local bars in their communities. We need to continue the dialogue we have started. State Bar leaders must be aware of what is going on at the local level, and local bar leaders need to know how the State Bar can be of assistance. If this is not done, the State Bar is not relevant to its membership. Much can be accomplished when both entities work together.

As my tenure as president comes to an end, I can look back and say that this has been the best year of my legal career. I am not referring to financial success. No attorney can serve in this position without making sacrifices. I am referring to the pride I feel that as an attorney I can make a difference in the lives of my clients and my community. One of the proudest days in my life was when I was accepted to law school. My involvement

with the State Bar of Montana has renewed my pride in being a member of the legal profession.

There are many members of the Montana Bar that have been of tremendous assistance to me in my journey. I must first thank our Executive Director, Chris Manos. The State Bar is fortunate to have an executive director who is not only an attorney, but who has practiced in Montana as a county attorney, sole practitioner and member of a law firm. He understands the challenges all of us face. Chris has earned the respect not only of the members of the Montana legal community, but he is also highly respected on a national level. I could not have done this job without Chris.

My predecessor, Shane Vannatta, has been my mentor and become one of my best friends. I thank him for his advice and counsel.

I would not have met nor had the privilege to work with one of the greatest attorneys in Montana if I had not been involved with the State Bar. I am referring to none other than Professor Martin Burke. Despite his recent “retirement,” he continues to be dedicated to making our profession the best it can be.

Thank you to the State Bar staff. This small staff of 12 full-time and part-time employees handles everything from the administrative duties of the various Supreme Court Commissions to publishing the monthly Montana Lawyer Magazine. Betsy Brandborg, our Bar Counsel, is allegedly a “part-time” employee. There is seldom a day that goes by where she is not dealing with a multitude of issues involving our membership either from the office or her home.

Finally, I must thank my local bar in Yellowstone County. I have received tremendous support from Billings Trustees and my friends, Vicki Dunaway and Ross McLinden; Damon Gannett, ABA delegate and Past President of the State Bar; Mark Parker, our new President-Elect; and, Gerry Fagan, Past President of the Yellowstone Area Bar Association. There are many more that I wish I could personally thank.

Right about now, I should be saddling up and riding off into the sunset. Yet, I am reminded of a quote from T.S. Eliot, “What we call the beginning is often the end. And to make an end is to make a beginning. The end is where we start from.” I look forward to continuing to be of service in new ways to our noble profession!

plaintiffs' bar typically represents a much more diverse range of clients and economic interests, and is, thus, less inclined to favor a judicial candidate with a particular ideological agenda or pre-disposition.

Justice at Risk shows that holding factors like individual justice characteristics, ideology and data about state law and political climate constant; there is a significant relationship between business group expenditures to state supreme court justices and the justices' votes on cases involving business matters. The numbers are stark—the more campaign expenditures a justice receives from business interests, the more likely the justice is to vote in favor of the business in court cases.

While some might argue that the judges are simply following their own ideological preferences and that business expenditures for a judge merely reflect businesses' desire for pro-business judges, *Justice at Risk* demonstrates the opposite. The report found that the influence of corporate campaign contributions goes far beyond ideological leanings. The largest influence was on judges affiliated with the Democratic Party, who are assumed to be less ideologically predisposed to favor business interests.

Importantly for Montana judicial elections, the data show expenditures influenced judges' decisions in both partisan and

non-partisan election systems. The report reveals the influx of expenditures generated by *Citizens United* and subsequent cases is having significant impact on judicial impartiality. The data demonstrate there is stronger correlation between business contributions and judges' voting in the period from 2010-2012, compared to 1995-1998. And, unfortunately, *Justice at Risk*, concludes that there is no sign that the politicization of supreme court elections is lessening. Indeed, powerful interest groups' influence on judicial outcomes will only intensify.

While Montana judicial elections have been, for the most part, free of mega- money influences, our State is not immune from the *Citizens United* effect. Montana's Corrupt Practices Act was mostly declared unconstitutional by the Supreme Court. The Ninth Circuit recently declared unconstitutional Montana's statutory ban on partisan endorsements and expenditures—in what are supposed to be non-partisan elections. New challenges are being raised--all with a purpose of destroying the bedrock principles of judicial impartiality and independence.

For Montanans the battle lines are clear: we must fight for the fundamental right to settle our legal differences in impartial courts; we must condemn those who would destroy that ability; and we must reject efforts to marginalize the judicial system-- a co-equal, constitutional branch of government. If those battles are lost to the forces of *Citizens United*, then we must change the manner in which judges and justices are chosen under our Constitution. Justice is, indeed, at risk.

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Younkin, Wordal announce partnership

Cindy E. Younkin is pleased to announce Susan L. Wordal has joined her as a partner at Younkin & Wordal PLLC. Cindy is a 1989 graduate of Lewis and Clark Law School, Portland, OR, and has been a solo practitioner for 4 years after 20 years with Moore, O'Connell and Refling. She was a 3 term member of the Montana House of Representatives and Majority Whip. Susan is a 1990 graduate of the University of Montana School of Law and a 2nd generation Montana attorney. Susan is also a member of the Ethics Committee. She recently retired as the Chief Prosecutor/Assistant City Attorney for the City of Bozeman after 21 years of service. Their practice areas include: Estate Planning, Farm and Ranch matters, Water Rights, Family Law, Contracts, Elder Law, Employment Law, Legal Ethics and Professional Responsibility. They may be reached at: Younkin & Wordal, PLLC, 2066 Stadium Dr. Ste 101, Bozeman MT 59715. Cindy: 406-586-9060, younkinlaw@gmail.com and Susan: 406-581-4123, wordallaw@gmail.com.

Matovich, Murphy recognized in 'The Best Lawyers in America'

Carey Matovich and Brooke Murphy, both of Matovich, Keller & Murphy, P.C., have been selected by their peers for inclusion in the 2014 edition of The Best Lawyers in America. Matovich has been selected in the specialties of Bet-the-Company Litigation, Commercial Litigation and Litigation - Labor & Employment, and Murphy has been selected in the specialties of Commercial Litigation and Product Liability Litigation - Defendants. They both can be reached at 252-5500.



Matovich



Murphy

Holland & Hart attorneys recognized in 'The Best Lawyers in America'

Nine Holland & Hart Billings attorneys were selected by their peers for inclusion in The Best Lawyers in America® 2014: Jeanne Matthews Bender (Employment Law - Management, Labor Law - Management, Litigation - Labor & Employment), Shane P. Coleman (Litigation - ERISA, Litigation - Intellectual Property, Litigation - Patent, Patent Law), Kyle Gray (Appellate Practice), Charles W. Hingle (Banking and Finance Law, Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law), W. Scott Mitchell (Commercial Litigation, Employment Law - Management, Litigation - Environmental, Natural Resources Law, Personal Injury Litigation - Defendants, Product Liability Litigation - Defendants, Workers' Compensation Law - Employers), Elizabeth A. Nedrow (Employee Benefits (ERISA) Law), Laurence W. Petersen (Banking and Finance Law, Corporate Law, Energy Law, Natural Resources Law, Project Finance Law, Real Estate Law, Tax Law, Trusts and Estates), Jason Ritchie (Employment Law - Individuals, Employment Law - Management, Labor Law - Management, Labor Law - Union,

Litigation - Labor & Employment) and Robert L. Sterup (Commercial Litigation, Real Estate Law). Additionally, three Holland & Hart Billings attorneys were given the distinction of being named the only 2014 Billings "Lawyer of the Year" in their practice areas: W. Scott Mitchell (2014 Billings Product Liability Litigation - Defendants "Lawyer of the Year"), Laurence W. Petersen (2014 Billings Tax Law "Lawyer of the Year") and Jason Ritchie (2014 Billings Labor Law - Management "Lawyer of the Year").

Strickland, Baldwin partner to create new research and writing firm

Attorneys Wilton Strickland and Tim Baldwin have partnered to create a new law firm devoted to legal research and writing, primarily for other practitioners who need assistance with litigation and appeals. Their partnership is already off to a great start. You can learn more about Strickland and Baldwin, PLLP at www.mylegalwriting.com and read the testimonials of professionals who know of their quality work.

Wilton Strickland graduated from the University of Virginia School of Law in 2000 and practiced commercial litigation in Florida covering a wide variety of disputes until moving to Missoula, Montana, in 2010. For the past three years his practice focused on insurance defense, coverage, and bad faith until founding Strickland & Baldwin, PLLP, with Tim. Wilton is admitted to practice in Montana and Florida, the U.S. District Court for the District of Montana, the U.S. District Court for the Southern District of Florida, the Eleventh Circuit Court of Appeals, and the Ninth Circuit Court of Appeals. Contact Wilton at (406) 552-2326 or at wiltonstrickland@outlook.com.

Tim Baldwin graduated from Cumberland School of Law in 2004. Immediately thereafter, Tim became a Florida felony prosecutor and then started his own practice in 2006. Tim has handled a wide array of cases in state and federal jurisdictions and has tried nearly 60 jury trials in his career. Tim recently retired from the Lerner Law Firm in Kalispell to start this unique partnership with Wilton. In addition to being a highly experienced litigator and trial attorney, Tim is a dedicated and skilled legal research and writer and very much enjoys this part of practicing law. This is why Tim is very excited about joining a partnership with Wilton to serve attorneys who need research and writing assistance. Contact Tim at (406) 407-6555 or at timbaldwin@outlook.com.

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Judge Jack Shanstrom – He *liked* the law

By Mark D. Parker

General back-country elk rifle season opens September 15th this fall in Montana, the same day Senior United States District Court Judge Jack Shanstrom will be working as a judge for the last time. If you don't know where he'd rather be – then you **don't know Jack**. On that day, we will call Jack Shanstrom "Judge" because we have to. On September 16th, we will call him "Judge" because we want to.

One of Doonesbury's characters years ago, Woodrow, went to law school and became a law nerd. Woodrow famously, at least back in the day he was famous, screamed out during class "by God, I love the law." About the same time in history, Judge Shanstrom's predecessor's predecessor, Judge William Jameson, turned to his wife, Mildred, and said the same thing, "Mildred, I love the law." Aaron Small chronicles this event in his wonderful biography, *Journey with the Law: The Life of Judge William J. Jameson*.

Judge Shanstrom *likes* the law. He respects the law. But he does not *love* the law. He saves his love for his wife, Audrey, his two children and his grandchildren. Anything left he rations among his friends – friends who might assemble in his basement for a poker game, and by the weekend be installing a furnace or be chauffeured between appearances on Face the Nation and Meet the Press. Men like Bobby G. – the best sheet metal man in Montana. Women like Justice Sandra Day O'Connor.

To say Judge Shanstrom "liked" not "loved" the law is not to suggest that his passion for his craft was any less than Jameson, Cardozo or Holmes. He kept the law in perspective.

Judge Shanstrom broke some ground in the law. Jack Shanstrom graduated from law school in 1957 and immediately signed up for the JAG. In 1960, he filed for the County Attorney's position in Park County, and won. In his first case, he prosecuted the Chief of Police – for burglary. *State v. Moran*, 142 Mont. 423, 384 P.2d 777 Mont. (1963). Next, he prosecuted a highway patrolman for burglary. *State v. Barick*, 143 Mont. 273, 389 P.2d 170 Mont. (1964). The prosecutorial power is used to its most noble end when convicting corrupt abusers of power. But, a part time prosecutor cannot stamp out all crime or please all the locals. The women on Livingston's B Street, having practiced the world's most senior calling for decades, remained employed. Occasionally, a good citizen would sidle into Jack's office demanding that he should cleanse the town of its ignoble industry. To each he had a canned response. "Please fill out this form with all the firsthand knowledge of this operation you can attest to. I will get right after it." No one admitted firsthand knowledge. The world did not end.

Jack prosecuted for four years before the phone rang and Governor Babcock was on the other line. Babcock, who became governor as a result of Governor Nutter's death, needed to replace the Park County district judge as the result of the

incumbent judge's untimely death. Jack agreed, and thus in 1964 (at the age of 30) Jack Shanstrom became Judge Shanstrom – for about 50 years, as it would turn out.

As judge, Jack Shanstrom continued to break ground – or tried to. In *Thompson v. State Farm Mut. Auto. Ins. Co.*, 161 Mont. 207, 505 P.2d 423 (1972), Judge Shanstrom's effort to expand the contours of insurance "bad faith" were beat back by the Supreme Court. It was not until 2000 that *Thompson* was overturned, by *Watters v. Guaranty Nat. Ins. Co.*, 2000 MT 150, 300 Mont. 91, 3 P.3d 626.

Today, we are accustomed to a fifty/fifty division of property when long married couples divorce. This tradition is a more modern trend. We can trace its origins, in part, to the work of Judge Jack Shanstrom. When Jack Shanstrom sat for Justice Castles on the Montana Supreme Court, he affirmed an uncommonly generous 50/50 award of the marital estate to the wife. The husband complained that "community property" had become the law by judicial fiat. Jack Shanstrom disagreed:

The only issue argued on appeal is whether the district court had the authority to award the wife a cash sum equal to one-half of the property owned individually by the husband. We affirm the judgment of the trial court. **In doing so, and contrary to the husband's contention, we do not impose a community property standard in Montana.**

Cook v. Cook, 159 Mont. 98, 101, 495 P.2d 591, 592-593 (1972), [Emphasis supplied].

Cook v. Cook was used as precedent the next year to sustain a 50/50 division of property in *Francke v. Francke*, 161 Mont. 98, 504 P.2d. 990 (1973). *Francke* is important in the progress towards recognizing the efforts of a homemaker towards the contribution of the marital estate. In *Francke*, the Supreme Court affirmed the district judge's 50/50 division. The district judge whose decree was affirmed – Judge Jack Shanstrom. Thus, Jack Shanstrom created the precedent to affirm himself. Jack Shanstrom understated the precedent changing value of *Cook* when penning *Cook*. The Supreme Court, in *Francke*, made sure the world knew that *Cook* may have made more difference than Judge Shanstrom let on. In *Francke*, the husband, arguing that his wife did not deserve a 50/50 split, cited a long line of apparently good authority. The Supreme Court noted Judge Shanstrom's *Cook v. Cook* opinion changed things.

Plaintiff's contentions are not valid in light of the pronouncements in Cook. Each case must be viewed individually and each is as different as are the persons and their lives that are involved.

Francke v. Francke, 161 Mont. 98, 102, 504 P.2d

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990, 992 (1973), [Emphasis supplied].

Over a decade later, husbands were still complaining to the Supreme Court that Judge Shanstrom was too generous to the wife. In re Marriage of Myers, 210 Mont. 173, 682 P.2d 718 (1984).

Although sometimes the husband prevailed, in In re Marriage of Brown, 179 Mont. 417, 587 P.2d 361 (1978), Judge Shanstrom broke ground for the homemakers. We don't know why, but we could speculate. He watched his mom as a camp cook in Silvergate while growing up. He knew what a mom's hard work contributed to the household – knew it very well. What his mom did not teach him, Audrey did.

While a state court judge, Judge Shanstrom traveled much around the state, especially to Yellowstone County. He also sat by designation on the Supreme Court many times, including the appeal of Duncan McKenzie's horrific murder conviction. State v. McKenzie, 186 Mont. 481, 608 P.2d 428 (1980). He was the sitting district court judge in Park County when hitchhiking in this region came to an end. A hitchhiker in Park County cooked and ate the fingers of the good soul who gave him a ride. The gory story made headlines everywhere.

His 18 years on the state court bench necessarily gave him an appreciation for the law, and more importantly its limits. It also allowed him to run a 110 trap line from Gardner to Livingston; with his wife, Audrey, raise two children; and fish the Yellowstone before the world watched or even read *A River Runs Through It*. He hunted each fall in the far reaches of the Rockies, filling his elk tag with a bull yearly. His rich life away from the law gave him a better perspective of the law.

In 1982, Judge Shanstrom moved from Livingston to Billings and became a United States Magistrate Judge. Here is where his mark and legacy on the law was made, and it will endure. He became a mediator. We know what mediation is because Judge Shanstrom taught us, or taught the people who taught us.

Judge Shanstrom soon cleaned up the local federal docket and then started getting calls from the Ninth Circuit and traveling to settle cases all over the West Coast. We all know now the important ingredients of a well run mediation. Shanstrom laid them out for us. Confidentiality. People with authority to settle. A day devoted to the task. Forcing people to realize the cost in money, and the risk.

But, Shanstrom brought another ingredient which is not

listed in the recipe we usually see. Because he liked the law, not loved it, he had no romantic illusion about how the law could bring great and noble justice. He knew it could be messy, and the court is a place to be avoided. Besides knowing the limitations of what the law could do, he knew of the limitless life one could lead if unburdened by a lawsuit. He knew that a case that ended was a life oftentimes begun anew – a day that the litigants could go fishing without thinking about the suit, a hunting day uninterrupted by a court appearance, a Christmas without the worry over what a judge might do.

There is no good history of the maturation of mediation as a method of dispute resolution in Montana, but no one has a memory of it being much of an issue before Judge Shanstrom made it one. His workload became so intense that many people had to hire their own mediators. We all now use the same basic model that Judge Shanstrom laid down for us in the early 1980's.

There is no metric to judge this contribution. We do know that Judge Shanstrom mediated over 1,000 cases. We also know, conservatively, each of these mediations saved the litigants, on average, \$25,000 in attorneys' fees and costs. I would not argue if someone told me they could prove the number to be \$100,000. Thus, at a minimum, \$25 million was saved by his efforts. The federal treasury was probably saved a similar amount. This rudimentary math ignores the angst and grieving avoided. Multiply this 100-fold by the progeny of mediators and mediations that have ensued and we have billions in savings for citizens both directly and indirectly through their taxes. A remarkable legacy.

In 1990, President Bush made Judge Shanstrom an Article III Judge. The "magistrate" was dropped and he succeeded Judge Battin to the federal

bench. One ruling many remember was "NOBODY MOVE!!!" During a six-week trial of numerous drug defendants, the lights went out, and the backup power did nothing of the kind. The courtroom was completely dark. The Judge's order was faithfully followed until the generators kicked in.

Judge Shanstrom would have been the judge in the "Freeman" case, but he was a witness. His life had been threatened, and he testified against those ultimately convicted of the threats.

He was the chief judge for many years, assuming senior status in 2001.

Judge Shanstrom's last day will be in the Bighorn Courtroom in the new federal courthouse. He named the courtroom himself – kind of. He was told he could name his own courtroom, so he did. He wanted it to be called

One ruling many
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the Winchester courtroom. Judge Shanstrom collected Winchesters. He also collected grimaces because they told him "no." For those who have never pulled back the hammer on a Winchester while a bugling elk slid into view, steam billowing from its nostrils on opening day, I cannot explain it. Either you have done it, or you haven't. Judge Shanstrom did not even try to explain to those who overruled the Winchester name the depth and breadth of the western hunting life. He knew it would be folly. Thus, Bighorn it is.

Judge Shanstrom is best known, and most widely respected, for his "friends in high places." He has, by the power of his personal grace alone, made the speaker list at the University of Montana's Jones-Tamm lecture series, the envy of Ivy League schools. Chief Justice Roberts, Attorney General Eric Holder and Justice Scalia have been a few of the recent ones. Ask Judge Shanstrom how his fishing guest list is the A list's A list, and he will tell you, "I had a boat and I knew Justice Byron 'Whizzer' White." Really? My guess is that every Supreme Court Justice knows dozens of people with dozens of boats. My guess is that these boats are a lot nicer than Jack's float boat.

But, when a Supreme Court Justice is in Jack's boat, they are fishing. The law is left at home. The chatter is from the mother goose hissing away the human intruder and the beaver tail slapping the water. Human conversation is confined to hatches, hearth and home. We talk about the things we love, not the things we merely like. To "not love" the law can so quickly devolve into either not liking the law or treating it with cynicism. It is Jack Shanstrom's ability to keep the law in balance that makes him a close friend to so many people in such high places. Plus, Jack does not "kibitz and tell." If Jack wants to give a damn boat the credit, well, we'll humor him.

His predecessor, Judge Battin, has a building named after him. Battin's predecessor has a building and the Jameson Award. Judge Shanstrom has nothing yet. And, I regret to say it, Jack, there might never be a Shanstrom award. I don't mean to say this with any disrespect. But, I am imagining the person who would earn such a high distinction. On the day it was awarded, the winner would not show up, and would have gone fishing.

Mark D. Parker is the incoming president-elect for the State Bar of Montana.



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Questions?

Please email: Kathie Lynch at klynch@montanabar.org or Janice Doggett at jdoggett@montanabar.org

You can also call us at 442-7660.



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You can also email your contact info to Kathie Lynch -- klynch@montanabar.org

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Medicare 101

The Basics in 2013

By Kimme Evermann

Created in 1965 during the Johnson administration, Medicare is the federal health insurance program available to US citizens who are 65 years and older, as well as to adults with (certain) disabilities of any age who are found to be disabled based on Social Security criteria; Medicare is also available to persons of any age with (ESRD) End Stage Renal Disease. ESRD is permanent kidney failure requiring dialysis or kidney transplant. To be eligible for Medicare, you must have at least (10) years of full-time employment credit on your SSA employment record (equals 40 work credits); citizens with fewer than (40) work credits are also often eligible for Medicare and may pay pro-rated premiums based on the number of work credits earned. Adults under 65 years of age who have been determined to be disabled by Social Security criteria become eligible for Medicare coverage after a (24) month waiting period. The Social Security Administration is responsible for Medicare enrollment and beneficiaries may begin their enrollment procedures as soon as (3) months prior to their 65th birthday, either in person or on the Social Security Administration website at www.ssa.gov.

Medicare is administered by the Centers for Medicare and Medicaid Services (CMS). Medicare coverage is offered to beneficiaries via two models: Traditional or Original Medicare & Medicare Health Plans (also known as Medicare Advantage Plans). Medicare coverage is further broken into (4) "Parts" which cover different categories of a beneficiaries' health care needs: Part A, Part B, Part C, and Part D.

Traditional/Original Model: Medicare Parts A, B, D

Medicare Part A - Helps cover your inpatient care in hospitals and skilled nursing facilities, but is not custodial or long term care; it may be also be referred to as "catastrophic coverage" or "major medical". Part A also helps cover hospice care and a limited amount of home health care.

Part A coverage is delivered via "benefit periods; a benefit period begins the day of admittance to a hospital or skilled nursing facility, and ends when you haven't received any inpatient hospital or skilled nursing facility care for (60) days in a row.

Most Medicare beneficiaries don't pay a monthly premium for Part A coverage; beneficiaries pay Medicare taxes during their lifelong employment. There is a deductible for each benefit period, however, and is \$1,184 in 2013.

Medicare Part B — Medicare Part B helps cover outpatient

medical services/outpatient care (i.e: doctor's visits, hospital outpatient care, and limited home health care.) Part B also covers some preventive services like exams, lab tests and screening shots, as well as durable medical equipment. Paying for Part B is an 80%/20% split; Medicare pays 80% of the standardized charges while the beneficiary may pay up to 20%. Part B is optional coverage; a beneficiary may refuse Part B without penalty if they have/maintain creditable coverage through an employer and are currently employed prior to enrolling in Part B. When to enroll in Part B has become an ever more important piece of individual retirement planning; many more beneficiaries are remaining employed (and are covered by employer group insurance) for years beyond their 65th birthdays.

Most beneficiaries will pay the standard Part B premium of \$104.90/month and a standard annual deductible of \$147.00 in 2013. For some beneficiaries, there is Part B financial assistance available through the Medicare Savings Program (QMB/SLMB/QI). Montana Medicaid administers these programs and beneficiaries may enroll at the local Office of Public Assistance.

A beneficiary who does not enroll in Part B when they are eligible and/or do not have creditable coverage when they do enroll in Medicare, may be penalized 10% per year and may have to wait until the July following their enrollment for their Medicare benefits to begin. It is important to note that enrollment in/health care benefits from the VA or IHS health care systems are not considered creditable coverage to Medicare Part B.

Medicare Part D — This is the newest major Medicare benefit, a result of the Medicare Modernization Act of 2003; Medicare Part D provides prescription drug coverage for all Medicare beneficiaries, including adults with disabilities or beneficiaries with ESRD.

In Montana, Medicare Part D plans range in cost from \$15.00 - \$110.20/month in 2013. If a beneficiary does not enroll in a Part D when eligible and does not have creditable coverage in place, the beneficiary may be penalized 1% per month until they do enroll in Medicare; in addition to a financial penalty, the beneficiary may have to wait to enroll until the annual Medicare open enrollment (October 15th through December 7th) and their benefit would not be available until January 1 of the following year. It is important to note that pharmacy benefits from the VA and IHS systems *are* considered creditable coverage as related to Medicare Part D.

MEDICARE, next page

MEDICARE, from previous page

Medicare Health Plans: Medicare Advantage

Medicare Part C – These are Medicare Health Plans, also known as Medicare Advantage Plans. Medicare Advantage Plans are health plan options (HMO's, PPO's & PFFS's) that are approved by CMS but are administered by private health care providers. Under this model, the beneficiary pays the private provider their Part B premium of \$104.90/month in 2013 and might also pay an additional monthly premium to their Medicare Health Plan. Medicare Health /Advantage Plans provide a CMS authorized standard menu of benefits covering Part A, Part B and (usually) Part D services to enrolled beneficiaries and may sometimes offer extra benefits such as dental, vision and/or hearing services which are not currently covered by Traditional/Original Medicare. Although all medically necessary services provided by Traditional/Original Medicare must also be covered by Medicare Health Plans (MA's), a Medicare health plan may charge different co-pays, co-insurance and deductibles than under Traditional/Original Medicare.

In Montana, the monthly premium of Medicare Health Plans range from \$0 to \$202.00/month in 2013, plus the Medicare Part B monthly premium of \$104.90/month in 2013. If a beneficiary is considering a Medicare Advantage plan, they should look at the plan's premium, co-pay, co-insurance and deductible structures as well as the core benefits being offered and approved provider networks before enrolling.

A Medicare Health Plan/Medicare Advantage is typically seen as a 'one stop shop' for Medicare benefits; Part A, Part B and Part D benefits are provided within one health care "package", usually utilizing a network of providers and facilities.

There is some financial assistance available for eligible beneficiaries; a Medicaid beneficiary who has also become eligible for Medicare is known as "dual eligible" and may get medical and pharmacy benefits from both Medicare and Medicaid; if you are in this status, you *must* enroll in a Medicare Part D (drug plan) or your drug coverage may be interrupted.

Some Medicare beneficiaries are eligible for financial assistance for the Part B benefit; the MSP (Medicare Savings Program) pays the monthly Part B premium and (possibly) deductible and co-pays. This program is administered by the MT Office of Public Assistance.

Some Medicare beneficiaries are eligible for financial assistance for the Part D benefit - LIS (Low Income Subsidy) or "Extra Help". Extra Help can pay for monthly Part D premiums (up to the regional benchmark of \$36.01/month in 2013) as well as associated co-pays, deductibles and coverage during the gap. Call SSA at 1-800-772-1213 or visit their website <http://www.ssa.gov/> for information and application.

Big Sky RX, Montana's SPAP (State Pharmaceutical Assistance Program) is another Medicare Part D helping program; in 2013, BSRX will pay up to \$36.01/month for eligible beneficiaries. Big Sky Rx pays the monthly Part D premium for some Medicare beneficiaries. Call 1-800-369-1233 for information and application.

Medicare Supplemental Insurance

If you are enrolled in Traditional/Original Medicare Parts A, B and D, you may also want to purchase a Medicare Supplemental Insurance policy. A Medicare Supplemental insurance policy coordinates only with Original Medicare and does

the following:

- Picks up "gaps" in Medicare coverage
- A beneficiary may choose any supplement without underwriting during the first (6) months of their Part B enrollment
- A beneficiary should not purchase a Medicare Supplemental policy if the beneficiary is enrolled in a Medicare Health Plan/Medicare Advantage Plan.
- Call the MT Commissioner of Insurance office for more information at 1-800-332-6148

When you are planning retirement, or if you are already a Medicare beneficiary, there are some extremely useful resources available at www.medicare.gov including:

- Prescription Drug Plan finder
 - Compare Part D plans
 - Review plan formularies, premiums and co-pays.
- Medicare Advantage Plans "Health Plan Compare"
 - Compare Medicare Advantage plans
 - Review plan benefits, formularies, premiums, coinsurances and co-pays.
- My Medicare.gov
 - Review your individual drug spend
 - Review your Medicare Summary Notices
 - Research your Medicare benefits, options and rights
 - Receive healthcare updates

State Health Insurance Assistance Program "Local Help for People with Medicare"

Additionally, there is a resource that all Medicare beneficiaries and their families should be aware of; SHIP (State Health Insurance Assistance Program) is a local counseling, assistance and advocacy resource available (at no charge) to all Medicare beneficiaries, their families, service providers and others who are interested in Medicare rights, options and benefits. The SHIPs were created by Congress in 1992 to assist beneficiaries with the standardization of Medicare Supplements, and to provide expert, objective Medicare information, assistance and advocacy to beneficiaries in a local, one-on-one setting. By 2013, the SHIPs have evolved into the local community's best and most objective resource on Medicare and other health insurance and benefits related to Medicare.

Every state and the territories provide this objective Medicare assistance via their state SHIP. This beneficiary advocacy program has been administered and supported by CMS (Centers for Medicare and Medicaid Services) for the past 17 years.

Contacts: To contact your local SHIP counselor, call 1-800-551-3191. Remember: SHIP counseling is free of charge and will provide objective information and advocacy to those beneficiaries who need assistance.

- Montana Area Agencies on Aging 1(800) 551-3191
- Kimme Evermann / Montana SHIP Director
kevermann@mt.gov (406) 444-7878
- Janet Stellmon / SHIP Assistant jstellmon@mt.gov
(406) 444-7784

If you need help with Medicare, please get in touch! SHIPs are your local assistance for people with Medicare.

Kimme Evermann is the Montana SHIP Director, Montana Department of Public Health & Human Services, Office on Aging.

Supreme Court follows Canada's lead in upholding Monsanto patent on genetically modified plants

By Toni Tease

The Supreme Courts in both Canada and the United States have now rejected farmers' claims that Monsanto's patents on glyphosate-resistant plants should not apply to the replanting and/or re-use of seed from such plants. In *Bowman v. Monsanto Company*, 133 S. Ct. 1761 (2013), the U.S. Supreme Court held that the patent exhaustion doctrine prevented Hugh Bowman, an Indiana farmer, from replanting Roundup Ready soybeans harvested from plants grown with seeds purchased from Monsanto pursuant to a patent license agreement. The license agreement permitted Bowman to use the glyphosate-resistant seed for a single crop but prohibited him from replanting soybeans cultivated from such crops.

According to the U.S. Supreme Court, the patent exhaustion doctrine applies only to the first sale of a patented item; that is, a patent holder may not sell a thing embodying a patented technology and then seek further royalties based on the subsequent use, consumption or resale of that thing. The patent exhaustion doctrine, however, does not give the purchaser the right to replicate or make copies of the patented thing. In other words, the patent exhaustion doctrine is not a patent license. (A patent license typically gives the licensee the right to make and sell the invention.)

The U.S. Supreme Court reasoned that if the patent exhaustion doctrine allowed the purchaser of a patented thing to replicate that thing (for example, by replanting seeds and growing more glyphosate-resistant plants), then a patent would only ever be good for a single transaction. Such a result, the Court concluded, would effectively eviscerate patent protection in the United States and stifle incentive for innovation. In short, the Court held that the patent exhaustion doctrine applies only to the particular item sold and not to reproductions of that item.

The Canadian Supreme Court grappled with a similar case in 2004, but the legal issue before the Court was not whether the patent exhaustion doctrine applied but rather whether the principle that higher life forms are not patentable--previously established by the Canadian Supreme Court--applied to plants. (Click here for our article on this decision.) The Canadian Supreme Court held that it did not, and as a result, the Court found that a Saskatchewan canola farmer infringed Monsanto's patent by saving and replanting seed from glyphosate-resistant canola plants.

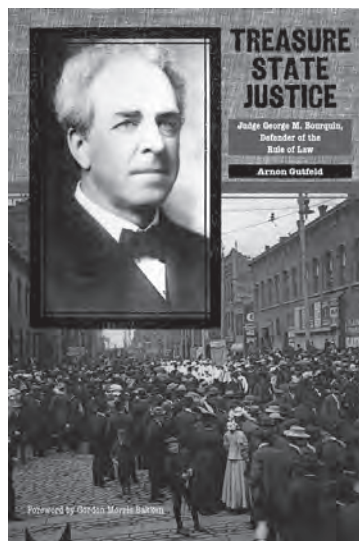
The U.S. Supreme Court's decision in the Bowman case was handed down nine years after the Canadian Supreme Court's decision in *Schmeiser v. Monsanto Canada Inc.*, but the result is the same: farmers may not replant seed from Roundup Ready plants and "replicate" the patented plant. This is true regardless of whether the seed is purchased from a grain elevator,

generated from plants grown under a license from Monsanto, or blown into a farmer's field from a neighboring field (as was the case in *Schmeiser*).

One of the two U.S. patents at issue in the Bowman case has since expired, and the other expires next year. Although we are unlikely to see similar cases involving these patents in the future, the Bowman case stands for the proposition that the patent exhaustion doctrine will not be widely interpreted to constitute a perpetual, royalty-free license. These issues are not so complicated when dealing with ordinary things (as in a piece of machinery), but they become more complicated when dealing with self-replicating things (like some plants). The U.S. Supreme Court clearly stated in its opinion that *Bowman* applies to the facts of that case only and not to any other forms of self-replicating inventions (like software).

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How does the LRIS work? The LRIS is staffed by an experienced paralegal and other trained staff. Calls coming into the LRIS represent every segment of society with every type of legal issue imaginable. Many of the calls we receive are from out of State or even out of the country, looking for a Montana attorney. When a call comes into the LRIS line, the caller is asked about the nature of the problem or issue. Many callers "just have a question" or "don't have any money to pay an attorney". As often as possible, we try to help people find the answers to their questions or direct them to another resource for assistance. If an attorney is needed, they are provided with the name and phone number of an attorney based on location and area of practice. It is then up to the caller to contact the attorney referred to schedule an initial consultation.

It can increase your business: The Lawyer Referral and Information Service (LRIS) is a national program of the ABA that exists in some form in every State in the nation. The Montana LRIS fields thousands of calls per year and makes thousands of referrals to participating attorneys in their practicing fields of law throughout the State. It's a great way to increase your client base and an efficient way to market your services!



It's inexpensive: The yearly cost to join the LRIS is minimal: free to attorneys their first year in practice, \$125 for attorneys in practice for less than five years, and \$200 for those in practice longer than five years. Best of all, unlike most referral programs, Montana LRIS doesn't require that you share a percentage of your fees generated from the referrals!

You don't have to take the case: If you are unable, or not interested in taking a case, just let the prospective client know. The LRIS can refer the client to another attorney.

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It's easy to join: Membership of the LRIS is open to any active member of the State Bar of Montana in good standing who maintains a lawyers' professional liability insurance policy. To join the service simply fill out the Membership Application at www.montanabar.org -> For Our Members -> Lawyer Referral Service (<http://bit.ly/yXI6SB>) and forward to the State Bar office. You pay the registration fee and the LRIS will handle the rest. **If you have questions or would like more information, call Kathie Lynch at (406) 447-2210 or email klynch@montanabar.org.** Kathie is happy to better explain the program and answer any questions you may have. We'd also be happy to come speak to your office staff, local Bar or organization about LRIS or the Modest Means Program.

Montana Law Student Pro Bono Service Award

This award is a collaborative effort between the University of Montana Law School, private firms and attorneys, Montana Legal Services Association, and the local judiciary to recognize the outstanding volunteer work of law students. The award is given annually in October during National Pro Bono week to a 3L student who has demonstrated extraordinary commitment to public service-in particular the field of pro bono legal work. For this award, pro bono is defined as: *work taken voluntarily, without payment, and done as a public service.*

Eligibility criteria for the award are:

- 1) The student has demonstrated a passion for public service, his or her community and the law, especially in terms of providing legal services to under-served populations. These include, but are not limited to low-income residents, veterans, handicapped, children or Native populations.
- 2) The student has performed meaningful pro bono legal work which has met a need or extended services to underserved segments of the community. This work can include but is not limited to projects at major firms that benefit an underserved population, work at the public defender's office, for veterans or native organizations, CASA, legal aid/services or the Housing Authority.
- 3) The student has participated in other public service oriented activities or groups such as an official student group, a religious institution, or a nonprofit. Community service activities will also be considered. These activities can include but are not limited to Kiwanis, legal aid or advice clinics, tax preparation clinics, Veterans Stand Down, Project Homeless Connect, or volunteering at soup kitchen/food pantry or as shelter advocates.
- 4) A total of at least 50 hours of completed legal pro bono work is suggested. Hours completed for course credit or mandatory clinicals may *not* be counted.

Students can either apply for the award or be nominated by a third party. For self -applicants, please provide two references along with this application. For nominations, see below criteria.

On a separate sheet of paper, please describe the candidate's involvement in the community and identify the ways in which they have met the eligibility criteria in narrative form. Supplemental supporting documents such as volunteer logs, letters of support, news articles or the student's resume may also be included in the nomination packet.

All nominations must be received by **Tuesday, October 1st**. Send to:

Montana Law Student Pro Bono Award Committee
c/o Montana Legal Services Association
211 N. Higgins Avenue Suite 401
Missoula, MT 59802

Electronic submissions can be emailed to: eweaver@mtlsa.org

Nominee Name _____

Nominee phone _____ Nominee email _____

Your name _____ Your phone or email _____

Annual Meeting Schedule

This year's meeting is at the Red Lion Colonial Hotel in Helena. Register online at www.montanabar.org, or mail-in a registration. You can also call 406-447-2206 for more information.

Wednesday | Sept. 18

- > **10 a.m.** | Justice Initiatives Committee meeting
- > **10 a.m.** | Access to Justice Commission meeting
- > **Noon** | Executive Committee meeting
- > **1 p.m.** | Joint meeting: ATJC and JIC
- > **3-6 p.m.** | Montana Justice Foundation meeting
- > **5-7 p.m.** Local Bar Reception at the Holter Museum

Thursday | Sept. 19

- > **8:30 a.m.** | Board of Trustees meeting (Bar members are invited to attend)
- > **9:30 a.m.** | Registration desk opens
- > **10 a.m.** | Elder Law Committee meeting
- > **10 a.m.** | Health Care Law Section meeting
- > **Noon** | New Lawyers Section Luncheon meeting

Hot Topics CLE 3.75 CLE/1 Ethics (e)

> **1:00-2:15 | Health Care — What Every Lawyer NEEDS to Know**

- Privacy & Security Overview: HIPAA, HITECH and the 2013 Omnibus Rule — *Darci Bentson*
- Compelling Production of Information under Montana Law and HIPAA — *Erin F. MacLean*
- Business Associates and Attorneys as Business Associates — *Kevin Twidwell*
- Transactions with Providers: Anti-Kickback and Stark Considerations and Pitfalls — *W. Rick Beck*
- Health Care Reform — *Kristy Buckley*

> **2:15 | Navigating the Indian Jurisdiction Maze** — *Lori Harper Suek*

> **2:45 | Advising Nonprofit Organizations and Serving on Nonprofit Boards (e)** — *Nonprofit Section*

>> 3:15 BREAK <<

> **3:30 | How Attorneys Get Hacked (And What You Can Do About It) (e)** — *Sherri Davidoff*

> **4:00 | Legislative Update** — *Todd Everts*

> **4:30 | Public Duty Doctrine:** A point/counterpoint between MTLA President Jamie Towe and MDTL President Leonard H. Smith — *Moderated by Beth Brennan*

> **5:00 | President's Reception**

> **6:30 | Banquet:** We will announce the winner of the Jameson Award and honor the recipients of 50-year

membership pins. Keynote speaker is the Founder and Chief Executive Officer of the World Justice Project, William H. Neukom.

Friday | Sept. 20

> **8:00 a.m.** | Registration desk opens

Oral Arguments Before the Supreme Court (2 CLE)

- **8:30 a.m.** | Introduction (.5 CLE credits)
Presenters: J. Martin Burke, Beth Brennan
- **9:00 a.m.** | *State of Montana v. Jill Marie Lotter* — DA 12-0139 (.75 CLE credits)
- **9:45 a.m.** | Break
- **10:00 a.m.** | Introduction (.5 CLE credits)
Presenters: J. Martin Burke, Beth Brennan
- **10:30 a.m.** | *Allianz Global Risks US Insurance Company v. Lincoln County Port Authority* — DA 12-0519 (1 CLE credit).

> **11:30 a.m. - 1 p.m.** | Awards luncheon: Winners recognized for Karla Gray Equal Justice Award, Neil Haight Pro Bono Award, Haswell Award, and Distinguished Service Awards. Outgoing State Bar President Pam Bailey will hand the gavel to incoming President Randy Snyder. The State Bar business meeting follows lunch.

Hot Topics CLE | 4 CLE/1 Ethics (e)

> **1:15 | Tax Update** — *J. Martin Burke*

> **1:45 | Family Law in a Time of Change (concurrent session)** — *P. Mars Scott, Gail Haviland, Jane Mersen, moderated by Shane Vannatta*

> **1:45 | Government Attorneys: Who is the Client? (concurrent session)** — *Helena City Attorney Jeff Hindoien; Dept. of Labor Lead Counsel, Judy Bovington; Solicitor General Lawrence VanDyke, Montana Dept. of Justice.*

> **2:45 | 21st Century Discovery, an Interactive CLE (e)** — *State Bar Technology Committee members Cort Jensen, David Carter, Joe Sullivan and Brian Smith*

> **3:45 | Criminal Law Update** — *Assistant Attorney General Tammy Hinderman*

> **4:15 | Elder Law: Long Term Care - Issues, Options, Updates** — *Twyla Sketchley and Sol Lovas*

> **4:45 | Civil Procedure Update: The 3-Day Service Rule and Other Questions** — *Justice Pat Cotter*

> **5:15** | Annual meeting adjourns

> **5:30 - 9 p.m.** | Paralegal Section dinner/meeting

Montana v. Federal Evidence Rules 2013¹

A short comparison

By Cynthia Ford

I began this series with “A Short History of the Montana Rules of Evidence.” In that article, I reviewed the rule-making process which led to the 1976 adoption of the M.R.E. and the fact that the M.R.E. are largely based on the Federal Rules of Evidence (F.R.E.), which became effective two years earlier. However, in several important respects, the Montana Evidence Commission felt that the existing Montana jurisprudence on a particular issue made more sense than the federal counterpart, and chose to depart from the federal model. The Montana Commission Comments to each rule state whether that rule was drafted to mirror, or deviate from, the corresponding federal rule.

Only one of the M.R.E. (Rule 407) has been modified in any significant way since they were adopted. By contrast, the F.R.E. have been amended multiple times, and just recently (2011) were systematically “restylized.” Thus, even if the particular M.R.E. originally reflected the federal version, subsequent federal amendments may have caused a diversion if those amendments were substantive. I recently prepared a short comparison of the current F.R.E. and the M.R.E. for my upcoming Evidence class at UMLS, and thought it might be helpful to practicing lawyers as well. This comparison is meant to cover major differences, and does not include those which I think are minor or inconsequential.

MAJOR DIFFERENCES² FROM F.R.E.

Judicial Notice, Article II: Montana more detailed

M.R.E. 201 explicitly covers judicial notice of “all facts,” whereas F.R.E. 201 is much messier, governing judicial notice “of an adjudicative fact only, not a legislative fact” without providing any definition of either term.

The F.R.E. Article II on Judicial Notice has only one rule,

Rule 201. By contrast, Montana adds M.R.E. 202, “Judicial notice of law.” It requires a trial court to take judicial notice of the laws (common law, constitutions and statutes) of the United States, of Montana, and of every other state, territory and jurisdiction of the United States. Additionally, Rule 202 lists many other types of law which a court may judicially notice of its own accord or on request of a party.

Presumptions, Article III: Montana more detailed

F.R.E. 301 is very short and vague, and does not even define “presumption.” Montana’s version is quite a bit longer, defining presumptions in general and then differentiating between conclusive (M.R.E. 301(b)(1) and disputable presumptions (M.R.E. 301(b)(2)). The Montana version also details the effect of presumptions, the burden of evidence necessary to overcome a disputable presumption, and how a judge should cope with inconsistent presumptions.

RELEVANCY, ARTICLE IV

Rule 404(a) Character Evidence

Under F.R.E. 404(a)(2), a federal criminal defendant may choose to offer evidence of a pertinent trait of character of the victim. However, the federal price for doing so is that the prosecutor is now free to do two things: rebut that evidence about the victim AND adduce evidence of the same trait of character of the defendant. Under M.R.E. 404(a)(2), the state criminal defendant may offer evidence of a pertinent trait of character of the accused, but the prosecutor may only rebut that evidence. The Montana prosecutor is not thereby freed to put on evidence about the defendant’s character.

In both state and federal court, in certain types of cases even if the defendant does not attempt to prove anything about the victim’s character but does put on evidence to show that the victim was the first aggressor in the incident, the prosecutor can offer evidence about the victim’s character trait of peacefulness. The difference is that in federal court, this can occur only in homicide cases. In Montana state court, the prosecutor may use

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¹ Copyright Cynthia Ford.

² Of course, this outline is for initial research only, and I specifically disclaim any warranties as to its accuracy and thoroughness. Furthermore, it does not include any amendments made to either set of rules—Montana and federal—after June 2013.

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this tool in both homicide and assault cases “where the victim is incapable of testifying.”

Rule 406 Habit Evidence: Montana more specific

In both state and federal courts, the general rule is that character evidence is not admissible, but habit evidence is admissible as proof of conduct on a particular occasion. However, the F.R.E. do not contain any definition of either “character” or “habit” in the rules, although there is some guidance in the CAN. The Montana version of Rule 406 does define “habit” and furthermore specifies two methods of proving habit, opinion or specific instances of conduct “sufficient in number to warrant a finding that the habit existed...”

Rule 408 Settlement Offers and Conduct: Federal more specific

In both sets of rules, the general concept is the same, and is based on the public policy in favor of settlement of cases. Both prohibit evidence of settlement offers and of conduct and statements made during settlement negotiations. However, Montana’s ban applies only when the evidence is intended to prove liability for or the invalidity of the claim. An amendment to FRE 408 now additionally prohibits use of such evidence for impeachment purposes. Montana has not yet followed suit.

RULE 409 MEDICAL EXPENSES

The exact titles of this rule differ, and that difference indicates the substantive difference in the Montana and federal rules. FRE 409 is “Offers to Pay Medical and Similar Expenses,” and prohibits evidence of either offers to pay or actual payment of medical, hospital or similar expenses as evidence of liability. MRE 409 is “Payment of Expenses.” By its terms, evidence that payment of “expenses occasioned by an injury or occurrence” (so not necessarily limited to medical-type expenses) was actually made is banned, but there is no prohibition about evidence that an offer to do so was made.

SEX OFFENSE CASES: FRE CONTAIN SEVERAL SPECIFIC RULES WHICH ARE NOT IN THE MRE

Federal Rule 412: “Rape Shield”—no MRE 412

FRE 412 applies to all federal civil and criminal cases involving alleged sexual misconduct, and as a general rule prohibits evidence of the victim’s sexual behavior or sexual predisposition. There are several exceptions outlined in Rule 412. Montana has a similar provision (for criminal cases only), but it is statutory rather than a rule of evidence:

M.C.A. § 45-5-511: Provisions generally applicable to sexual crimes

(2) Evidence concerning the sexual conduct of the victim is inadmissible in prosecutions under this part except evidence of the victim’s past sexual conduct with the offender or evidence of specific instances of the victim’s sexual activity to show the

origin of semen, pregnancy, or disease that is at issue in the prosecution.

Federal Rules 413-415: Similar Crimes Admissible in Civil and Criminal Sexual Assault and Child Molestation Cases—no Montana counterpart

The FRE have three specific rules by which Congress meant to ensure that the jury would hear evidence that the person accused (civilly or criminally) of sexual assault or child molestation had performed other similar acts, whether or not those earlier acts had resulted in charging or conviction. There has been much academic criticism of those rules. Montana, like many other states, has never adopted any of them. Thus, in sexual assault and child molestation cases in Montana state courts, MRE 403 and 404 will govern the admissibility of prior acts by the defendant.

PRIVILEGES, ARTICLE V: HUGE DIFFERENCES

In Montana, privileges are statutory only. M.R.E. 501 states that there is no privilege of a witness about any matter unless the constitution, statute or court rule provides such a privilege. Numerous Montana Supreme Court cases discuss the public policy in favor of full disclosure of information helpful to a jury, and the resulting narrow construction of even those privileges which are provided by statute. (The Montana privilege statutes are located in M.C.A. Title 26, Chapter 1, Part 8).

By contrast, FRE 501 rejects a statutory list of privileged communications approach. Instead, it provides that federal evidentiary privileges are to be decided by the federal courts on a case-by-case basis: “The common law—as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.”

N.B.: F.R.E. 501 specifically provides that in federal diversity of citizenship cases, state privilege law governs for those claims on which state law provides the rule of decision.

In addition to this striking difference in approach, Montana and the federal system do not recognize the same privileges as a substantive matter. Montana statutes provide privileges for communications between: spouses (criminal only); attorney-client; parishioner-clergy; speech pathologist/audiologist-patient; psychologist-patient; student-educational employee; domestic violence/sexual assault advocate-victim. There also are privileges for confidential communications made to a public employee, and for communications made in the course of mediation. For civil medical malpractice actions only, any apology or expression of sympathy is privileged. Montana has a specific “Media Confidentiality Act” which statutorily provides a privilege to protect media sources. M.C.A. 26-1-901 to 903. Montana also privileges law enforcement officials from disclosing the identity of informants.

Without doing an in-depth review of the federal case law, as a general proposition, federal courts recognize: both testimonial

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and communications privileges for spouses in criminal actions; attorney-client privilege; parishioner-clergy privilege; and a psychotherapist-patient privilege (which covers licensed clinical social workers as well as psychologists). There is no doctor-patient privilege. The Supreme Court has not decided any cases about speech pathologist/audiologist privilege, student-teacher privilege, advocate-victim privilege, public employee privilege, mediation privilege or apology privilege. Federal protection of the reporter-source communication has been declined.

The M.R.E. has specific rules, 503 and 504, dealing with the waiver of privilege, if the holder voluntarily discloses any significant part of the privileged matter, unless that disclosure was erroneously compelled. M.R.E. 505 prohibits court and counsel from commenting on any claim of privilege.

The F.R.E. contains only one other privilege rule after 501. F.R.E. 502, relatively recently adopted, deals with the effect of disclosures of information which is protected by either the attorney-client privilege or the “work product” doctrine. This rule is specific and complex. Ironically, Montana does not have a counterpart, so that disclosures of this sort are dealt with by Montana case law rather than rule or statute.

WITNESSES, ARTICLE VI

Rule 606—Competency of Juror as Witness—one difference

The general rule in both the federal and state versions of Rule 606 is that it is very hard to introduce a juror’s testimony about what happened in the jury in order to attack the validity of the verdict. The federal and Montana versions of Rule 606 both except (and thus allow) juror testimony about extraneous information improperly brought to the attention of the jury, and about outside influences brought to bear on any juror. FRE 606(b)(3) also allows juror testimony that a mistake was made in entering the verdict on the form (for instance, that they agreed on \$100,000.00 but the foreperson wrote \$10,000.00). MRE 606(b)(3) instead allows juror testimony about whether there was any resort to the determination of chance (such as rolling a dice or a coin toss).

Rule 609—Impeachment by Conviction of Crime—huge difference

F.R.E. 609 allows the opponent of a witness to present evidence that the witness has previously been convicted of a crime. The overall concept is that criminality impacts credibility. The federal rule is specific and complex about what type of crime, and how long ago the conviction, in deciding whether the evidence is admissible.

The Montana approach is exactly the opposite, plain and sweet: “For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.”

OPINIONS AND EXPERT TESTIMONY, ARTICLE VII

Rule 702 Testimony by experts—very different

FRE 702 was amended to codify the reliability requirements

for expert testimony imposed by the U.S. Supreme Court in the *Daubert* and *Kumho Tire* cases, which rejected the pre-Rules “Frye general acceptance test.” MRE 702 has not followed suit, and does not contain in the language of the rule anything about reliability of the expert’s method or application of that method in the case at hand.

Furthermore, the Montana Supreme Court cases do not mirror those of the federal court system. Like the U.S. Supreme Court, the Montana Supreme Court has rejected the pre-Rules “general acceptance” test in favor of a more liberal admissibility. However, Montana does not apply *Daubert* and its progeny to all forms of expert testimony. Montana does use a *Daubert*-like analyses when the expert testimony involves “novel scientific evidence:”

Expert testimony regarding novel scientific evidence must be reliable. *Hulse*, ¶ 52 (citing *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 2795, 125 L.Ed.2d 469 (1993)). We have adopted non-exclusive factors to consider when determining whether novel scientific evidence is reliable, including testing, peer review, technique rate of error, standards of operation and general acceptance.

Wheaton v. Bradford, 2013 MT 121, 370 Mont. 93, 300 P.3d 1162, 1166, footnote 3.

However, when the testimony does not involve a “novel” scientific method, Montana does not require a *Daubert* analysis. “[A]ll scientific expert testimony is not subject to the *Daubert* standard and the *Daubert* test should only be used to determine the admissibility of novel scientific evidence.” *Hulse v. State, Dep’t of Justice, Motor Vehicle Div.*, 1998 MT 108, 289 Mont. 1, 28, 961 P.2d 75, 91.

Certainly, if a court is presented with an issue concerning the admissibility of novel scientific evidence, ... the court must apply the guidelines set forth in *Daubert*, while adhering to the principle set forth in *Barmeyer*. However, if a court is presented with an issue concerning the admissibility of scientific evidence in general, the court must employ a conventional analysis under Rule 702, M.R.Evid.

Hulse v. State, Dep’t of Justice, Motor Vehicle Div., 1998 MT 108, 289 Mont. 1, 31, 961 P.2d 75, 93.

[T]he district court’s gatekeeper role in applying the *Daubert* factors, which guide trial courts in their assessment of the reliability of proffered scientific expert testimony, applies only to the admission of novel scientific evidence in Montana. *Damon*, ¶ 18. Novelty in Montana is assessed from a very narrow perspective.

Harris v. Hanson, 2009 MT 13, 349 Mont. 29, 37, 201 P.3d 151, 158.

Rule 703—Basis of Expert Opinion—looks but is not different in effect

Both the state and federal rules 703 allow an expert to base her opinion upon inadmissible evidence, so long as that evidence is

of a type reasonably relied upon by experts in her field. The federal version has been amended to add that the otherwise-inadmissible information is usually not allowed into evidence on direct examination of the expert. The Montana version does not contain this stricture, but the Montana Supreme Court has held similarly: “Rule 703, M.R.Evid., anticipates that experts form opinions and inferences based upon first-hand observations, facts presented at trial and information obtained outside of the courtroom prior to trial. The rule recognizes that an expert witness may rely upon inadmissible evidence when forming an opinion. ... However, **Rule 703, M.R.Evid., does not give a witness permission to repeat inadmissible out-of-court statements to bolster his or her expert opinions before the jury.** (Citations omitted; emphasis added). *Perdue v. Gagnon Farms, Inc.*, 314 Mont. 303, 313, 65 P.3d 570, 576 (2003).

FRE 706—Court-Appointed Experts: Montana does not have any such rule

In the federal system, Rule 706 allows a court to appoint its own expert, and sets out the procedure for doing so. Montana does not have any such rule.

HEARSAY, ARTICLE VIII

Rule 801(d)(1)(A): Nonhearsay by definition: Prior Inconsistent Statement of Witness

Montana’s version of this rule treats all prior statements which are inconsistent with the witness’ testimony at trial as nonhearsay, regardless of when, how, or to whom the statements were made. Thus, a bartender could recount what the witness said to him late on a Friday night. The federal version is much more conservative. In order for a prior inconsistent statement to qualify as nonhearsay, it must have been made in a specific way (under penalty of perjury) and in a specific setting (at a trial, deposition, hearing or “other proceeding”).

Rule 803(3): Exception for Then-Existing Condition

Montana does not extend this exception to statements of memory or belief which are offered to prove the fact remembered or believed. Thus, such statements of memory or belief are subject to the hearsay rule. FRE 803(3) does extend the exception to statements of memory or belief, but only if the statement relates to the terms or validity of the declarant’s will.

Rule 803(6): “Business Records” Exception

There are two differences here. First, the FRE version allows a proponent of a business record to satisfy this exception’s foundation either by calling a foundation witness (the custodian of the record or “other qualified witness”) or by submitting a certification which conforms to the self-authentication provisions in FRE 902(11) or (12). Montana requires a foundation witness; the MRE do not have any corollary to 902(11) or (12).

The second difference is that Montana’s version of 803(6) adds language not present in the federal rule. That language purports to allow admission of Montana state crime lab reports without calling the person(s) who compiled the report, if the

requisite pretrial notice is provided to the opponent. (Note that the same language used to be found in M.R.E. 803(8), the public records exception, but was removed after the Montana Supreme Court found that it unconstitutionally violated defendants’ Confrontation rights under the 6th Amendment. So far, there has not been a similar holding re: 803(6), but recent U.S. Supreme Court Confrontation Clause cases put this language in jeopardy.)

Rule 803(8): Public Records Exception

The two versions of this rule are very different in their length and complexity. The federal rule was greatly simplified and shortened in the recent stylistic amendments to the FRE. The Montana version still suffers from the stylistic difficulties of the first draft, after which it was modeled. In addition, it seems to exempt from the exception (thus prohibiting as hearsay) a greater list than the revised federal rule, but more case law is necessary to show whether this is really true.

MRE 803(24) and MRE 804(b)(5): Other exceptions to the hearsay rule (the “residual exception”).

The FRE no longer contain these subsections to the rules providing exceptions to the hearsay prohibition. Instead, the “residual exception” has been consolidated, and expanded, into FRE 807. Montana does not have a rule 807.

FRE 807 imposes several requirements for an out-of-court statement to be excepted from Rule 802 which do not appear in either of the separate MRE residual exception clauses. Montana’s only requirement is that the proffered hearsay bears “equivalent circumstantial guarantees of trustworthiness” as the enumerated exceptions. The federal rule has additional procedural (pretrial notice) and substantive requirements (that the evidence is more probative than other admissible evidence, and that the interests of justice will be served by its admission) which make the residual exception more difficult to meet.

Rule 804(a):

Difference 1: Montana is more liberal about when a witness is “unavailable,” thus potentially allowing more use of the Rule 804 exceptions.

The Montana version of Rule 804 (a)(1) says that “unavailability,” the prerequisite to use of the 804(b) exceptions, “includes” the 5 listed specific situations, thus potentially allowing a proponent to expand on that list. The federal version appears to be limited to the five listed situations.

Difference 2: FRE 804(a)(5) requires the proponent to have tried to obtain testimony OR attendance by the declarant if the statement is offered as a statement under belief of imminent death, a statement against interest, or a statement of personal/family history. Montana simply requires the attempt to have been to obtain the declarant’s attendance at trial.

Rule 804(b)(2) Statements under Belief of Imminent Death: FRE version is more restrictive

Montana allows the use of this exception in all types of cases. The FRE version restricts it to homicide and civil cases, excluding other types of criminal cases.

Education advocacy for highly mobile children

By Patricia Julianelle

*Legal Director of the National Association
for the Education of Homeless Children and Youth*

With the McKinney-Vento Act, unstable housing doesn't have to mean unstable schooling

In 2002, Subtitle VII-B of the McKinney-Vento Act was reauthorized as part of the No Child Left Behind Act. The McKinney-Vento Act provides federal funds to assist states in ensuring that children and youth in a wide variety of homeless situations can enroll and succeed in public schools. The Act also confers broad education rights on children, youth and families. As every state accepts McKinney-Vento funds, its provisions apply to every school district in the country. More information and the text of the law are available from the National Association for the Education of Homeless Children and Youth (NAEHYC), at www.naehcy.org.

Who is covered by the McKinney-Vento Act?

The McKinney-Vento Act covers children and youth who lack a fixed, regular and adequate nighttime residence, including those who are:

- Sharing the housing of others due to loss of housing, economic hardship, or a similar reason;
- Living in motels, hotels, trailer parks, or campgrounds due to the lack of adequate alternative accommodations;
- Staying in emergency or transitional shelters; and
- Sleeping in cars, parks, bus/train stations or public places.

The Act covers youth who have run away from or been forced to leave their homes, as well as migratory children living in one of the living situations described above.

What rights does the McKinney-Vento Act confer?

- **School stability**, by requiring school districts to keep students in their school of origin the entire time they are homeless and until the end of the school year in which they find permanent housing, according to the child's best interest. School of origin is the school the child attended when

permanently housed or in which last enrolled.

- A requirement that school districts provide **transportation** to permit students to remain in their schools of origin.
- **Immediate enrollment** in any school other children living where the child is staying temporarily are eligible to attend. Children experiencing homelessness have the right to attend classes and participate fully in school immediately, even if they do not have normally required documents (including proof of residency, guardianship, immunizations and school records).
- Immediate enrollment for unaccompanied homeless youth (those not in the physical custody of a parent or guardian).
- A requirement that **all school districts designate a staff person** (called a "liaison") to ensure that children and youth in homeless situations are identified and enrolled in school and receive all the services they need.
- A **prohibition on segregating** students experiencing homelessness in separate schools, programs or settings.
- **Basic procedural safeguards**, including the right to attend the school of choice while disputes are pending and rights to written notice regarding disputes. The McKinney-Vento Act is also enforceable in federal court, via 42 U.S.C. §1983. The plaintiffs have won every case that has been brought pursuant to that authority.

How can attorneys use the McKinney-Vento Act to support school access and success for children and youth?

Attorneys from law firms, legal services, protection and advocacy agencies, and solo practitioners have used the McKinney-Vento Act to assist highly mobile students. Some ways to get involved include:

- Provide trainings and information to service providers, advocates and educators. These professionals are hungry for information on a variety of legal issues, such as immigration, public benefits, landlord-tenant, income tax and family law.
- Represent individual children and youth whose educational rights have been violated.
- Establish a legal clinic specifically for youth on their own,

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**Rule 804(b)(3): Statements against Interest:
Montana is more liberal**

The FRE version recognizes statements which are against only certain types of interests: proprietary, pecuniary or civil or criminal consequences. The MRE version also includes statements which would “make the declarant an object of hatred, ridicule or disgrace.”

Rule 804(b)(6): No such Montana exception

The FRE allow an exception to the hearsay prohibition for statements which are offered against a party that wrongfully obtained the declarant’s unavailability. This is an added penalty for wrongfully causing a potential witness to be unavailable: the wrongdoer both loses his/her/its own ability to profit from the absence by invoking a hearsay exception, and may be harmed by admission against that party of what would otherwise be barred as hearsay.

AUTHENTICATION, ARTICLE IX

The federal version contains two rules which Montana does not have, which make a substantial difference in how a proponent obtains admission of certain documents. The federal method dispenses with the need for live testimony from the custodian, if the record in question has been certified by its custodian.

**FRE 902(11): Certified domestic business records: no
Montana counterpart.**

**FRE 902(12): Certified foreign business records: no
Montana counterpart.**

Together, these two rules allow a proponent of a business record in federal court to meet the authentication requirement by submitting a document certified by its custodian, instead of having to present live testimony from that custodian that the document is indeed a business record. If it is a document from a U.S. organization, the certification must meet federal standards. If the document is from another country, the certification should match the standards of that country. For both rules, the proponent must provide advance notice so that the opponent has time

to investigate and object.

BEST EVIDENCE, ARTICLE X

The two articles are basically the same. Montana’s version is slightly more liberal, in allowing admission of not just a duplicate but also “a copy of an entry in the regular course of business” in lieu of an original in most circumstances.

**Rule 1003: Admissibility of Duplicates: Montana adds
“[and] copies of certain entries.”**

This is where Montana says that if you can admit either duplicates or copies of entries in the regular course of business” in lieu of an original, unless there is some question about the authenticity of the original or other circumstances make this unfair. The federal rule sticks to “duplicates,” which are defined as “accurately reproducing the original.”

**Rule 1008: Functions of court and jury: FRE gives the jury a
role in some circumstances; MRE makes the judge the sole
decision-maker.**

The FRE recognizes, as does the MRE, that the judge ordinarily decides whether the proponent has fulfilled the factual conditions for admission of “other evidence” (not the original) of the contents of a writing, recording, or photograph. However, the FRE specifically assigns to the jury factual decisions about: whether the asserted item ever existed; whether another one produced is the original; and whether the “other evidence” accurately reflects the content. MRE 1008 says the court is to decide all these issues.

ADDITIONAL RESOURCE

With the help of my fabulous research assistant, Michelle Vanisko (3L, would be a terrific hire for next year, just saying), I put together a side-by-side table of the M.R.E. v. F.R.E. It is too long to print here, but I have posted it on my faculty page under “Helpful Research Links”: <http://www.umt.edu/law/faculty/people/ford.php>. Again, this is current only through June 2013 but you are welcome to download, print and use it with that caveat.

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

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held on a regular basis at schools or community agencies.

- Lead a Youth Homelessness Task Force in your community. NAEHCY can help you launch this inter-agency collaborative to support homeless youth.
- Engage in state policy advocacy to support homeless youth. NAEHCY’s State Advocacy Toolkit provides ready-to-use advocacy tools and sample laws.

How can you find out about opportunities to help?

To find out where your services are needed in your community, contact the following:

- Montana Legal Services Association, www.mtlsa.org. Anyone who is being unlawfully denied access to education may apply with MLSA by calling the HelpLine at 1-800-666-6899. Any attorney who accepts a pro bono client in this area of law may contact MLSA attorney Amy Hall at ahall@mtlsa.org if additional support would be helpful.
- Heather Denny, Montana’s State Coordinator for the Education of Homeless Children and Youth, at 406-444-2036 or at hdenny@mt.gov. Ms. Denny can also provide contact information for local school district McKinney-Vento liaisons.
- Montana Coalition for the Homeless, www.mtcoh.org
- Tumbleweed in Billings, www.tumbleweedprogram.org
- Patricia Julianelle, Legal Director of the National Association for the Education of Homeless Children and Youth, at pjulianelle@naehcy.org

Q&A: ALPS President & CEO David Bell

Editor's note: The Montana Lawyer worked with Laura Churchman, ALPS Marketing Communications Manager, on this article. David Bell recently stepped up to his new role at ALPS, and we thought a Q&A would provide a more personal introduction to State Bar members.

You've lived all over the country and as far away as Bermuda. What brought you to Missoula?

I fell in love with the west when I was young. I came to the University of Montana as a teenager and knew right away that Montana was a special place. I met my wife, Brittany, while we were both attending UM. She's from Conrad, so as we moved to different parts of the country and internationally, Montana was always "home base" and we knew we would return. When I met ALPS Founder Bob Minto on one of my trips back to Montana, we made a connection and as the opportunity at ALPS unfolded, I knew it was time to come back home.

What drew you to the insurance industry originally? What has kept you there?

Like many others in senior positions I found the industry (or it found me) by accident. I went to work for Chubb out of college, mainly because it was a large, highly reputable organization with an international footprint, and that was the experience I was looking for out of school. The "trade" of insurance – focused on the transfer of risk from one corporate balance sheet to another – was fascinating. It has been called the DNA of capitalism. It's also an industry full of good people. In my experience, compared to other financial service industries, it seems to have a higher concentration of leaders who came from humble means and are committed to giving back to the industry and their communities.

How does the lawyers' professional liability insurance line differ from your previous experiences in the industry?

It has been fun to focus on a single

industry niche. In my previous role as COO of Allied World, a large public company, we had significant resources and more than 40 different coverage lines. That did have its advantages, but I was never able to get "in the trenches" as ideas were first incubated. At ALPS, our mission is to provide the best coverage protection to the legal community. Because of our niche focus, we have been able to successfully build a culture focused on customer service and ease of doing business. I am now able to participate at the grass roots level to help ensure we live up to the faith our policyholders place in us.

ALPS was started in 1988. Now, 25 years later as you are taking the helm, how has the company changed?

As I learned about the ALPS story it became clear that some things have changed a lot, and some things not at all. What has changed is the utilization of technology, policyholder expectations regarding customer service and a general business model that has evolved over a quarter century. ALPS has done a fantastic job of staying ahead of the curve, and is regularly out front as the innovation thought leader. What hasn't changed is the hallmark of the ALPS value proposition. We are a "by lawyers, for lawyers" professional liability carrier committed to making the legal profession better through risk management and stable risk transfer. From the beginning when Bob Minto and his colleagues started this company, ALPS made a commitment to provide the broadest coverage in the marketplace at a reasonable price. ALPS made a promise to our policyholders that if you have a claim it will be handled honestly, promptly and professionally. Those values are the same today as in 1988, and will be the same for many years to come.

As a non-lawyer, how do you view the challenges and opportunities facing the legal community of today?

New issues in the legal community are constantly emerging. At ALPS, we have the good fortune to have longstanding affiliations and endorsements from more state and local bar associations than any other insurance carrier. As a non-lawyer myself, these relationships are truly valuable for me to gain a better understanding of what today's lawyers are grappling with and to be able to offer real solutions.

For example, right now, we have law school students emerging with significant debt and fewer opportunities. With less "big firm" options they are increasingly hanging a solo shingle. On the flip side we have our baby boomer lawyers reaching retirement age. As they leave the practice of law, with them goes some of our most experienced and knowledgeable legal practitioners. ALPS is responding by launching ALPSLegalMatch.com, a new tool that will pair "new" lawyers with soon-to-be retiring lawyers. This tool will help retiring lawyers identify a successor. It will help new lawyers find a practice, and will partner them with a mentor during the transition. The result: for ALPS we have our best lawyers training our newest lawyers, which make the new lawyers a better risk for us to insure. For retiring lawyers, they will have a succession plan using a process that allows them to pick the right person without months of painstaking diligence. For the new lawyer, nothing takes the place of experience and this provides an opportunity to work with someone and gain the benefit of that experience...as well as potentially take over a practice.

I view this challenge and others like it as opportunities, and there are plenty of both on the horizon.

On-Demand and Recorded CLE

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

Ethics/SAMI

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

Family Law

- Drafting Family Law Briefs to the Montana Supreme Court | Oct. 2011
- How NOT to Mess Up Children During a Divorce Proceeding | Jan. 2012
- Settlement Conference Dos and Don'ts | Feb. 2012
- Facilitating Co-Parent Communication with OurfamilyWizard.com | June 2012
- Social Networking | Nov. 2012
- Income, Estate, & Gift Tax Consequences Of Divorce | Jan. 2013
- Hendershott v. Westphal, 2011 MT 73 | Feb. 2013
- Point of Transformation: Divorce | March 2013
- Standing Masters' Observations | May 2013
- A Primer on Divorce | July 2013
- Attorney's Guide to the Guidelines (child support) | Aug. 2013
- Parenting Plans | Aug. 2013

Government

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

Probate and Estate Planning

- Probate Update | Dec. 2011

Law Office Practice and Management

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

Civil

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

Labor and Employment

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

Rules and Policy

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

Appellate Practice and Procedure

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

Healthcare

- A Look Inside: OCR Compliance Audits | April 2013

Oral argument schedule amended

Summarized from an Aug. 14 order — DA 12-0139

Based upon a request from the State Bar of Montana, the previous order of this Court setting oral argument in this matter is hereby revised.

IT IS ORDERED that *State of Montana v. Jill Marie Lotter*, DA 12-0139, previously classified and set for oral argument on Friday, September 20, 2013, at the Red Lion Colonial Hotel, Helena, Montana beginning at 9:30 a.m., is hereby rescheduled for 9:00 a.m. that same date, following an introductory presentation that will commence at 8:30 a.m.

The oral argument in both cases argued that day will be preceded by an introduction to the arguments provided by faculty members of the University of Montana School of Law.

All other provisions of this Court's order on June 12, 2013, shall remain the same.

Discipline

Summarized from an Aug. 20 order — PR 12-0270 and PR 13-0077

On April 27, 2012, and January 29, 2013, respectively, formal disciplinary complaints were filed against Montana attorney Dennis G. Loveless in this Court's Cause Nos. PR 12-0270 and PR 13-0077. The disciplinary complaints may be reviewed by any interested persons in the office of the Clerk of this Court.

On May 24, 2013, Loveless gave notice to the Commission on Practice that he asserts his inability to assist in his defense of the disciplinary matters being prosecuted against him. He requests transfer of his license to practice law in Montana to disability/inactive status, pursuant to Rule 28 of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE). The Commission has filed a report with this Court indicating that, pursuant to Rule 28 and *In the Matter of John Schantz*, 2009 MT 298, 352 Mont. 300, 224 P.3d 603, it has deferred the pending disciplinary proceedings during the period of Loveless's inability to defend, or pending further order of this Court.

Based upon the foregoing,

IT IS HEREBY ORDERED:

1. Dennis G. Loveless is transferred to disability/inactive status. Pursuant to Rule 28, MRLDE, if Loveless wishes to petition to return to active status, he will be required to show, by clear and convincing evidence, that the disability rendering him unable to assist in the defense of these disciplinary proceedings has been removed.

2. To the extent that he has not already done so, and pursuant to Rule 30, MRLDE, Loveless shall provide notice of his transfer to disability/inactive status to all clients he represents in pending matters, co-counsel, opposing counsel, and any courts in which he presently appears as counsel of record. In addition, Loveless shall deliver to all clients their papers or other property as required by Rule 30, MRLDE.

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September

Sept. 19-20 — State Bar's Annual Meeting. At the Red Lion in Helena. 10.5/2 ethics CLE credits. Keynote speaker is Bill Neukom, former ABA president, chief legal officer for Microsoft, and the founder of the World Justice Project. CLE Topics include modern discovery, health care law, Indian law jurisdiction issues, tax update, Supreme Court arguments, a special segment for government attorneys, and more. .

October

Oct. 4 — Maximizing Your Effectiveness as an Advocate. Sponsor: Women's Law Section. Chico Hot Springs Spa & Resort. 7.00 CLE/2.0 ethics.

Oct. 11 — Issues, Ethics and Opportunities in Dispute Resolution. Sponsor: Dispute Resolution Committee. Hilton Garden Inn, Bozeman. 6.75 CLE/2.0 ethics.

Oct. 16 — School Law Update. Billings

Sponsored by the State Bar of Montana School Law Section. Credits, details pending.

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. Sponsored by the Business, Estates, Trusts, Tax & Real Property (BETTR) Law Section. 1/2 day on new Trust Code, other half to be determined.

Special Education Symposium

Kids, Families, Schools, and the Law: Working Together for Success

October 3 – 4, 2013

Flathead Valley Community College, Kalispell

This two day event is sponsored by Disability Rights Montana in partnership with Flathead Valley Community College, with support from Parents Let's Unite for Kids (PLUK) and the University of Montana Rural Institute on Disabilities. 6.25 CLE credits have been approved for attorneys. Workshops will be offered to attorneys, parents, family members, paraprofessionals, teachers, school administrators, and members of the community. Attorneys will gain a basic understanding of special education law to include exhaustion of administrative procedures, damages actions, and attorney's fees. Parents and family members can learn about their children's legal rights to a free and appropriate education through informed IEP planning. Teachers, administrators, and other professionals can learn how to better serve children for a more comprehensive education. Nine highly qualified speakers are confirmed to give presentations.

Keynote Speaker and Presenter

Ron Hager - Senior Staff Attorney with the National Disability Rights Network

Ron provides training and technical assistance to the P&A/CAP network on special education and assists in overseeing training and technical assistance to CAP. He has specialized in disability law, particularly special education, since 1979, when he started his legal career in Buffalo as a VISTA attorney. After that, he was a Clinical Professor at the State University of New York at Buffalo Law School for nine years, supervising the Education Law Clinic. In 1991, Ron moved to Neighborhood Legal Services (NLS) where he represented clients in a wide variety of disability-related cases. As part of NLS's National AT Advocacy Project, Ron also was a

frequent author on disability-law-related issues. He was co-chair of the New York State Bar Association's Committee on the Rights of People with Disabilities for four years, and was the President of the Board of Directors of Autistic Services, Inc., in Western New York, for 10 years. Ron earned a B.A. in Psychology from the State University of New York at Binghamton and a J.D. from the State University of New York at Buffalo Law School.

Presenters:

Andrée Larose, *Special Education Attorney*

Prior to joining Morrison, Motl & Sherwood in 2008, Andrée was a senior staff attorney for Disability Rights Montana for over 20 years. She has a long track record of successfully obtaining appropriate educational services for students with disabilities, both through settlement and litigation at administrative, district court and appellate court levels.

Bea Kaleva, *Attorney at Law*

After graduating from University of Montana School of Law in 1995, Bea joined the Montana School Boards Association as a staff attorney. She rose to the General Counsel position and remained with the MTSBA until 2003, when she returned to Missoula in private practice. Bea serves as counsel for school districts in all areas of employment and school law

Registration

Registration fee: \$185 for attorneys receiving CLE credits (Includes lunch and snacks) 6.25 CLE credits have been approved.

To register, visit www.fvcc.edu; click on Continuing Education, then Disability Rights Montana. For more information, contact Debbie Struck at (406) 756-3835 or dstruck@fvcc.edu or visit <http://disabilityrightsmt.org>.

Charles Louis Turner

Charles Louis "Chuck" Turner, age 59, passed away July 15, 2013 in Missoula after giving his liver cancer a heck of a fight. Services were held in Missoula and in Shelby. He is survived by his wife, Kathy, daughters Robin Turner and Veronica Mietz, son-in-law Joshua Mietz, sisters Marsha (Bill Santos) Moen and family and Barbara (Larry) Arthur and family, Bill Woon and family, and numerous other family members and friends.

Chuck was preceded in death by his parents, Robert and Zelma Turner, and sister Susan Woon.

Chuck was born October 3, 1953 in Shelby, Montana, to Robert Louis and Zelma (Doran) Turner. He graduated from Shelby High School in 1972, collecting many honors, including "Outstanding Lineman" of the 1971 football team. Chuck also met the love of his life, Kathy Turner, at SHS. Their first date was the 1968 Homecoming dance. They've been together ever since, married December 27, 1975. Chuck and Kathy were to celebrate their 38th wedding anniversary in December.


Chuck attended undergraduate and law school at the University of Montana. He earned his J.D. in 1979, and he and Kathy moved to Shelby immediately after. Chuck worked with his father at Turner Agency, Inc. insurance agency, and took over the business in 1981. He ran the business for nearly 32 years. Chuck served as a substitute justice of the peace and briefly as Shelby City Attorney. Chuck was a

Shelby community leader, involved in the following: Shelby Development Corporation, N.E.T.A. Chairman, Chamber of Commerce President, Marias Valley Golf and Country Club President and greens chairman, Shelby Optimist, and Kiwanis International, serving as Shelby's club president and district Lt. Governor.

Chuck and Kathy moved to Missoula in 2002 where he worked as general counsel for Payne Financial Group. In Missoula, Chuck was a member of the Sentinel Kiwanis, the Missoula Symphony Board of Directors, the advisory board of Missoula Catholic Schools, and the Helena Diocesan Finance Council. He was a member of St. Francis Xavier Catholic parish.

Chuck was an expert card player, fine woodworker, teller of great stories and jokes, and the man with the best advice. Chuck was a deeply devoted and supportive husband and father. He cherished vacations all over the country and in Montana's great outdoors. Chuck and Kathy also enjoyed many weekends at the "habin" they built on the shores of Bull Lake.

Chuck taught his friends not to take themselves too seriously through his own self-deprecating nature. His incredible courage, optimism, generosity, gentle nature, sometimes-appropriate jokes, and intelligence attracted so many to him. His family and friends will be forever inspired by his bravery in fighting his illness while living life to the fullest.



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Retirement from the practice of law

A lawyer's journey

By Molly Shepherd

According to a survey that the State Bar of Montana conducted in 2011, forty-six percent of its members are over the age of fifty. Thus a significant number of Montana lawyers already have begun a journey that will lead them toward and beyond retirement. It's an integral part of a life in the law.

Practicing lawyers follow different routes on their journey toward retirement. Some lawyers work full-time until a predetermined retirement date. Many more lawyers gradually reduce their workload and hours until their presence at the office is largely ceremonial. At some point, they cease to practice. Finally, there are the few stalwarts who continue to work into their seventies or even their eighties. For them, practicing law is the default mode of life. They retire with reluctance.

The journey toward retirement doesn't always follow a predictable path, however. Family, money, illness, disability and other circumstances may drive how and when a lawyer retires. Avoidance and both kinds of luck also may affect the route that he or she travels.

I retired ten years ago at the age of sixty. I had enjoyed the practice of law – the satisfaction of helping others, the relationships with colleagues and clients, the intellectual challenges. But for the call of the North Fork, I might have continued to practice until age sixty-five or seventy, gradually reducing my work load.

Almost thirty years ago, however, I bought land on the North Fork of the Flathead River, above Polebridge. The property adjoins Glacier National Park and is fifty mostly unpaved miles from a grocery store. For years, I drove up from Missoula for an occasional weekend. But I longed to spend more time in this extraordinary place. Commuting to work in Missoula wasn't feasible. Nor was telecommuting: the North Fork is off-the-grid and has only twice-weekly mail service. So I opted to work until a predetermined date, then headed north.

I have no regrets about my retirement. My life is rich and varied; I'm never bored. Even on weekdays, I can spend time with family and friends, weave rugs, cook, garden, read, travel,

get plenty of exercise, and try to be a good steward of my eighty acres.

Moreover, I have durable ties to my former colleagues and to the Bar. I've served as an officer and/or member of multiple boards and continued my long-time association with the Montana Justice Foundation. I've also been active in the North Fork community and, since the fires of 2003, have chaired its wildfire mitigation efforts.

For those of you in the over-fifty age group, as well as those of you who one day will attain that status, here are some tips about a lawyer's journey toward and beyond retirement.

1. Plan carefully for your retirement, in collaboration with your colleagues and in consultation with others who will be affected by it.
2. Save money! If you're not already doing so, start contributing as much as you can to your retirement/savings plan(s).
3. Don't wait too long to retire. If possible, do it while you still have the physical and mental capacity to lead an active and fulfilling life.
4. Develop skills, interests and relationships that will give you good reasons to get up in the morning after you retire. Keep learning.
5. After retirement, don't sever ties to your colleagues and to the legal profession, at least for a while. Abrupt termination of established routines and connections can leave an unhealthy void in your life.
6. Consider pro bono practice. The State Bar's emeritus program is a good fit for many retired lawyers.
7. Continue to be engaged in public service and in non-profit organizations. The skills and experience gained from practicing law, and the habits associated with thinking like a lawyer, still have relevance and value.
8. Get a dog, if you don't already have one.

— Molly Shepherd, Polebridge, Montana, August 2013.

Molly Shepherd served as State Bar president in 2000-2001.

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