

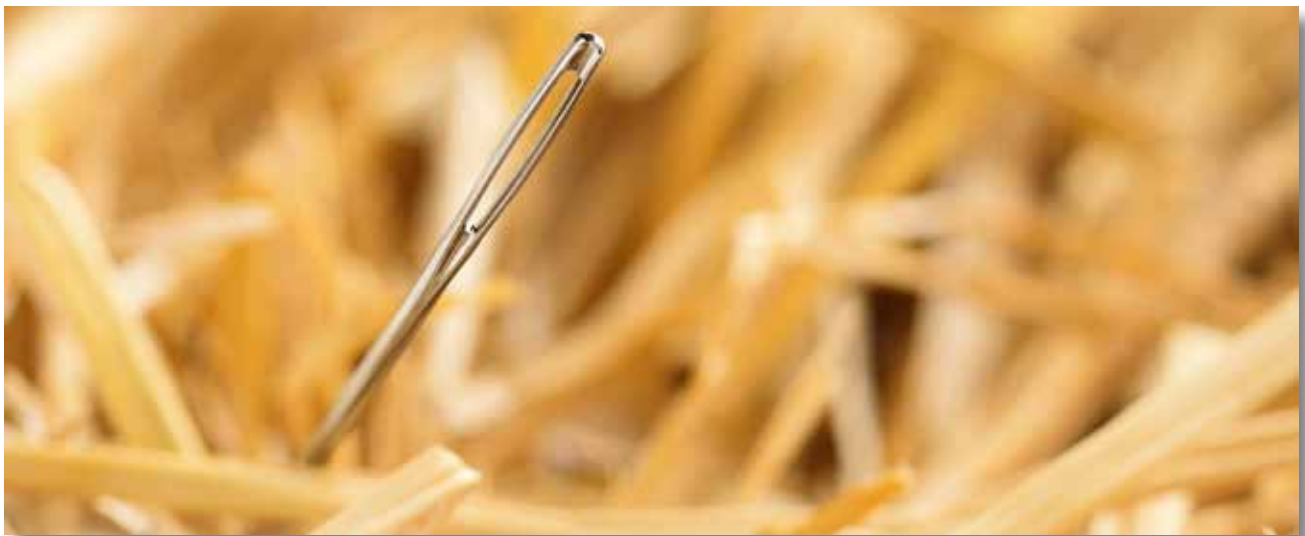
MONTANA LAWYER

State Bar
— of —
Montana

August 2015 | Vol. 40, No. 9

SMARTER SEARCHES

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"By identifying priorities and addressing ways to improve and expand education on technology and practice management, our members will be able to attack this ever-changing landscape head on."

State Bar of Montana President Matt Thiel is an attorney in Missoula whose practice focuses mostly on personal injury and labor law. He is an appointed member of the Montana Facility Finance Authority and the Montana Insurance Guarantee Association.

Helping members address technology issues will be a major focus of term

Prior to running for State Bar of Montana Trustee in 2008, I had a few misconceptions about the State Bar and lacked real knowledge of the Bar's working structure. I had attended a few State Bar conventions, returned ballots for most Bar elections and donated to help sponsor the convention when it was in Missoula. However, it is through my service with the State Bar that I gained insight into the important role the State Bar plays in maintaining the quality of our self-regulated profession.

I have come to know the State Bar as a diverse and democratic organization that is responsible for managing and administering a complex network of Commissions, Committees, Sections and other Court mandated programs. A relatively small staff and hundreds of Montana attorneys, volunteering their time and effort, make the State Bar function effectively, serve the public, and promote access to justice. A quick review of the Lawyers' Deskbook and Directory reveals the incredible number of Montana attorneys who donate their time and expertise to these various Bar functions.

The governing board of the State Bar and its executive officers are a diverse group in terms of practice areas, age and political perspectives. Past and present Trustees and Officers include sole practitioners, large and small firm lawyers, attorneys who do plaintiff's work, insurance defense, family law, criminal defense, prosecution, business and labor law, general practice, mediation, act as in house counsel and serve as District Court judge. In short, the Trustees and Executive officers of the Bar represent much of the diversity that exists in our membership. I have been fortunate to work with outstanding officers, including current President, Mark Parker and have benefited greatly from his thoughtful perspective and approach to issues. I have been enriched through working with attorneys from all perspectives to make sure that the Montana justice system remains viable. In the end, this is what working with the State Bar is all about: Montana attorneys sharing the common goal of promoting the rule of law, safeguarding an independent judiciary and ensuring access to justice for all parties. Individual legal goals are not obtainable without these broader principles. The State Bar is a critical factor in ensuring that the practice of law in Montana remains self-regulated

while assisting its members to serve and protect the public interest. And these functions depend heavily on a coordinated team effort of hundreds of volunteer attorneys.

While Presidents occasionally begin with ambitious agendas, the most important contributions are made through sound planning and team work among the staff, officers and trustees to ensure progress is made on the issues most important to our practice with a sustained effort over years. We are subject to the urgent issues of the day and must represent all members by responding to issues as they arise such as legislative attempts to interfere with the independence of the judiciary or encroach on the Supreme Court's role in regulating the practice of law, or responding to misguided attacks on the right to counsel or trial by jury. The job of educating the public and even the media never seems to end.

Having said that, the State Bar has achieved many things in the past few years, including updating a traveling CLE to make sure all Montana attorneys have access to cutting-edge legal education, bringing all the diverse attorney groups together to address an attempt to greatly restrict attorneys right to substitute judges, and expanding member benefits to include Fastcase legal research, now free to all State Bar of Montana active members.

In the coming year, the Bar will continue to explore ways to assist members improve productivity by becoming more technologically adept and ensure members have the knowledge and support to meet Montana clients' unique needs. The advances in technology need not be insurmountable. We have begun addressing how these technological changes will affect the practice of law. In the next five to 10 years technological advances, Internet marketing, multi-jurisdictional practice, a nationalized practice and the risks posed to confidentiality of client information will change the legal landscape. By identifying priorities, and addressing ways to improve and expand education on technology and practice management, our members will be able to attack this ever-changing landscape head on.

If you have not yet considered becoming involved in your State Bar, I hope this is the year you will.

Ragain, Cook form new Billings firm

Jim Ragain and **Joe Cook** have joined to form Ragain & Cook, PC, in Billings. Ragain & Cook will continue to practice in the areas of plaintiff personal injury, product liability, medical malpractice, insurance disputes, construction litigation and general business litigation.

Ragain received his law degree from Washburn University School of Law in 1979, and earned his LL.M from the University of Florida College of Law in 1981. Since 1982, Ragain has been practicing and litigating in Montana courts. In addition to his active litigation practice, Ragain has served as an instructor at Rocky Mountain College, been a frequent presenter at legal seminars, and has served as a director for the Montana Trial Lawyers. Ragain is a member of the Million Dollar Advocates Forum, Best Lawyers in America, and Mountain States Super Lawyers.

Cook is a 2009 graduate of the University Montana School of Law. Cook is a former president of the Rural Advocacy League, American Association of Justice Trial Team alumni, and recipient of the International Academy of Trial Lawyers Student Advocacy Award. Prior to forming Ragain & Cook, PC, Cook served as a judicial clerk to the Hon. Sam E. Haddon of the United States District Court for the District of Montana and practiced as a trial attorney in Billings.

Ragain and Cook can be reached at 406-651-8888, jim@ragaincook.com, or joe@ragaincook.com.

Stack & Kottke establish new firm in Missoula

Katy Stack, formerly of Stack Law Firm, and **Briana E. Kottke**, formerly of Smith & Stephens P.C., have joined forces to provide criminal defense and other services in western Montana. Stack & Kottke PLLC opened its doors on June 1. It is located in downtown Missoula at 234 E. Pine St. The phone number is 406-284-1860. Please visit www.stackandkottke.com.



Stack



Kottke

Katy Stack, member/owner, holds a master's of science psychology from MSU-Billings with high honors and a juris doctorate from the University of Montana School of Law. After law school she clerked for U.S. Magistrate Judge Keith Strong and then for Chief U.S. District Court Judge for the District of Montana Dana L. Christensen. Following her clerkships she started her own private practice, Stack Law Firm, focusing on criminal defense, family law, and general practice. Stack is licensed to practice in all courts in the state as well as the U.S. District Court for the District of Montana and the Ninth Circuit Court of Appeals. Her focus is on criminal defense, family law and general practice.

Briana E. Kottke, member/owner, holds bachelor's degrees in political science and paralegal studies with high

honors from the University of Great Falls and a juris doctorate with honors from the University of Montana School of Law. After law school she clerked for Justice Jim Rice of the Montana Supreme Court and then went to work for the criminal defense firm of Smith & Stephens P.C. in Missoula. She is a member of the National and Montana Associations of Criminal Defense Lawyers and is a published author. She is licensed to practice in all Montana courts, the U.S. District Court for the District of Montana, and the Ninth Circuit Court of Appeals. Her focus is on criminal defense.

Oitzinger joins Doggett Law Offices in Helena

Doggett Law Offices in Helena has added **Hilary Oitzinger** as an associate attorney.



Oitzinger

Oitzinger graduated with honors from the University of Montana School of Law in 2008 and holds a master's in public administration. After law school, she clerked for Justice John Warner of the Montana Supreme Court.

Following her clerkship, she focused her practice on family law and general civil litigation. She is trained in mediation and collaborative law and offers both of these services through Doggett Law Offices, P.L.L.C.

State Law Library receives library service award

The State Law Library of Montana recently received the 2015 Excellent Library Service Award (ELSA) from the Montana State Library (MSL) Commission. The awards were announced by Commission Chair Colet Bartow.

The ELSA recognizes libraries for achieving excellence in serving their communities in areas including collection development, information access, policies, planning and evaluation, fiscal management, board accomplishments, continuing education for staff and trustees, and outreach to the community. The ELSA requirements are adapted from Montana's current Public Library Standards, which serves as a measuring tool for libraries in the state.

"The Montana State Library Commission is pleased to recognize Montana's excellent libraries with the ELSA award," Bartow said. "Montana's communities face unique challenges of geography, scarce resources, and diverse needs. The libraries that receive the ELSA are not only meeting these challenges, they are exceeding expectations to ensure that the communities they serve are provided with the best resources, services, technology and information. Congratulations to law library staff on their commitment to excellence."

The mission of the State Law Library of Montana is to provide access to legal information consistent with the research needs of Montana's judges and court personnel, members of the State Bar of Montana, state officers and employees, and members of the general public.

Member and Montana News

The State Law Library is proud to assist all citizens of Montana with their legal needs.

Jones joins Matovich, Keller and Murphy



Jones

Matovich, Keller & Murphy, P.C. has announced that Emily Jones has become a shareholder in the firm. Jones practices in a diverse array of litigation areas, including insurance defense, employment law, the defense of product liability claims, municipal liability defense and commercial litigation. She has represented Fortune 500 corporate clients, Montana towns and cities, as well as small Montana and Arizona businesses. She is licensed in Montana state and federal courts, Arizona state courts, and the Ninth Circuit Court of Appeals.

Jones is experienced in all areas of litigation management, and has achieved successful outcomes for her clients through dispositive motions, at trial, and at the appellate level. Her trial experience ranges from arbitration hearings in employment matters to federal product liability trials, and includes serving as lead trial counsel. Emily was selected as a Mountain States

Super Lawyers "Rising Star" in 2014 and 2015.

Jones is active in the legal community, and was selected to serve on Montana's Judicial Redistricting Commission by the State Bar of Montana in 2015. She also serves on the Board of Directors for the Yellowstone Area Bar Association and the State Bar of Montana's Judicial Relations Committee. Additionally, she is a member of the Order of Barristers, the American Bar Association, Defense Research Institute, and the State Bar of Arizona.

Matovich, Keller & Murphy, P.C. is also on the Web at www.mkmfirm.com.

Williams finishes sixth in Missoula Marathon

Missoula lawyer Megan Williams finished sixth overall in the women's Missoula Marathon on July 11.

Williams finished in a time of 3:13:48.48 and was second only to overall winner Trisha Drobeck in the 35-39 age group. Williams said she was hoping for a better finish but was recovering from bronchitis heading into the race. She finished third overall in 2014 in a time of 3:07:04.5.

Alexander Blewett III
SCHOOL OF LAW



LAW ALUMNI REUNION WEEKEND

SEPTEMBER / 25-26 / 2015

Join fellow classmates and other law school alumni from class years ending in a 0 or 5. More info at umt.edu/law.

CLE PROGRAM

Friday September 25, 2015
Time and location
information forthcoming

TAILGATE

Saturday September 26, 2015
Noon - 2:00 p.m.
Garlington, Lohn
& Robinson Plaza

GRIZ FOOTBALL

vs. Northern Arizona University
Kickoff: 2:00 p.m.
Washington Grizzly Stadium

Additional activities include class dinners for the featured classes and the annual scholarship brunch.

Supreme Court reverses Butte jury's \$52 million verdict against bank, sends back for new trial

The Montana Supreme Court in a 4-3 decision released in July reversed a Butte jury's \$52 million verdict against Comerica Bank and sent the case back for a new trial.

The Court heard the oral argument for the case on Sept. 26, 2014, at the State Bar of Montana's Annual Meeting in Big Sky.

According to a synopsis of the case prepared by the Court, case stems from a commercial financing relationship among the Butte Local Development Corporation (BLDC), Masters Group International, Inc. (Masters), and Comerica Bank (Comerica). Masters was an office supply business that sought to build a warehouse in Butte and obtained loans from BLDC for that purpose. Masters also obtained and — in the lead-up to the financial crisis in 2008 — defaulted on a \$10.5 million loan from Comerica. In December 2008, Comerica offered to forbear on calling the loan until February 2009, to allow Masters to seek alternative financing. But on Dec. 31, 2008, Comerica swept the accounts of Masters and its guarantors. Masters subsequently defaulted on its loans from BLDC.

BLDC sued Masters for its failure to pay its obligations. Masters in turn sued Comerica under theories of breach of contract, breach of the implied covenant of good faith and fair dealing, constructive fraud, deceit, wrongful offset, and interference with and loss of prospective economic opportunity. All claims between Masters and Comerica went to trial in January 2014. That same month, a unanimous jury found Comerica liable to Masters for a total of \$52 million, including punitive damages. Comerica appealed.

The Court agreed unanimously that Masters' claims against Comerica should have been governed by Michigan law, not by Montana law, as the parties specified in numerous contracts throughout their commercial dealings that Michigan law would apply. Under Michigan law, Masters could not pursue tort claims or punitive damages stemming from Comerica's alleged breach of contract, so these claims should not have been tried before a jury. Five members of the Court determined that Masters could pursue its breach of contract and implied covenant of good faith and fair dealing claims, and that Masters submitted enough evidence to take these claims to trial. At trial, however, Masters presented irrelevant and prejudicial evidence concerning Comerica's receipt of federal Troubled Asset Relief Program (TARP) funds during the 2008 financial crisis. The Court concluded that these funds did not bear on the issue at trial: whether Comerica breached a contract to forbear. A majority of the Court found that Masters presented extensive evidence on these funds and tied their availability directly to claims that Comerica improperly swept Masters' accounts and did not treat Masters fairly. In light of the manner in which the TARP evidence was presented and argued, the majority concluded that there is a reasonable possibility that the inadmissible evidence might have contributed to the jury's verdict, which necessitated vacating the verdict and

Oral argument to be heard at 2015 annual meeting in gas spill case

The Montana Supreme Court will hear an oral argument at the State Bar of Montana's Annual Meeting in Missoula in September in a case involving an insurance claim over injuries caused by a 6,380-gallon gasoline tanker spill.

The oral argument in the case — *Kohler Et Al. v. Keller Transport Et Al. and Westchester Insurance v. Keller Traqnspport Et Al.* — is scheduled to begin on Friday, Sept. 11, at 10 a.m. at the Holiday Inn Missoula Downtown.

According to briefs filed with the court, Keller Transport and Wagner Enterprises — the trucking companies involved in the spill — were sued in a tort damages action by property owners whose properties were allegedly damaged by the gasoline.

The trucking companies were both covered by the same two insurance policies: a primary policy issued by Carolina Casualty Insurance Company and an excess policy issued by Western States.

The parties in the tort action ultimately agreed to consent judgments in which the trucking companies stipulated to more than \$13 million in damages in exchange for homeowners' promise to pursue recovery of the judgments only from the insurers.

Carolina claimed exhaustion of policy limits of \$1 million. Westchester withdrew after paying an additional \$4 million.

The annual meeting will be held Sept. 9-11 at the Holiday Inn.

remanding for a new trial. The Court noted that this conclusion did not affect the judgment in favor BLDC against Masters.

Justice Beth Baker wrote the opinion, with Justice James Shea writing a special concurrence.

Two members of the Court, Justice Jim Rice and Justice Laurie McKinnon, would have determined as a matter of law that Masters and Comerica did not have a binding contract to forbear. They would have vacated the verdict and dismissed Masters' action. Rice and McKinnon agreed, however, that given the Court's decision that the case properly went to the jury, the TARP evidence was irrelevant, prejudicial, and necessitated a new trial.

Three members of the Court — Chief Justice Mike McGrath, Justice Patricia Cotter and Justice Mike Wheat, agreed that Masters presented sufficient evidence to get to trial on its contract claims. They argued, however, that Masters' presentation of TARP evidence constituted harmless error and did not require complete reversal of the jury's verdict. They would have upheld damages awarded to Masters in the sum of \$25,037,593.

Neill retires after 19 years as district court judge

The Hon. Kenneth Neill stepped down after 19 years as Cascade County District Court judge on June 30.

Neill said it was a bittersweet day, but that he was comfortable with his decision to leave. "It was time," he said in an interview on his last day on the bench.



Neill

"The law has been my life, so I'm just going to miss being involved on a daily basis," Neill said. "The district court is just a great place to be, because that's where the action is."



Kutzman

The most highly publicized case he presided over was the 2002 trial in the notorious Nathaniel Bar-Jonah case. Bar-Jonah was convicted of kidnapping and assaulting two young boys and was also the chief suspect in the disappearance of a 10-year-old Great Falls boy. The case received national attention both because of the grisly details of the case and the fact that Bar-Jonah had been convicted of the attempted murder of two boys in Massachusetts 22 years earlier.

The case was moved to Butte because of pretrial publicity. A press room was set up on the top floor of the courthouse and Neill had to have a meeting with the media to go over rules of their coverage. The trial had a pool of 400 jurors.

"My staff and everyone involved managed to have a good time in Butte despite it all," Neill said.

Neill said he will miss going to work in the Cascade County Courthouse every day.

"I'm kind of the unofficial historian of this courthouse," said Neill, who wrote a history of the building in 2003 in conjunction with its centennial celebration. "Other than the Capitol, it is the most beautiful public building in the state. It's a fascinating place. The investment this county made in 1903 — they spared no expense."

John A. Kutzman took his oath and was sworn in as district judge of Montana's Eighth Judicial District on July 13. The ceremony was performed by Neill.

Kutzman told a packed house at the swearing-in ceremony that his new courtroom has long been a very special place for him, the Great Falls Tribune reported. He made one of his first court appearances in that room, argued one of his most important briefs before Neill there and had a personal relationship with the late Judge Robert Goff, who preceded Neill.

Gov. Steve Bullock appointed Kutzman on June 16. Kutzman was one of four people whose names were submitted to Bullock for the seat by the Judicial Nomination Commission. The other three were Allen Page Lanning, Michael Leon Rausch and Joseph M. Sullivan.

Kutzman was previously a partner and member of Paoli Kutzman, P.C., and he is a graduate of the University of Montana and the University of Montana School of Law.

The State Bar of Montana will honor Judge Neill with the Karla Gray Equal Justice Award at its Annual Meeting in Missoula on Sept. 10. Look for a story on the award in the September issue of the Montana Lawyer.

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Indian wills CLE provides wealth of knowledge on complex topic; clinics planned around state

This past May, attorneys and paralegals from across the state attended a continuing legal education seminar focused on preparing wills for Native American seniors. The CLE was the result of a comprehensive collaboration among distinguished legal professionals. Due to the complexity of drafting Indian wills, there is a limited pool of legal professionals in Montana who have the expertise to assist Native Americans. However, Montana is not alone in this need.

Due to the complexity of the topic, several extremely qualified legal professionals provided guidance and insight. Attorney Joe Hardgrave of Montana Legal Services and a specialist in Indian law, did an excellent job explaining the nuts and bolts of will drafting; Frances Skare, a probate specialist and supervisor in the Tribal Lands Department at the Confederated Salish and Kootenai Tribal Offices, provided fascinating insights and entertained questions raised by the paralegals and attorneys in attendance; Judge Albert Jones treated the attendees to an inside view of the history of the federal law and a glimpse at how probate cases are decided. Each presenter's practical approach in explaining this complex



Photo provided

Attendees listen to a presentation at an Indian Wills CLE in Missoula in May.

material area of the law was refreshing and useful.

The final speakers were Janice Doggett and Betsy Brandborg who explained the ethical ramifications of limited scope representation and pro bono activity related to the clinics held around the state. Participating in these clinics is a wonderful way to learn more about the estate planning, disability planning and tribal will preparation while getting valuable pro bono credit.

Three Legal Document and Indian Will Clinics are scheduled for this summer and fall:

- Aug 26: Pablo — Salish Kootenai College
- Sept. 23: Hardin — Big Horn County Council on Aging
- Oct. 21: Harlem — Harlem Senior Center

For more information on this and other pro bono activities contact John McCrea at 406-444-7783.

State Bar News

State Bar seeks trustee for Area D

One of 2 trustee positions for Area D (Glacier, Toole, Pondera, Teton & Cascade counties) will be vacant effective September 9, 2015 with the resignation of Jason Holden.

Holden resigned to run for Secretary-Treasurer of the Board of Trustees.

Interested candidates must send a letter of interest by Aug. 24. The letter can detail their involvement in local and State Bar activities as well as local community activities. The State Bar Board of Trustees will select the new trustee to serve the remaining one year of the term beginning Sept. 9. Selection will be made at the trustees' Sept. 9 1:30 to 5 p.m. board meeting during the State Bar's 2015 Annual Meeting in Missoula.

Interested candidates must be available for a telephone or

in-person interview at that time. Any questions about the position, contact Chris Manos, executive director of the State Bar of Montana, at 406-447-2203 or cmanos@montanabar.org.

Free CLE, webinar on Aug. 7 will give lawyers tools to address veterans' financial problems

There will be a 2-hour CLE, from 1 to 3 p.m. on Friday, Aug. 7, presented by the Bar's Veterans' Law Section during the afternoon session of the Helena Area Veterans Service Provider Symposium at Carroll College.

Admission to the CLE, Financial Problems Facing Montana's Veterans and Legal Tools to Address Them, will be free. This CLE seeks to educate financial advisers and attorneys on the potential problems facing veterans and legal solutions

available. The principal law is the Servicemembers Civil Relief Act, which provides many tools to veterans and their families to address their debts or grant them more time to do so. Training will also cover provisions of the Uniformed Services Employment and Reemployment Rights Act.

The CLE will also be presented as a webinar through the assistance of the State Law Library.

Seating is limited for the in-person CLE, so you must register at montanabar.org if you are attending.

To view the webinar, visit <http://stream.vision.net/MT-gov> at 1 p.m. on Aug. 7.

It will be presented by a financial expert, Greg Strizich, the president of the Helena Community Credit Union, and Steve Garrison, a 40-year Montana attorney and military veteran.

Gov appoints 2 to Public Defender Commission, 1 to Judicial Standards Commission position

Gov. Steve Bullock on July 24 announced the appointment of Larry Mansch and Maylinn Smith to the state Public Defender Commission.

Mansch, the legal director of the Montana Innocence Project in Missoula, was nominated by State Bar of Montana President Mark Parker. The State Bar nominee is required to be an attorney experienced in the defense of felonies who has served a minimum of one year as a full-time public defender.

Smith is the Director of the Margery Hunter Brown Indian Law Clinic at the University of Montana Alexander Blewett III School of Law. She was appointed as a member of an organization that advocates on behalf of a racial minority population in Montana.

Also on July 24, Bullock announced the appointment of Brianne Dugan of Bozeman as a citizen member of the Judicial Standards Commission. Dugan is President of Bird Dog Strategies, LLC, a strategic planning and public relations firm.

Judicial Nomination Commission accepting applications for Flathead County district judge

The Judicial Nomination is now accepting applications to replace the Hon. Ted O. Lympus as judge in the 11th Judicial District, which serves Flathead County.

Lympus recently announced that he will retire effective Aug. 31.

Any lawyer in good standing who has the qualifications for holding the position of district court judge may apply. The application form is available electronically at the court website (http://courts.mt.gov/supreme/boards/jud_nomination). Applications must be submitted electronically as well as in hard copy. The deadline for submitting applications is **5 p.m., Wednesday, Aug. 12**. The commission will announce the names of the candidates thereafter.

The public is encouraged to contact commission members regarding the applicants during the public comment period, which will begin Thursday, Aug. 13, and close Saturday, Sept. 12.

The commission will forward the names of three to five nominees to Gov. Steve Bullock for appointment after reviewing the applications, receiving public comment and interviewing the applicants if necessary. The person appointed by the governor is subject to election at the primary and general elections in 2016. The successful candidate elected in 2016 will serve for the remainder of Judge Lympus' term, which expires January 2019. The annual salary for the position is \$126,132.

The Judicial Nomination Commission members are: District Judge Richard Simonton of Glendive; Elizabeth Halverson of Billings; Hal Harper of Helena; Mona Charles of Kalispell; Lane Larson of Billings, Ryan Rusche of Columbia Falls; and Nancy Zadick of Great Falls.

Manos named to Fastcase 50 leaders in law list

Chris Manos, executive director of the State Bar of Montana, has been selected as a 2015 Fastcase 50 honoree.

Every year, Fastcase honors 50 individuals who are leading the charge in innovation, entrepreneurship and creativity within the world of law to receive the award.



Manos

Fastcase had this to say about Manos in naming him a Fastcase 50 honoree:

"If you are a member of a bar association in America, chances are pretty good that you have benefited from the good counsel of Chris Manos, the Executive Director of the State Bar of Montana.

When bar association executives assemble for training and collaboration, Chris has volunteered his expertise in planning and mentoring for new executives. He was the Chair of the National Association of Bar Executives Chief Staff Executive Program Committee and new executive director orientation and Chair of the Program Committee for the mid-year and annual meetings. Chris is organized and understated, as befits a West Point graduate and retired Colonel in the Army Reserve. Chris has served as Executive Director since 2001, but he's forward-looking in the best way, making sure the State Bar of Montana and its members are prepared for what's next as law evolves."

Others named to the Fastcase 50 list include Hon. Ann Aiken, chief judge of the U.S. District Court of Oregon; William C. Hubbard, president of the American Bar Association; Joe Mornin, founder of Bestlaw; John Suh, CEO of Legal Zoom; and Donald Verrilli, solicitor general of the United States, who had two huge victories before the U.S. Supreme Court last term in cases upholding the Affordable Care Act and marriage equality.

Check out this year's list of leaders and visionaries who made the Fastcase 50 list at <http://bit.ly/1HI0kKF>.

Court reimplements admission on motion, effective Jan. 1

Order signed by 6 of 7 justices;
State Bar, Character and Fitness,
Bar Examiners to examine rules

The Montana Supreme Court June 24 ordered the re-implementation of admission to the State Bar of Montana on motion.

The order is effective Jan. 1, 2015, allowing time for the State Bar to work with the court's Commission on Character and Fitness and Board of Bar Examiners to implement new rules or amend existing rules to accommodate admission on motion. The court will consider proposed amendments to the preliminary rules prior to the implementation date.

The order was approved on a 6-1 vote with Justice Mike Wheat dissenting.

The existing rules for admission on motion are attached to the court's order. A link to the order is posted on the State Bar website, montanabar.org.

The approval followed a nearly six-month comment period, during which the court received more than 30 comments on the proposal, most of which were positive.

The court held a public meeting on June 9, receiving more comment.

Following are the interim rules for admission on motion:

ADMISSION ON MOTION

A. An applicant who meets the requirements of this rule may, upon motion, be admitted to the practice of law in Montana if the applicant:

(1) has been admitted by bar examination to practice law in one (1) or more states, territories, or protectorates of the United States of America, or the District of Columbia, and has been admitted to and engaged in the practice of law for at least five (5) of the past seven (7) years preceding application to Montana in one or more states, territories, or protectorates of the United States;

(2) has never been denied certification because of character and fitness to practice law in Montana or any other jurisdiction;

(3) has not, within the five (5) years preceding application under this rule, taken and failed the Montana Bar Examination;

(4) is not now nor ever has been admitted to the practice of law in Montana, unless the applicant voluntarily withdrew or resigned from the bar of Montana while in good standing or practiced under an order of temporary admission issued by the Montana Supreme Court;

(5) has not been previously denied admittance to practice

law on application or motion to practice law in Montana or any other jurisdiction;

(6) has not previously engaged in the unauthorized practice of law in Montana or any other jurisdiction;

(7) establishes that the applicant is currently a member in good standing in every jurisdiction where the applicant is admitted to practice law or, if the applicant is not presently a member eligible to practice in a state, territory, protectorate, or the District of Columbia, establishes that the applicant resigned in good standing. An applicant who is disbarred or suspended for any reason from the practice of law in another jurisdiction at the time of filing an application for admission on motion shall not be eligible for admission on motion;

(8) submits evidence of a passing scaled score on the Multistate Professional Responsibility Examination as described in Rule II E 3 of the Rules for Admission to the Bar of the State of Montana;

(9) establishes to the satisfaction of the Commission on Character and Fitness, which may use the National Conference of Bar Examiners character investigation, that the applicant possesses the character and fitness to practice law in this jurisdiction;

(10) submits evidence of in-person attendance at the Montana Law Seminar for new Montana bar admittees, before being approved for admission; and

(11) is a graduate of a law school formally accredited by the American Bar Association.

B. Amendment of application. Every applicant is required promptly to amend his or her application in the event any of the answers on the application has been affected by intervening conduct or events.

C. Documents needed. The following documents shall be furnished with each application, in addition to any and all other information that may be required:

(1) a copy of the certification of moral character and fitness by the Commission on Character and Fitness;

(2) a properly authenticated transcript (sent from the law school) evidencing graduation with a juris doctor or bachelor of laws and letters degree from a law school formally accredited by the American Bar Association;

(3) a certificate of admission, currently valid license to practice law, or certificate of good standing from every jurisdiction where admitted;

(4) a letter from the grievance or disciplinary entity of every state, district, territory, protectorate, province, or foreign country in which the applicant is admitted indicating that there are no disciplinary complaints or charges pending against the applicant;

(5) for any jurisdiction relied upon by the applicant to satisfy the active practice of law durational requirements in this rule, a certificate from the highest court in that jurisdiction certifying that:

(a) the applicant has been eligible to engage in the actual practice of law in that jurisdiction for at least five (5) of the seven (7) years immediately prior to the date of the certificate;

(b) the applicant is in good standing in the bar of that jurisdiction and has not been disbarred, placed under disciplinary suspension, or resigned from that bar while under disciplinary investigation;

(c) the applicant is not the subject of any pending disciplinary complaints or proceedings in that jurisdiction; and

(d) if the applicant has been suspended or disbarred, that the applicant has been duly reinstated; and

(6) an affidavit executed by the applicant describing the applicant's active practice of law for the required durational period in every applicable jurisdiction, which shall include a detailed explanation of how it satisfied the definition of the active practice of law as set forth in Paragraph D of this rule.

D. Active practice of law defined.

(1) For the purposes of this rule, the "active practice of law" means being actively and continuously engaged in employment in the performance of legal services and may include the following activities if performed or treated as performed while the applicant was admitted in active status; however, in no event shall activities listed under Sub-subparagraphs (e) and

(t) of this subparagraph be accepted toward the durational requirement if they were performed in advance of bar admission in the jurisdiction where such activities were performed:

(a) representation of one or more clients in the practice of law;

(b) service as a lawyer with a United States local, state, territorial, or federal agency, including military service with any branch of the United States military;

(c) teaching at a law school formally accredited by the American Bar Association;

(d) service as a judge in a United States local, state, territorial, or federal court of record;

(e) service as a judicial law clerk in a United States local, state, territorial, or federal court of record;

(f) service as in-house counsel provided to the applicant's employer or its organizational affiliates;

(g) service as a lawyer in Montana pursuant to temporary admission by order of the Montana Supreme Court; or

(h) any combination of the above.

(2) "Employment in the performance of legal services" is defined for the purpose of this rule to require that during each of the required five years in the durational period, the applicant spent at least 1,000 hours per year engaged in one or more of the activities listed above.

(3) The active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

E. Application and filing fees. Any applicant seeking admission to the practice of law on motion shall meet the requirements of Paragraphs A through D of this rule and shall:

(1) file an application for admission on motion, including character and fitness investigation information and all required supporting documents;

(2) pay the non-refundable application fee of \$2,500. This application fee includes the Montana attorney application fee, Montana Law Seminar registration, and the first year's bar dues and fees, including fees for the Office of Disciplinary Counsel, Lawyers' Fund fee, and annual attorney license fee, but it does not include the fee for the character and fitness investigation conducted by the National Conference of Bar Examiners. There shall be no refund of, or credit for, this application fee for any reason, including but not limited to denial of admission, withdrawal of the application, or failure to pursue admission after application, regardless of the date of notification by the applicant; and

(3) pay all costs in connection with any investigation and hearings, and bear his or her own costs associated with any application, investigation, and hearing.

Court OKs multi-jurisdictional practice by attorneys exclusive serving one client

The Montana Supreme Court ordered to add a provision to the Montana Rules of Professional Conduct allowing multi-jurisdictional practice by attorneys who provide legal services exclusively to one client as an employer.

The June 16 order was prompted by a request from the Montana Petroleum Association. The Court accepted public comments on the proposal and voted on the revision at a public meeting on June 9.

The Court voted to modify Rule 5.5 to accomplish the proposed revision as to lawyers licensed in another United States jurisdiction, and to further revise the rule to address lawyers licensed in foreign jurisdictions, to reflect portions of Rule 5.5 of the American Bar Association's 2013 Model Rules of

Professional Conduct.

The new subsection of Rule 5.5 reads as follows:

(b) A lawyer admitted in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this state to the lawyer's employer or its organizational affiliates provided that those legal services are not services for which Montana requires pro hac vice admission and, when provided by a foreign lawyer and requiring advice on the law of this or another jurisdiction of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice.

Tireless advocate for kids, leader in state, national bars wins top honor

Gannett to receive Jameson at Annual Meeting in September

Damon Gannett has spent the majority of his professional career as an advocate for children. Surprisingly, he says, it was his time working as an attorney for the U.S. Air Force JAG Corps that helped push him in that direction.

Gannett was fresh out of law school in 1972 when he started working as a JAG attorney, and he was assigned to represent defendants. It struck him at the time that the people he was defending were just kids themselves, often barely out of high school.

When he left the service, Gannett joined a Billings firm that was representing delinquent youths. Shortly after he joined the firm, Gannett said, Youth Court added child abuse and neglect cases to his duties.

He has done the job ever since, serving as guardian ad litem (GAL) in Yellowstone County, representing children in abuse and neglect cases since 1977.

"I've found it to be rewarding when you get what you consider to be a successful result," Gannett said. "I find it to be disappointing and disturbing when the result is less than you hoped for."

Gannett, 68, of Billings, is the winner of the 2015 William J. Jameson Award. Named for longtime U.S. District Court Judge William J. Jameson, it is the highest award bestowed by the State Bar of Montana.

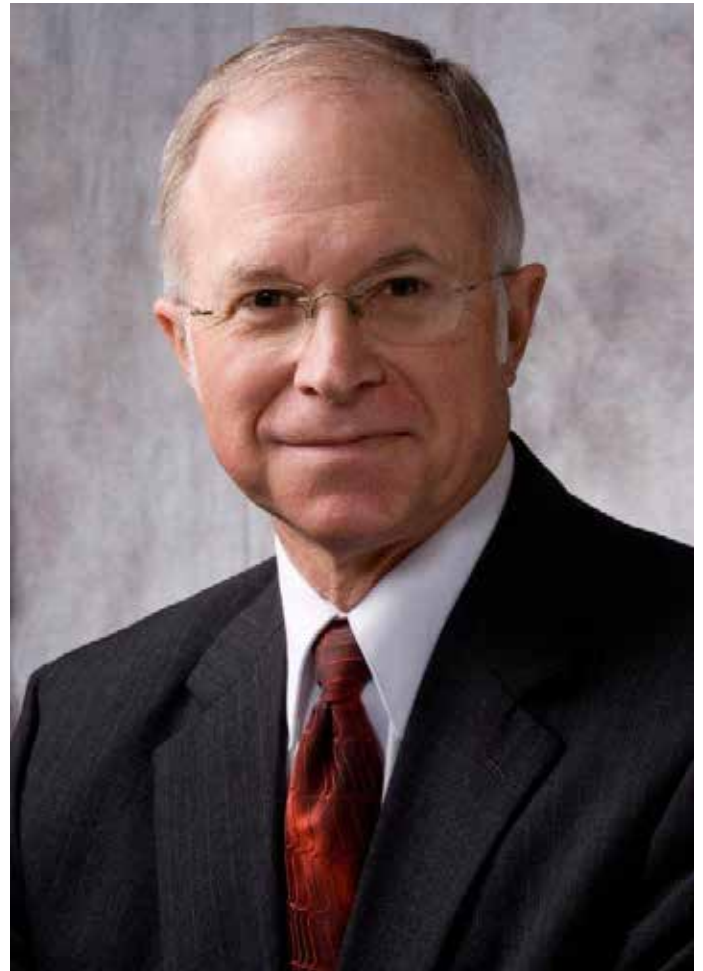
Gannett says it seems to him that as a sole practitioner practicing in family law he is an unlikely choice for the prestigious honor.

"You don't always see yourself the way others do," Gannett said. "When I see the names of the past winners, it seems a little peculiar that I'm going to be the one getting the award this year. I didn't seek it."

He added that nothing he has accomplished in his career would have been possible without his wife, Carol.

"I took the easy job and went to work," he said. "She stayed home and did the hard work. Many days I think that was a lot more demanding than what I was doing."

For the members of the bar's Past Presidents of the State Bar, who selected Gannett for the award in July, there couldn't be a better selection.



Damon Gannett

A quick look at his resume makes it easy to see why.

Gannett was president of the State Bar in 1990-91 and president of the Western States Bar Conference in 1993-94. He has been a Montana delegate to the American Bar Association since 2001.

Robert Carlson, the 1993-94 president of the State Bar wrote in his nomination letter that Gannett's service in those three capacities alone would qualify him for the Jameson. But his contributions go far beyond that, Carlson noted.

"Damon dedicated countless hours as a member of the State Bar's Ad Hoc Committee on Discipline. As some of you may recall, this Committee was formed during a time when the State Bar was working with the Commission on Practice and the

Supreme Court to improve the discipline process. The State Bar was committed to creating an independent office of discipline counsel separate from the Commission on Practice. The goal was to create a system which was fair and transparent but also effective. This process was lengthy but Damon's commitment was unwavering. The current discipline system is the result, in no small measure, of Damon's efforts and dedication."

The list of professional boards Gannett has been elected or appointed to, community groups he has volunteered for, and honors he has received for public service is long. In fact, they take up more than three resume pages.

In addition to much of his practice, much of Gannett's volunteer work has focused on children.

He is a member of the Yellowstone County Child Protection Team, a volunteer for the Young Families Program, and a Youth Court Advisory Committee member. He has served on the Court Appointed Special Advocates Advisory Committee since 2000 and on the Family Drug Court Steering Committee since 2001.

Gannett humbly says that people who serve on committees often do so because no one else wanted to do it.

"I did those things because I thought they were important," he said. "When you're given a job, others are kind of expecting you to perform. You just kind of do the best that you can do."

He seems to have met those expectations.

In addition to Carlson, the names of those who supported Gannett's Jameson nomination read like a who's who of the Montana bar. Six attorneys wrote letters of support for the nomination. Two of them — Molly Shepherd and Sherry Matteucci — are also past Jameson recipients. Five — Matteucci, Shepherd, Donald MacIntyre, Peggy Probasco, and Ed Bartlett — are also past bar presidents.

Matteucci pointed to Gannett's work as guardian ad litem as the contribution that best exemplifies his character and commitment.

"There is no more vulnerable group in the United States, or in the world, than children who cannot care for, or speak for, themselves. Damon's compassion and concern has certainly benefited the children he has directly represented. But his efforts have also been of great service to courts, faced with often competing advocacy, in making decisions which are truly responsive to the needs of children. Damon has also served as a great inspiration, teacher and mentor for others who seek to serve children's interests," Matteucci wrote.

Shepherd's letter noted Gannett's work on behalf of children, but also focused on the personal that make him an effective leader.

"Over the years, Damon has chaired countless meetings. He does so with grace, humor and self-deprecation. He is forthright in addressing difficult issues and scrupulous in resolving them. His integrity and devotion to the public good are unquestionable. So is his capacity for friendship.

"Damon Gannett is a warm, generous, spirited and compassionate person. His record of service to his clients and his profession reflects his character. He is eminently qualified to receive the William J. Jameson Award."

Judy Williams of Billings wrote that, having worked with Gannett before she became an attorney, when she was a child

WILLIAM J. JAMESON AWARD

The Jameson Award is the highest award bestowed by the State Bar. The Past President Committee chooses the winner guided by the extent to which the candidate:

1. Shows ethical and personal conduct, commitment and activities that exemplify the essence of professionalism.
2. Works in the profession without losing sight of the essential element of public service and the devotion to the public good.
3. Possesses an unwavering regard for the Rules of Professional Conduct, the Creed of Professionalism, the State Bar's Guidelines for Relations Between and Among Lawyers, and the State Bar's Guidelines for Relations Between Lawyers and Clients.
4. Assists other attorneys and judges in facing practical and ethical issues.
5. Participates in programs designed to promote and ensure competence of lawyers and judges.
6. Supports programs designed to improve the discipline process for judges and attorneys.
7. Participates in programs that aid the courts in ensuring that the legal system works properly, and continually strives for improvements in the administration of justice.
8. Is actively involved with public and governmental entities to promote and support activities in the public interest.
9. Actively participates in pro bono activities and other programs to simplify and make less expensive the rendering of legal services.
10. Actively participates in programs designed to educate the public about the legal system.

protection social worker in 1979, she has probably known him longer than almost anyone associated with the State Bar.

"Being in Court with Damon when I was an Assistant Attorney General in the Child Protection Unit was like having a 'clean up batter' in trial. He has a way of getting to the heart of the matter that is enviable. Later, I became his colleague as a second GAL in Billings. Damon was always willing to consult, assist, and lend advice on dealing with difficult situations. When I gave up the GAL position last year one of the things I missed was my regular early morning coffee meetings with Damon, when we shared information, strategy, or just our frustrations in trying to do the best we could for our community's disadvantaged children."

MacIntyre noted that the State Bar of Montana and the Montana Justice Foundation, respectively, were both very new organizations when Gannett served as their president:

"I am confident that the hours he dedicated to improve the legal profession and to make justice more accessible to the least among us cannot be calculated. Suffice it to say that the number of hours is overshadowed by the effort he expended in moving the State Bar of Montana and the Montana Justice Foundation to the mission oriented entities that they are today. If one were to pause and reflect on the 10 factors used in judging a candidate for selection for the William J. Jameson Award and ask the question which two legal organizations in Montana focus almost

Missoula attorneys Willey, Samson share award 2015 for professionalism

Richard J. Samson and Charles W. Willey have taken very different paths in their careers. They also share many similarities.

Both live in Missoula. Both have served as adjunct professors at the University of Montana School of Law. Both give generously of their time to serve the legal profession.

And now they have another thing in common: They share the State Bar of Montana's 2015 George L. Bousliman Professionalism Award. The two were chosen in July by the bar's Past Presidents Committee to receive the award.

They will officially be honored on Sept. 10 at the State Bar of Montana's Annual Meeting in Missoula.

Chuck Willey

Willey, 82, has been a member of the State Bar since 1959, but after finishing first in his law school class and clerking for Ninth Circuit Court of Appeals Chief Judge Walter Lyndon Pope, he had a distinguished legal career in California. Among his accomplishments in California were serving as president of the Santa Barbara Bar Association and chairman of the Committee on Justice.

At age 67, Willey moved back to Montana. It has hardly been a retirement. For most of the 15 years since he has been back, he has served as an adjunct professor at the UM law school. He also has served for 10 years as the chairman of the Business, Estates, Trusts, Tax & Real Property Law Section; spoken at 12 CLEs; spoken at the Tax Institute four times; and has done legislative work for the bar.

"I've retired twice, and my wife says I flunked both times," Willey jokes.

He says it was an accident that he first got into teaching. The law school's Business Transactions professor at the time had fallen ill and, knowing Willey had expertise in the subject, she asked if

he could take over half of her class.

Since then, he says, he has been the "finger in the dyke guy," filling in whenever there was a need.

One year, a group of second-year students approached him to ask if he would teach a course because they had heard that the two previous professors of the subject had not been effective. He gladly did it.

He has taught Real Estate Transactions, Property, Conflict of Laws, and Business Organization. He wrote the only Montana real estate transactions textbook.

This year, Willey said, there is a subject that is part of the bar exam and no one else teaches the material. So true to form, at age 83, Willey has also stepped up.

For 10 years, Willey also a former chairman of the Bar's Business, Estates, Trusts, Tax & Real Estate Section. He was among the attorneys who produced the Bar's Montana Probate Forms manual in 2006, and he authored a 61-page section of the book.

He was nominated by Randy Snyder. "Chuck has always supported the State Bar and, past age 80, still contributes. He exemplifies professionalism and deserves our recognition," Snyder wrote in his nomination letter.

Dick Samson

Samson, 63, is a partner at Christian, Samson and Jones PC of Missoula. He was nominated by Shane Vannatta. Submitting letters supporting Samson's nomination were Daniel S. Morgan of Morgan Pierce in Missoula; Kevin Jones of Christian, Samson & Jones; Neal Jensen, Office of the United States Trustee; and Bernard McCarthy of Butte, recently retired clerk of the U.S. Bankruptcy Court of Montana.

One of Samson's main areas of



Richard J. Samson



Charles W. Willey

Bousliman, next page

Bousliman, from previous page

emphasis in his practice is bankruptcy, so he often encounters clients at some of the lowest points of their lives. The compassion and friendliness he shows in these situations was a theme among those who wrote in support of his nomination.

Samson was shocked when informed of the award.

"There's a lot of other people out there, you know what I mean? I'm speechless right now," he said.

A member of the State Bar since 1987, Samson has twice been president of the bar's Bankruptcy Section.

He was a high school teacher before he went to law school. He said one of the highlights of his career so far has been the opportunity to combine his law career and his education background by teaching a bankruptcy course at the University of Montana School of Law.

Winning the Bousliman Award also qualifies as a highlight, he added.

"That would be *the* highlight now," he said.

Here are some excerpts from letters of support for Samson's nomination.

Daniel Morgan:

"Every day, Dick Samson makes bankruptcy as pleasant as it can be for other lawyers and he humanizes what could otherwise be a humiliating process for dozens of debtors every month. He does this all the right way – through personal communication and advice given respectfully and with a smile."

Kevin Jones:

"Richard takes his job as an attorney seriously. He always is willing to undertake a pro bono adoption or give free advice to a friend or acquaintance who finds themselves with a legal dilemma. He is a great public ambassador for the legal profession and his efforts help to establish confidence

in the legal profession."

Neal Jensen:

"In all the years that I have known and worked with Dick I have never once known him to exhibit anything but the fullest measure of professionalism to anyone. I cannot say that about many people, let alone lawyers. But Dick is a special human being. And for this reason I have no hesitation in seconding his nomination for and heartily endorsing his receipt of this special award."

The award is named for George L. Bousliman, a former executive director of the State Bar. It is given every year to a member of the bar who has established a reputation for and a tradition of professionalism as defined by Dean Roscoe Pound — pursuit of a learned art as a common calling in the spirit of spirit of public service — and who has demonstrated extraordinary professionalism within two years prior to the nomination.

Gannett, from page 13

exclusively on those 10 factors it would be the State Bar of Montana and the Montana Justice Foundation. Damon Gannett has demonstrated his passion for the advancement of the legal profession in Montana through his unparalleled dedicated public service to these organization – service which has and continues to positively impact Montana lawyers and those seeking access to our courts."

Wrote Bartlett: "Damon is acknowledged statewide as an exceptional, highly ethical, extremely competent and very trustworthy attorney. He has dedicated his career to serving the public, his clients, and the State Bar and its Members."

Probasco noted Gannett's dedication to his family: He and Carol have raised six children and are currently raising a grandson.

"In short, Damon is the best of what an attorney should strive to be. He expresses intelligent thoughts without being patronizing;

he demonstrates dedication without being dramatic and enthusiasm without being domineering. He works quietly and continually to promote the rule of law and provides an example to fellow attorney and the public alike as to how to be a lawyer."

Randy Snyder, chairman of the Past Presidents Committee,

expressed the sentiments of many of the committee members in choosing Gannett for the award.

"He is someone who is a top-notch litigator who speaks slowly, calmly, confidently and is enjoyable to talk to. He is the most gracious man," said Snyder, immediate past president of the bar. "And I

don't know how he finds time to practice law with all the volunteer work he does."

Gannett will receive the award at the awards banquet at the bar's Annual Meeting in Missoula on Sept. 10. The Annual Meeting will be at the Holiday Inn Missoula Downtown Sept. 9-11.

Mark your calendars!

The Alexander Blewett III School of Law at the University of Montana invites you to participate in the

Fall 2015

On-Campus Interview Weekend

Interview 2nd and 3rd year students for intern, law clerk, and associate positions during our semi-annual on-campus interview program.

Friday • Saturday September 25 • 26



Career Services

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EMAIL:

jennifer.ford@umontana.edu or

CALL:

406.243.5598

Arant wins writing award for article on protection from breach liability

Peter J. Arant of the Missoula law firm Garlington, Lohn & Robinson is the winner of the 2015 Frank I. Haswell Award for outstanding contribution to Montana Lawyer magazine.

Arant won the award for his article "Understanding data breach liability: The basics every attorney should know," which was published in the February 2015 issue of the magazine.

Arant's article was a thoroughly researched analysis of what attorneys need to do to protect their clients and their firms from liability from a potential breach of personal data. The article armed readers with all the information they need to get protected from this ever-present threat.

"I would like to thank the State Bar for this recognition. It is an honor to receive an award given in Justice Haswell's name. By all accounts, Justice Haswell was an outstanding judge and served the people of our state with great distinction. I hope this article continues to raise awareness in our legal community regarding data security and privacy issues. Data-breach lawsuits are here to stay, and they will only continue to increase in number."

The award comes with a \$200 prize through an endowment set up by the late Montana Chief Justice Frank I. Haswell. The winner was chosen from a number of finalists by the State Bar of Montana's Past Presidents Committee.

Committee member Shane Vannatta said he is waiting for



Peter Arant

the day that a breach liability case comes to him — and when it does, he has Arant's article filed away to guide him on how to handle the case.

"This is the type of article I think we should have more of in the Montana Lawyer," Vannatta said.

The Committee, noting that many other articles in the past year were deserving of praise, gave honorable mention to three others. They were: Trent Hooper and Bonnie Owen for their article "War stories for wisely choosing a defensible business name"; Hilly McGahan and Brandi Ries for their

article kicking off a series of articles on domestic violence; and a continuing series of articles on the gaps and barriers to justice faced by especially vulnerable groups of the Montana population (four of the articles were by Americorps VISTA Iris Marcus, and a fifth was by Professor Maylinn Smith of the University of Montana School of Law).



Neil Haight Pro Bono Award

Professor Hillary Wandler
Univ. of Montana Alexander
Blewett III School of Law

Look for profile in September



Karla Gray Equal Justice Award


Hon. Kenneth Neill
Retired Cascade County
District Court judge

Look for profile in September

50 year pin recipients

Congratulations to the 20 State Bar of Montana members who will be honored for their distinguished careers! This year's class is particularly impressive, with a list including a U.S. district judge, several state district judges, partners and founders of venerable Montana firms, a longtime county attorney, a past president of the State Bar and an executive director of the State Bar. Pins will be presented at the Thursday night awards banquet at the Annual Meeting in Missoula Sept. 10.

L. Neil Axtell, Spokane, Wash.
Robert Baxter, Thompson Falls
Donald Bjertness, Billings
Thomas Boone, Missoula
J. Allen Bradshaw, Drummond
Floyd Brower, Roundup
Milton Datsopoulos, Missoula
Diana Dowling, Helena
Bradley Dugdale, Havre
Hon. Sam Haddon, Helena
David Jackson, Helena
Horton Koessler, Billings
Hon. Kenneth Neill, Great Falls
David Niklas, Helena
Frederick C. Rathert, Williston, N.D.
Francis "Hank" Raucci, Helena
W. Gene Theroux, Grand Forks, N.D.
R. William Walsh, Great Falls
Hon. John Whelan, Butte
Douglas Wold, Polson



HOT TOPICS CLE

THURSDAY, SEPT. 10

- **Supreme Court Case Law Update** — Beth Brennan
- **Electronic Evidence Handling** — Sherri Davidoff, LMG Security
- **Castle Doctrine** — Professor Andrew King-Ries
- **Indian Law for Non-Indian Practitioners** — Ryan Rusche
- **Five-Point Test for Vexatious Litigation** — Alanah Griffith, Susan Swimley
- **Servicemembers' Post-Deployment Legal Needs** — Mike Talia
- **The State of the Law in Montana** — Gov. Steve Bullock
- **Constitution's Dignity Clause** — Professor Anthony Johnstone
- **How to Execute on a Judgment** — Bruce Spencer

FRIDAY, SEPT. 11

- **Legislative Update** — Jaret Coles
- **Land Issues: Public Access, Easements, Eminent Domain** — Colleen Dowdall
- **Supreme Court Oral Argument**, with introduction by UM law school faculty
- **Obtaining Medical Records for Your Client** — Darci Bentson, Ellen Layton, Tammi Fisher

OTHER HIGHLIGHTS

- **Local Bar Reception** in Washington Grizzly Stadium suite — Mingle with bar members and enjoy complimentary beer, wine and hors d'oeuvres Wednesday, Sept. 9, 5 p.m.
- **CLE presentation by Gov. Steve Bullock**, Thursday, Sept. 10
- **Awards lunch and business meeting** (1 ticket included in registration), Thursday, Sept. 10
- **Awards banquet**, with presentation of Jameson, Bousliman, Haswell Awards and 50-year pins
- **Supreme Court Oral Argument (see case description, page 6)** Friday, Sept. 11
- **Reception sponsored by University of Montana Alexander Blewett III School of Law** dedicating name change and introducing new Dean Paul Kirgis. Friday, Sept. 11, at conclusion of Annual Meeting.

Examination of victim rights: Ensuring safety and participation in court process

By Robin Turner

Montana Coalition Against Domestic and Sexual Violence

Asserting a crime victim's access to justice can improve our state's response to the epidemic of domestic violence in our country. The impacts of domestic violence reverberate throughout the lives of the victims and the children exposed to the abuse.¹ The U.S. economy loses \$8.3 billion annually due to a combination of lost productivity and increased health care costs caused by violence.² A system's response which anticipates the safety of the victim and allows the ability to meaningfully participate in the criminal justice process can nurture powerful results.

Modern crime victim rights

Most attorneys have heard victims (in real life and on television) discuss "bringing charges against" or "dropping" criminal charges against an individual. As we learned in our criminal procedure class, victims can no longer "press charges" against the accused perpetrator of a crime.³ In the U.S., it is within the prosecutor's purview to bring those charges. As a crime-victim-rights attorney, I explain this to my own clients many times throughout the investigation and prosecution.

The modern victim-rights movement partially took root in U.S. Supreme Court decisions in the 1970s and '80s, starting with the holding in *Linda R.S. v. Richard D.*⁴ Linda R.S. argued that a Texas district attorney should prosecute the father of her child for refusal to pay child support (a misdemeanor), and that the government's failure to do so violated the Equal Protection Clause of the 14th Amendment. The U.S. Supreme Court upheld the district attorney's decision and stated that Linda R.S. had no standing to prosecute this matter, as any outcome under the misdemeanor statute only brought about jail time and not the monetary relief she requested. The Court noted in dicta that "a citizen lacks standing to contest the policies of the prosecution authority when he himself is neither prosecuted nor threatened with prosecution."⁵ The Court also noted, however, that Congress had the power to "enact statutes creating legal

Domestic Violence series

This article is part of a continuing series of articles highlighting domestic violence issues running in the Montana Lawyer in 2015.

rights, the invasion of which creates standing . . ."⁶ This decision spurred a greater interest from victims and activists in advancing rights of victims of crime. The U.S. Supreme Court's early holding that victim impact statements were admissible in the sentencing phase of a homicide trial further recognized a victim's voice during important moments of a criminal prosecution.⁷

Subsequent federal and state statutes developed in recognition of a crime victim's need to participate in the system and to receive victim services. In 2004, the federal government enacted the Crime Victim Rights Act (CVRA), which afforded the following in all federal prosecutions: (1) the right to be reasonably protected from the accused; (2) the right to reasonable, accurate and timely notice of proceedings and/or release or escape of the accused; (3) the right not to be excluded from public court proceedings (with some exceptions); (4) the right to be reasonably heard; (5) the reasonable right to confer with the prosecution; (6) the right to full and timely restitution; (7) the right to proceedings free from unreasonable delay; (8) the right to be treated with fairness and with respect for the victim's dignity and privacy.⁸

Federal courts have developed a variety of remedies to victims whose rights were not recognized by the justice system. Victims may also file a complaint with the crime-victim-rights ombudsman with the U.S. Department of Justice, should they feel that their rights have been negatively impacted by the criminal justice process. Federal victim witness advocates work in U.S. Attorney offices to support victims and provide information regarding the case during the criminal prosecution, sentencing and beyond.

According to the Department of Justice, "the number of identified victims in federal cases has more than tripled since the CVRA passed, increasing from 554,654 victims in 2004 to 2.2 million victims in 2010, a 298 percent increase. Victim notifications doubled to 5.7 million notices within one year of CVRA's passage in 2004 and totaled nearly 8 million in 2010."⁹

1 Hilly McGahan and Brandi Ries, *Understanding Domestic Violence*. The Montana Lawyer 14-16 (March 2015).

2 Robert Pearl, M.D., *Domestic Violence: The Secret Killer that Costs \$8.3 Billion Annually* (Dec. 2015), available at <http://www.forbes.com/sites/robertpearl/2013/12/05/domestic-violence-the-secret-killer-that-costs-8-3-billion-annually/>.

3 Victims historically could prosecute crimes privately under the common law. For a fascinating overview (with extensive citations), see the National Crime Victim Law Institute's report at <http://law.lclark.edu/live/files/11822-fundamentals-of-victims-rights-a-brief-history-of>.

4 410 U.S. 614 (1973).

5 *Id.* at 619 (internal citations omitted).

6 *Id.* at 617, n. 3.

7 *Payne v. Tennessee*, 501 U.S. 808 (1991).

8 18 U.S.C. § 3771 (a).

9 U.S. Dept. of Justice, *Victim's Rights*, available at <http://www.justice.gov/usao/priority-areas/victims-rights-services/victims-rights>.

Starting in the 1970s, a majority of U.S. states have enacted discrete constitutional amendments providing victims with rights in a criminal proceeding. Many of these amendments are modeled after CVRA. Other states do not enumerate all eight rights listed above, but typically grant the right to be heard, informed and present at all important stages of a criminal prosecution. As of the writing of this article, 32 states display a victim-rights amendment in their constitutions.

The rights of domestic violence victims

Previous articles have discussed the low percentage of prosecutions against perpetrators of domestic violence and the pervasive acceptance of spousal abuse in U.S. society.¹⁰ Abuse of a wife was historically considered “a necessary tool for a man to maintain order and discipline in his home, to make sure that his superior intelligence rules, and to avoid the mushrooming of the hysterical, short-sighted and naïve qualities that men widely attribute to women.”¹¹ These not-so-distant attitudes entrench themselves into our criminal justice system response and lurk within our juries. We do not believe the victim. We accuse her of trying to get the upper hand in a family law case. We do not take a trauma-informed approach to addressing victims’ needs, despite the fact that many victims (including children who witness the abuse) develop post-traumatic stress disorder as a result of abuse. We blame the victim.

A prosecutor once told me that while the abuse committed by a particular batterer was dangerous to the community and most likely lethal for my client, that my client also “really knew how to push [perpetrator’s] buttons.” This betrays a basic misunderstanding of the dynamics of a battering relationship. This perpetrator created a world in which the victim is manipulated, intimidated and terrorized. Because of the creation of that world, no matter what my client did or did not do, she ran the risk of “pushing” the buttons of the perpetrator. It was unsurprising that my client was reluctant to cooperate with law enforcement after running into that perspective on multiple occasions.

Finally, victims must fully understand the role of the players in the criminal justice system. Defense attorneys protect the constitutional rights of their clients and strive for acquittal or dismissal of charges. Often, this goal is at direct odds with what a victim seeks from the criminal justice process. Victims must also recognize that prosecutors are not the victim’s attorneys. While conscientious prosecutors develop practice priorities around victim safety and input, they cannot represent the victims.¹² A prosecutor’s goals in a domestic violence prosecution may not ultimately align with the victim’s goals. Victims should understand that they hold rights independent of their role as a witness for the prosecution, and they need to understand how to assert those rights.

Montana’s statutory rights and remedies

In Montana, victims are generally identified as those who suffer the loss of property, bodily injury or reasonable apprehension of bodily injury as the result of a crime or as a result of attempting to prevent a crime/apprehend a perpetrator. Members of the immediate family of a homicide victim are also considered crime victims.¹³

A crime victim’s rights are listed in Title 46, Chapter 24 of the Montana Code Annotated. The Montana Constitution does not provide enumerated rights to crime victims as provided by the states discussed above. Montana statute lists several rights of victims in the criminal justice process, although not all contemplated by the federal CVRA. At this time, Montana does not provide victims the level of enforcement available in other states under an exhaustive constitutional amendment. Additionally, Montana also has not developed a significant body of case law regarding the rights of victims in the context of criminal prosecutions.

That being said, Montana citizens approved a right of restitution through constitutional amendment in 1998. This amendment amended the purposes of Montana’s criminal prosecution from a focus on prevention and reform to a focus on prevention, reform, public safety and restitution.¹⁴ Further, the express right of privacy contained in Article II, § 10 of the Montana Constitution has been examined by the Montana Supreme Court in the context of privacy for the victims of sex crimes during investigation and prosecution.

The right of notice and participation

Prosecutors must consult with victims of both misdemeanor and felony domestic violence offenses regarding dismissal of the case or release of the accused during pretrial proceedings, pretrial negotiations and pretrial diversion. Further, a victim must be notified of scheduling changes in the criminal case, if the change will impact their appearance at that hearing. Finally, a victim must be kept aware of the status of any criminal prosecution and notified of the confinement status and location of an accused.¹⁵ Montana courts must also provide one free copy of all public documents from the court file to victims or their representative. Victims may be allowed additional criminal justice information at the prosecutor’s discretion.¹⁶

Consultation with prosecution is essential for victims of domestic violence. Updates of the status of a criminal case and the location of a perpetrator of domestic violence are extremely important to the victim. Victims of domestic violence are in danger of additional violence or homicide during the criminal prosecution of a domestic violence case. Something as basic to attorneys as rescheduling a pretrial evidentiary hearing involving an accused out on bond might mean additional logistical and safety planning for a victim. In other situations, a victim may wish to be present at or provide crucial information to

10 Hilly McGahan and Brandi Ries, *Understanding Domestic Violence* at 15.

11 Lundy Bancroft, *Why Does He Do That? Inside the Minds of Angry and Controlling Men* 321 (Berkeley Books 2002).

12 Montana Attorney General’s Office, *The Criminal Justice System and You* (Nov. 2006), available at <https://dojmt.gov/wp-content/uploads/2011/05/criminaljusticeandyou.pdf>. Additional forms and information relevant to victims of crime are available on the Attorney General’s website at <https://dojmt.gov/victims>.

13 Mont. Code Ann. § 46-24-106(5).

14 Mont. Const. Art. II, § 28.

15 Mont. Code Ann. §§ 46-24-104, -203, -204.

16 Mont. Code Ann. § 46-24-106(6).

finding a NEEDLE



without drowning in a haystack

"The fact is, we're looking for a very small number of very evil needles in a very large haystack, ..."

Charles Clarke, Member of British Parliament, and Home Secretary (2004 – 2006).

By Joel Henry, PhD, JD; and Michael Pasque UM law student

The practice of law continues to change, albeit slowly. Nowhere does this change impact the legal field more profoundly than the volume of data created by clients, lawyers, courts, and the public. Society has gone well beyond being "data rich" to being "data swamped." Computers, phones, cars, even household appliances, generate enormous amounts of data every day. The practice of law requires attorneys to account for much of this data. They must understand not only the data they handle, but also their client's data. Failure to maintain this understanding can result in state or federal penalties, adverse court decisions, sanctions to both attorney and client, or potentially even disbarment. Yet even the tech aware attorney can become overwhelmed.

A simple discovery request might include a benign-looking and well-intended request such as: "All emails sent, received, or otherwise exchanged by Acme Corporation employees relating to Joe Smith." However, when a lawyer sends this request on to a client, or the technician who handles their technology, such a request becomes a nightmare. Each employee sends or receives an average of 125 emails per day. If Joe Smith's controversy spanned six months and involved 10 Acme employees, the volume of email to search would be in the neighborhood of 225,000. This fails to count any email attachments, which also need to be examined.

Sheer volume alone hides some nasty challenges. For example, some of those emails may have been archived (stored on backup disks), or come from another email account an employee used such as a web-based email provider.

Mining a mountain of data

Technology of today can make searching documents faster and more accurate. Follow these steps to make the most of an electronic discovery request.

Preserve	<ul style="list-style-type: none">• Identify data sources, protect data from deletion• Determine need for metadata and native format
Collect	<ul style="list-style-type: none">• Identify most important issues, custodians and data• Prepare data for review — OCR, organize, select
Review	<ul style="list-style-type: none">• Understand volume of data vs. timeframe and cost• Select the best technology to meet the project needs

Extracting email from archives and collecting from external email servers will keep your poor technician busy for days on end. And the job isn't over once emails have been collected. Now they must be reviewed to prevent disclosure of privileged, or otherwise confidential, information (i.e. Social Security numbers, health data, and human resource issues).

Manually reviewing such a mountain of email can't be performed efficiently, especially when reviewers spend a majority of their time sifting through email that has nothing to do with Mr. Smith. Traditionally, 90 percent of the email collected for review has nothing at all to do with him. One could simply perform a search on the email with the words "Joe" and "Smith," which would likely reduce that 225,000 email mountain significantly. However, keyword searches, which utilize single words or even combinations of words, both over-collect emails and miss many others. For example, if one employee had a husband named *Joe*, such a search would return all those emails. Alternatively, if employees referred to Joe Smith as *JS*, such a search would find none of those emails.

Technology provides the ability to continually create and store data that can be revised and shared at a moment's notice. However, the ability to save all that data and then find something in it becomes a challenge. In the days of paper records, a law office had no choice but to manually review every piece of paper related to the case at hand. With the technology of today, we can now search these documents faster and more accurately. Using technology to assist document review allows us to reduce one of the most fallible links in the discovery chain: humans. Review that requires humans to spend days reading documents results in errors – lots of them. There is no doubt that machines will make errors too, but human review guided by smart technology reduces the probability of missing otherwise potentially relevant or privileged documents.

Legal Framework

The duty to preserve suffers the most profound impact of this data deluge. Just as an attorney must preserve a vehicle involved in an accident, client and other data must be preserved in the electronic data world. Unfortunately many lawyers struggle to understand technology and therefore see data preservation as a form letter to a client or a technologist. This is not the case, as data preservation requires a hold letter that specifies what to preserve.

A legal hold letter may result from current or reasonably anticipated litigation, audit, government investigation, or other such matter that suspends the normal disposition or processing of data. Legal holds may encompass procedures affecting email, document storage, database records, social media content, and even text messages. Accessibility of this data may be reasonable, or not reasonable at all – try retrieving your text messages from six months ago.

The obligation to preserve evidence arises when a party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation. Identifying the boundaries of the duty to preserve involves two related inquiries: When does the duty to preserve attach and what evidence must be preserved?¹ It is not enough to wait until litigation has commenced to start preserving data; preservation begins much sooner than that. This becomes very important as companies often have data-retention policies that would eliminate the data before litigation could commence to require preservation.

The duty to preserve extends to those employees likely to have relevant information, including the retention of all relevant documents or tangible things in existence when the duty attaches.² While this initially seems like a large task, "a party need not preserve *all* backup tapes even when it reasonably anticipates litigation" as doing so would cripple large clients.³ Instead the duty to preserve extends to those employees likely to have relevant information, and not the entire corporate database.⁴

More data results in more problems, in that the likelihood of inadvertent disclosure of privileged information to opposing counsel increases. Fortunately, in 2008 the Federal Rules of Evidence were amended, providing much needed help.

Rule 502 generally provides for protection of traditional "subject-matter waiver" standards when the protected information is inadvertently provided to the opposing party.⁵ To clarify, the committee directly addressed the cost/benefit problem, commonly referred to as proportionality, when discussing Rule 502, responding to the "widespread complaint that litigation costs necessary to protect against waiver . . . have become prohibitive due to [disclosure concerns]."⁶ While some courts previously held that even unintentional disclosure of protected

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1 *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

2 *Id.* at 217; Fed. R. Civ. P. 34(a).

3 *Id.* (emphasis added).

4 *Id.*; Fed. R. Civ. P. 34(a).

5 Fed. R. Evid. 502(a)-(b).

6 Fed. R. Evid. 502 Advisory Committee Notes.

information constituted waiver, Rule 502 now expressly protects this information. This is certainly helpful to those weary of having to manually review every document or email in order to ensure protection of privileged information.

Rules of evidence require authentication, which can be especially challenging with digital evidence. Such authentication can be done using metadata; however, asking for metadata with a discovery request should be done sparingly as gathering metadata associated with every document or email requires significantly more work and expense.

The term “metadata” seems to float around digital evidence and electronic discovery like pollen in the spring. However, what exactly constitutes metadata seems to escape many who use the term. Metadata can be thought of as data about data. For example, documents contain words and sentences — clearly this is data. However, metadata contains data about that document, including when it was created and modified, by whom, on which computer, and when. Metadata can be thought of as a set of unique library catalog cards, one for each document or email you create, read, modify, or copy. Thus, just as a catalog card provides background information on a book, metadata provides background information on documents, emails, messages, pictures, blog posts, web site visits, and a host of other electronic items and actions.

While metadata can be used to authenticate, admissions will always be more common. Only when someone fails to admit involvement in creating, editing or viewing a document, or sending or receiving an email will metadata be needed to authenticate. Of course data processing and electronic discovery vendors will be very happy to provide metadata at attractive rates — attractive to themselves.

Ethical Standards

ABA Model Rule 1.1 of Professional Conduct expresses in a few words the lawyer’s duty to represent all clients competently. In 2013, the ABA accepted a proposal of the ABA Commission on “Ethics 20/20” to modify one of the comments to this rule in order to make clear that a lawyer must continuously maintain familiarity with technological change in order to comprehend the manner in which technology may affect a particular representation. The added language reads, “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”⁷ (Many state bars have adopted this language, and the State Bar of Montana’s Ethics Committee is expected to give a recommendation on it to the Bar’s Board of Trustees by this fall.) Lack of knowledge as to digital evidence cannot excuse a lawyer from such diligence. What’s a lawyer to do? The California Rules of Professional Conduct may supply an answer. Recent changes in California rules included this ominous passage:

Attorneys who handle litigation may not ignore the requirements and obligations of electronic discovery. Depending on

the factual circumstances, a lack of technological knowledge in handling e-discovery may render an attorney ethically incompetent to handle certain litigation matters involving e-discovery, absent curative assistance under rule 3-110(C), even where the attorney may otherwise be highly experienced. It also may result in violations of the duty of confidentiality, notwithstanding a lack of bad faith conduct.⁸

This may be the future across the nation. Regardless, the volume of data will not shrink in the future, nor will the importance of some of the needles in the growing haystack of data. The outcome of cases will turn on these needles, as will the ability of lawyers and law firms to compete with those who leverage technology to reduce costs.

Even the most tech-savvy lawyer, using software to find that needle, will likely require the expertise of technology professionals — data from multiple sources, in multiple formats, doesn’t simply appear within a software product without retrieval and conversion. The ABA addressed this issue in a formal opinion, providing that a lawyer who engages a non-lawyer (or lawyer) to provide outsourced services is required to ensure that person’s compliance with Rules 5.1 and 5.3.⁹ Therefore, utilizing help from outside vendors to complete a complicated e-discovery task is not unethical. It is, however, the supervising lawyer’s obligation to ensure that those tasks are delegated to individuals competent to engage in them.

Data Review

Document review continues to employ methods that date back to the invention of paper — manual review. According to the Best Practices Commentary by the Sedona Conference, “[e]ven assuming that the profession had the time and resources to continue to conduct manual review of massive sets of electronic data sets (which it does not), the relative efficacy of that approach versus utilizing newly developed automated methods of review remains very much open to debate.”¹⁰ New associates fear and loath the traditional review of documents, namely sitting in a room with other young lawyers reviewing reams of documents, electronically or in paper form, for days on end. Not only is this effort mentally exhausting but in the age of computers it requires the review of exponentially greater amounts of documents than ever before. Even if it were affordable, manual review of that amount of data leads to error rates of 35-40 percent.¹¹

Technology assisted review (TAR) includes a software component that goes beyond simple display of electronic data within the review process. Even though the legal profession views manual review as the gold standard compared to other forms of review; the use of TAR produces accurate, efficient results while still maintaining compliance with applicable discovery rules. “One point must be stressed — it is inappropriate to hold TAR to a higher standard than keywords or manual review. Doing so discourages parties from using TAR for fear of spending

⁸ State Bar of Calif. Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. Interim No. 11-0004 (2015).

⁹ ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 08-451, (2008).

¹⁰ The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 199 (2007).

¹¹ *Id.*

⁷ ABA Model R. of Professional Conduct, 1.1, cmt. 1 (2013) (emphasis added).

more in motion practice than the savings from using TAR for review.¹² Thus TAR should be viewed on an even playing field with manual review.

Just as when you buy a new computer, there are many choices when it comes to TAR. The three primary types of software available utilize Continuous Active Learning (CAL), Simple Active Learning (SAL), or Simple Passive Learning (SPL). In a study performed by two of the most renowned experts in e-discovery, any active learning process (CAL or SAL) greatly outweighs passive learning (SPL), especially when compared to traditional review techniques.¹³

Active learning differs from passive in that active learning software provides the user with the most likely relevant documents to review while passive selects documents randomly, or allows the user to select documents. Active learning leverages user actions to provide increased accuracy and efficiency of the searching and tagging performed by a user while passive learning treats all data the same and provides data to the user that better represents the entire data set (based on random sampling the user sees the data set as a whole). Both processes continually learn from reviewer actions. Both methods use statistical measurements to determine when to let the software mark the remaining documents. After the software marks a set of documents, the user reviews these and corrects any mistakes. The cycle continues until statistical measurements reach pre-set goals, often set as a part of the cost/benefit analysis. Once the software has done enough analysis, the software then marks documents yet to be reviewed by the user. In this way many documents get marked but the user reviews only a portion of them.

Two very simple terms can be used to convey the effectiveness of TAR: precision and recall. Precision is the percentage of correctly marked documents within all marked documents. Recall is the percentage of correctly marked documents within all documents in the dataset. Essentially, precision measures how accurately a TAR technology uses reviewer markings to mark unreviewed documents. For example, if a user marks 100 documents relevant, and the software marks 1,000 of the remaining 9,000 documents relevant, then precision would be the percentage of the 1,000 documents the software marked that the reviewer confirms as being relevant. Recall works similarly by calculating the number of relevant documents within the remaining unmarked 9,000 documents the software should have marked relevant. An attorney can utilize these measurements to judge the progress of document review and substantiate both the use and accuracy of TAR.

As more time is spent to get closer to that ever-elusive high precision/high recall result, an exponential amount of money is spent. However, the amount of time spent trying to get one more percentage point higher recall or precision may not be proportional to the value of the case. Thus, courts often reiterate that their rulings regarding proportionality for one

particular case should not be applied to other cases.¹⁴

In early 2012, Federal Magistrate Judge Andrew Peck opined one of the first legal affirmations for TAR, stating that “judicial opinion now recognizes that [TAR] is an acceptable way to search for relevant ESI in appropriate cases.”¹⁵ It has been three years since that ruling was published, and courts have generally approved the use of TAR in discovery.¹⁶ It is important to note that while courts approve of the usage of TAR, it is up to the parties to determine when TAR is appropriate. Courts generally have not required TAR in discovery where the party has shown that the benefits do not outweigh the cost.¹⁷

Many lawyers fear TAR as they assume they must be statisticians or mathematicians to use it. While it is necessary to understand how the technology works, a lawyer need not understand the detailed statistics or programming behind TAR. The choice in technology lies with the producing party as courts resist dictating the use of TAR or what type of TAR to use. Thus, the system used should be dependent on the specifics of the data within the case at hand, which can only be determined on a case-by-case basis.

Production

Data can be produced in one of four formats: native, near-native, near-paper, or paper. Each has its benefits and drawbacks, so the process used for one case may not fit the next.

A request for production may include metadata and, if so, such metadata should be delivered with the document in native format. This metadata acts much like a digital fingerprint and can be imperative in authenticating the document. Native production refers to the form ordinarily used by the producing party to store and revise the document. For example, with Microsoft Word, documents would be stored in .doc or .docx format. Production in this format delivers metadata but presents challenges when applying a Bates stamp, performing redaction, and controlling privileged or confidential data. Additionally, if the native format requires special software, such as a Computer Assisted Drawing (CAD) package, the opposing party will have no feasible way to view the native file.

The near-native production keeps as much of the original data as possible, but places all documents in a commonly read file format more easily used by the opposing party. For example, CAD drawings can be converted to PDF files. This also makes Bates stamping and redaction easier to perform.

Near-paper production simply produces an electronic file

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14 *Moore v. Publicis Groupe*, 287 F.R.D. 182, 193 (S.D.N.Y. 2012) *adopted sub nom. Moore v. Publicis Groupe SA*, 11 CIV. 1279 ALC AJP, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012); *Rio Tinto*, supra note 12.

15 *Id.* at 183.

16 *Green v. Am. Modern Home Ins. Co.*, No. 14–CV–04074, 2014 WL 6668422 at 1 (W.D.Ark. Nov. 24, 2014); *Aurora Coop. Elevator Co. v. Aventine Renewable Energy–Aurora W. LLC*, No. 12 Civ. 0230, Dkt. No. 147 (D.Neb. Mar. 10, 2014); *Edwards v. Nat’l Milk Producers Fed’n*, No. 11 Civ. 4766, Dkt. No. 154: Joint Stip. & Order (N.D.Cal. Apr. 16, 2013); *Bridge-stone Am., Inc. v. IBM Corp.*, No. 13–1196, 2014 WL 4923014 (M.D.Tenn. July 22, 2014); *Fed. Hous. Fin. Agency v. HSBC N.A. Holdings, Inc.*, 11 Civ. 6189, 2014 WL 584300 at 3 (S.D.N.Y. Feb. 14, 2014); *EORHB, Inc. v. HOA Holdings LLC*, No. Civ. A. 7409, 2013 WL 1960621 (Del. Ch. May 6, 2013); *In re Actos (Pioglitazone) Prods. Liab. Litig.*, No. 6:11–MD–2299, 2012 WL 7861249 (W.D.La. July 27, 2012) (Stip. & Case Mgmt. Order); *Global Aerospace Inc. v. Landow Aviation LP*, No. CL 61040, 2012 WL 1431215 (Va.Cir.Ct. Apr. 23, 2012).

17 *In re Biomet M2a Magnum Hip Implant Prods. Liabl. Litig.*, 2013 WL 1729682 & 2013 WL 6405156; *Kleen Prods. LLC v. Packaging Corp. of Am.*, 2012 WL 4498465.

12 *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 129 (S.D.N.Y. 2015).

13 Cormack, G. V., & Grossman, M. R., *Evaluation of machine-learning protocols for technology-assisted review in electronic discovery*, Proceedings of the 37th international ACM SIGIR conference on Research & development in information retrieval, 153–162, (ACM 2014).

For more information about upcoming State Bar CLEs, please call Tawna Meldrum at 406-447-2206. You can also find more info and register at www.montanabar.org. Just click in the Calendar on the upper left of the home page to find links to registration for CLE events. We also mail out fliers for multi-credit CLE sessions, but not for one-hour CLE or webinars.

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What evidence of 'reasonable' medical expenses is available in light of Meek v Eighth Judicial District Court, 2015 MT 130, 379 Mont. 150, 349 P.3d 493? Carriers and defense attorneys can more energetically challenge plaintiff's claims for recovery of excessive medical charges.

Nancy is a nationally recognized expert in medical billing and bodily injury litigation support services. She testifies in state and federal court on issues involving the reasonable value of medical care. As Vice President of Elevate Services, Inc. Nancy strategically leads a range of services that improve outcomes, reduce costs and expedite settlements in bodily injury claims and litigation.

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the prosecutor for bond hearings. The release of the accused may bring about dangerous consequences to the victim and the family.

The right of protection from the accused

Each district court has the *option* of issuing standing criminal no-contact orders over individuals accused of domestic violence at the time of arrest. In participating counties, those arrested for or charged with domestic-violence-related offenses in Montana are immediately under the no contact order. This means the accused cannot contact the victim prior to his first appearance. The presiding judge has the opportunity to extend that no-contact order at the initial appearance (or impose it for the first time). This no-contact order immediately disappears with dismissal or should a judge not include it in the sentence.¹⁷ Victims must be given the opportunity to consult with prosecutors and law enforcement regarding any violations of the no-contact order during prosecution, to ensure that the full context of the battering relationship is considered.

Victims of domestic violence prosecutions must also receive safety planning services from attorneys and crime victim advocates from the time of arrest to the end of the case. For safety planning purposes, the victim and/or her advocates/attorneys must understand the status of all phases of a criminal prosecution. Any attorneys interested in representing domestic violence survivors in any type of criminal or civil proceeding can review the American Bar Association's safety planning publication for assistance in developing their own tool.¹⁸

The right to be heard

As discussed above, prosecutors must discuss key stages in the case with victims. Montana law also allows victims to attend criminal proceedings.¹⁹ Under this statute, victims are not merely witnesses subject to sequestration. Victims must be given the opportunity to argue why they should be allowed to remain in the courtroom during the trial, even as the prosecution or defense moves to sequester witnesses. Oftentimes, domestic violence victims are not represented by counsel in the criminal proceeding and may feel unable to address the court directly regarding his/her right to be present for the hearing. Unfortunately, I have observed victims of domestic violence who were without representation be removed from the courtroom after they have testified without the opportunity to address the court on the decision.

The right of privacy

Information about victims of domestic violence is not automatically removed from public court documents under Montana statute. Victims of domestic violence must specifically request that law enforcement not disseminate their

address, telephone number or place of employment (with some exceptions). On the other hand, law enforcement may never voluntarily release any information identifying a victim of sexual offense (besides the address of the crime scene in some situations). A victim who has fled the home may wish to have her new address concealed from the accused. Montana statute protects the victim from having to disclose her address when testifying in open court.²⁰

Further, throughout the course of the criminal prosecution, the prosecution and/or the defense may attempt to admit evidence that violates victim privacy. A major portion of victim-rights legal work involves protecting that privacy if the victim wishes. Victim-rights attorneys must also be prepared to explain privacy implications of participating in the criminal justice process, and how the exclusion of some victim information could impact the criminal prosecution.

The Right of Information — Notification of Victim Assistance

Many domestic violence victims remain in an abusive situation because they cannot afford to leave. A 2012 Mary Kay Foundation survey of 700 domestic violence shelters across the U.S. revealed that 75 percent of domestic violence survivors stayed with their abuser longer because of financial insecurity.²¹ A cooperative victim may have to take time off from work to participate in the criminal justice process, to appear in family court proceedings (or order of protection proceedings), or for medical or therapy appointments.²²

Montana law enforcement is required to give victims written notice of the availability of crime victim compensation and victim advocacy programs.²³ Crime victim compensation statutes allow victims to apply for the following benefits without having to wait for a restitution order: lost wages, medical bills, funeral expenses and mental health counseling (for both the victim and child victims of domestic violence).²⁴

Victim rights in tribal court

The tribal courts located in Montana have developed their own statutes to address domestic violence. Some of these statutes list enumerated victim's rights in the prosecution of domestic violence offenses. Further, since the passage of the Violence Against Women Act Reauthorization of 2013, tribal courts have exercised greater jurisdiction over prosecutions on the reservation.²⁵ Attorneys practicing in Montana tribal court should consult the statutes for each individual tribal court

Violence, next page

¹⁷ For this reason, many crime victims opt to apply for a civil order of protection, which holds the possibility of permanent protection.

¹⁸ American Bar Association Commission on Domestic and Sexual Violence, *Safety Planning*, available at <http://www.americanbar.org/content/dam/aba/migrated/tips/publicservice/DVENG.authcheckdam.pdf>.

¹⁹ Mont. Code Ann. § 46-24-106.

²⁰ Mont. Code Ann. § 44-5-311.

²¹ Truth About Abuse Survey Report (Mary Kay Foundation 2012).

²² Fortunately, MCA § 46-24-205 bars a victim's employer from firing or disciplining her for participating in the criminal justice process. However, Montana law does not require employers to provide paid leave for employees experiencing domestic violence.

²³ Mont Code Ann. § 46-24-201.

²⁴ Mont. Code Ann. § 53-9-101 et al.

²⁵ U.S. Dept. of Justice, VAWA Reauthorization 2013: <http://www.justice.gov/tribal/violence-against-women-act-vaawa-reauthorization-2013-0>.

before proceeding.²⁶

Conclusion

Recognition and celebration of the rights of domestic violence victims could very well save lives. A victim-centered approach to domestic violence crimes and supportive policies can improve the lives of victims and their families. Attorneys can assist these victims in asserting their rights under state, federal and tribal constitutional and statutory schemes. Crime-victim-rights work is extremely rewarding. I have seen my clients gain confidence and healing from asserting their rights through this

²⁶ State Law Library Indian Law Portal, at <http://indianlaw.mt.gov/default.mcp.x>. Note: The State Law Library has not updated this data in the past few years, therefore, it is recommended that attorneys ensure they have the most updated statutes from the tribal court of interest before proceeding.

E-Discovery, from page 23

with each document presented as if it were printed and scanned into an electronic file. For example, a group of emails can be exported from Outlook into a single, multi-page, PDF file. Converting to this format allows for Bates stamping, redaction, removal of confidential information, and control of metadata. Traditionally lawyers would collect the data to be produced, print it, and then scan it back into a PDF, a costly and inefficient process. Software now allows this process to be performed seamlessly by the user when extracting data, thus decreasing cost and making this an often preferred method of production for data.

Lastly, the paper format is just as it sounds, production completely in paper. As in near-paper, this provides the ability to completely control redaction, Bates stamping, and removal of confidential information. However paper will not include any metadata and, unlike all methods above, will not allow the party to electronically search the information.

Technology that Fits

Currently, discovery extends to any non-privileged matter relevant to any party's claim or defense, making it very broad and far reaching. Proposed changes to the Federal Rules of Civil Procedure include a change to Rule 26, limiting discovery to be "proportional to the needs of the case." The motivation for this change stems from an effort to decrease cost and increase efficiency in the age of growing data volumes. The current interpretation of Rule 26 has led to increased costs and delays as firms struggle to sift through large amounts of data even though the expense often far outweighs the benefit to either party. Opinions vary on the impact of such changes but most agree that the proportionality standard will require substantiation beyond legal arguments – namely based on technical and resource expenditures. Most attorneys struggle with these types of arguments, requiring technical experts to weigh in as to the limits and accuracy of the software used when courts require a

process. Additionally, a positive experience with the criminal justice system inspires the victim to participate through family law and order of protection matters in the civil justice system.

Local crime-victim advocates and victim witness professionals are an excellent resource to both victims and attorneys. Advocates are experts in safety planning and confidentiality, and provide crisis counseling, support, information on the criminal justice system, and information on the rights described above. You can find local advocacy organizations around the state and on all of Montana's Indian reservations at www.mcadsv.com or at <https://dojmt.gov/victims/crime-victim-advocates/>.

Robin Turner is the public policy and legal director at the Montana Coalition Against Domestic and Sexual Violence (www.mcadsv.com) and the co-chair of the State Bar of Montana's Justice Initiatives Committee.

party to prove proportionality.

Many cases and controversies settle without data volume becoming a factor, and without a thorough examination of documents and emails. A case with 1,000 pages of documents and email may appear too small for technology, yet paralegals and lawyers struggle to keep the content of that data organized mentally, especially when handling dozens of matters simultaneously. A case with 10,000 pages requires more than the human memory. However, a matter valued at \$200,000 may not warrant a five-figure technology investment. What technology fits a case like this?

Practicing attorneys can answer this question without the need to become technology geeks. Simple tools that merely organize data into a table of contents linking file names to file locations provide very little value. Tools that truly assist in analyzing, relating, and understanding the content in a dataset provide the real assistance needed. Software such as Start:Review, Encase, Logikull, and iPro fit the bill. The current market offers varying solutions, from cloud-based data review to on-site software. With each vendor having their own methods to perform the complicated analyzation required, this allows lawyers to shop around, finding the right features, at the right price, to find those needles in their haystack of data.

Conclusion

E-discovery is an area of the law that every lawyer should embrace and understand enough to work in. Big data is not going away, and sooner or later the time will come that requires the use of complicated software to navigate a case. Understanding how TAR can help you wade through a seemingly impossible task is the first step in embracing e-discovery, and is your obligation to effectively serving your client by providing them more bang for their buck.

Joel Henry, PhD, JD, is a professor of computer science at the University of Montana and adjunct professor of law at the university's Alexander Blewett III School of Law. Michael Pasque is a third-year candidate for J.D. 2016, University of Montana Alexander Blewett III School of Law

For purposes of this subsection, the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

DISCIPLINE

Attorney Russell K. Jones disbarred in action reciprocal to discipline in Washington

Summary of Supreme Court order in Case No. PR 14-0073

The Montana Supreme Court disbarred Montana attorney Russell K. Jones in a June 16 order. The reciprocal discipline is based on Jones' December 2014 disbarment from the practice of law in the state of Washington.

Jones was found by the Washington Supreme Court to have violated various sections of the Washington Rules of Professional Conduct through misconduct arising out of litigation involving his mother's estate. According to the Montana Office of Disciplinary Counsel, the Washington court generally described Jones' misconduct as failing to comply with discovery requests, filing frivolous motions and appeals and misrepresenting the value of estate property to other heirs.

He was removed as personal representative but continued a series of frivolous appeals and subsequent litigation, which resulted in sanctions against him totaling over \$138,000 and four separate contempt findings.

The Montana Office of Disciplinary Counsel filed a petition for Jones' reciprocal disbarment on Feb. 2. Jones filed a counter-petition for a hearing before the Commission on Practice. He argued that he was denied due process in the Washington disciplinary proceedings and that there was such an infirmity of proof in those proceedings that the court could not accept the Washington decision as final.

Jones also asked the Washington Supreme Court to recall its certificate of finality of its decision in his case in that state. The Montana court suspended its proceedings pending the outcome of that motion. The Washington court denied Jones' motion.

The Montana Supreme Court then ruled that Jones' claims had no merit and granted reciprocal discipline against him. The court noted that Montana Rules for Lawyer Disciplinary

Enforcement do not provide for a right to a hearing upon a petition for reciprocal discipline. The rule incorporates a presumption that the court will impose discipline identical to that imposed by another state.

Attorney Randy Laedeke disbarred for misappropriation of trust funds

Summary of Supreme Court order in Case No. PR 14-0471

The Montana Supreme Court disbarred attorney Randy S. Laedeke in a June 30 order.

The disciplinary proceeding arises out of Laedeke's conduct in relation to representation of the widow of a man who died in a motor vehicle accident.

In addition to being disbarred, Laedeke was ordered to pay restitution of \$65,547 to those entitled to recover for the man's death and to pay the costs of the disciplinary proceedings. He was not ordered to disgorge his fee of \$120,000, since disgorgement is not specified as a permissible form of discipline in the Montana Rules of Professional Conduct.

Laedeke had previously been disciplined for misappropriating \$12,000 funds belonging to a client. The Office of Disciplinary Counsel argued that he should have been disbarred in that case, but the court granted leniency because of mitigating circumstances.

The Commission on Practice held a hearing in the new case on April 14 and concluded that Laedeke misappropriated and mishandled a substantial portion of \$300,000 in settlement proceeds he obtained for the motor vehicle death. The commission also found that Laedeke intentionally delayed and obfuscated throughout the process.

The commission recommended Laedeke be disbarred, repay all funds misappropriated and disgorge his fee.

Laedeke filed objections both to disgorging his fees and being disbarred. He argued that due to mitigating circumstances, he should instead be suspended for at least an additional year. The court agreed with his argument on fees, but not on his disbarment.

The court wrote in its order: "(W)e agree with the Commission that Laedeke's actions in this matter reflect a blatant disregard of his obligations as an attorney, and bring disrespect to the profession as well as harm to the public. In the previous disciplinary matter, Laedeke was granted leniency in what appeared to be an isolated incident of misconduct. The additional misconduct established here demonstrates that is not true."



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More Classifieds, page 30

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