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From the cover

Data breaches have the potential to cause financial ruin to attorneys or their clients. Peter J. Arant of Garlington, Lohn & Robinson outlines the basics of what every attorney should know to mitigate liability from data breaches.

JFK mystery: An answer far too simple to understand

A friend of mine, attorney Greg Murphy, said he ran into fellow Montana attorney Mike Majerus, and Mike had solved the biggest mystery behind the Kennedy assassination. I told Greg I'd like to talk to Mike about it, but I was busy talking to Jimmy Hoffa about a jackalope hunt. I ended up eating those words. Mike Majerus is a member of the State Bar of Montana. He passed the bar in 1982 and went on to solve the biggest mystery of the Kennedy assassination. Untied, not cut, the Gordian knot of doubt left by the Warren Commission and a league of scholars, historians, journalists and nuts.

Majerus and his colleague, Jack Nesson, set out to solve the unanswered questions of the Kennedy assassination, and, believe it or not, did. They chronicle their efforts in a book, "Phantom Shot." I suggest you all buy the book, then read the book. Here is why.

A healthy swath of us remembers where we were when President Kennedy was shot. We recall the teacher or nun sending us home. Then we lived through the wild speculation that followed – the hours of TV, the days of grief, the years of speculation.

The speculation and conspiratory theories began instantaneously. Robert Kennedy's first words to the new President Johnson were "Did you kill my brother?" Mark Lane published his criticism of the Warren Commission's lone-assassin theory in a much read volume, "Rush to Judgment." Jim Garrison's high drama of prosecuting an odd batch of innocent nobodies, further over-dramatized Oliver Stone's wild-eyed film, "JFK."

Through it all, more than one generation knows about Dealey Plaza, the grassy knoll, Zapruder, and some even, the ballistics of the 6.5 Mannlicher.

Majerus recalls for us the day his long journey to solve the mystery of Kennedy's death began. A Great Falls youngster bemoaning a lost playground ball in the nasty neighbor's yard, returning to school to fetch another and finding out the president was shot.

Majerus' private frame-by-frame recitation of this day, his private cerebral Zapruder film, mimics those in the heads of all of us of similar vintage. Where his departs from ours is he has taken the effort to carefully write it down.

Majerus' befuddlement at the unanswered mysteries aggravated, not resolved, by the layers of investigation and speculation over the succeeding decades differs little from many. Where Majerus' befuddlement takes a path different than most (in fact all), is he gets somewhere. He gets to the answer. He gets there in a Montana way – simple hard work. He attended

every day of the House Select Committee on assassinations in the 1970's. He owns two 6.5 Mannlichers and an exact duplicate of the Zapruder Bell & Howell camera. He has read everything there is to read.

The answer is simple, pristine, (unlike the mythical "pristine" bullet responsible for Kennedy's death).

How so?

Leaving aside for a second the predilection of humans to gravitate toward suspicion of conspiracy and other unnecessary complication of simple problems, the physical evidence and even ear witness evidence of the assassination left even the clear thinkers with a mystery. Some of the witnesses reported three shots and three spent shell casings were found on the sixth floor of the Book Depository building. Thus, three shots must have been fired. Combined with the known time parameters in which the shots must have been fired, a glitch in the single gunman narrative developed. It is nearly impossible, emphasis on "nearly," to fire three rounds in such a short time. But, it was possible, thus scholars and the not so scholarly divided paths – those who explained the three shots by saying Oswald was anomalously quick that day, and those who insisted there needed to be a more complicated, sinister and dark explanation. Neither camp had a theory without embedded doubt. How could Oswald really be that quick? How could Oswald's unknown conspirators vanish permanently into the cosmos without a trace?

Majerus and Nesson explain it all. There were not three shots, there were two. If Oswald fired two shots, not three, the mystery is solved. How do they explain it?

Buy the book.

But, buy the book for more than just satisfying yourself that Majerus and Nesson did solve the problem. Buy the book for Majerus' own personal journey toward that end. His story would be nearly as compelling if it ended up with no answer. His brief visits with Marina Oswald and with Jackie Kennedy are very heartwarming.

I do not know how this simple and efficient answer to the mystery of the Kennedy assassination was ignored – by intent or neglect – by so many for so many years. That sociological study can wait for another day. Perhaps our unwillingness to accept that our presidency is so fragile that one man can end it is related to our unwillingness to accept that these two fellows can explain it.

Mark D. Parker

Moore joins Bliven & Evans, Trial Lawyers, PC

Bliven & Evans is pleased to announce that Kraig W. Moore has joined the firm as an associate attorney. We would like to congratulate Kraig and welcome him as part of our firm. Kraig graduated from Willamette University College of Law in Salem, Oregon, and was recently admitted to practice law in Montana.



Moore

Moore was born and raised in Kennewick, Wash. Immediately following high school graduation, he joined the United States Navy and served five years both at home and abroad. After his time in the military, he attended Clarke University where he completed his undergraduate studies. He returned to the Northwest for law school in 2011 to attend Willamette University College of Law. While in law school he interned for Oregon Legislative Counsel, and worked at the Marion County District Attorney's Office.

Moore begins his practice at Bliven & Evans with a focus on civil litigation, workers' compensation, and Social Security. He can be contacted at kraig@blivenevanslaw.com, or at 406-755-6828. Bliven & Evans is also on the Web at blivenevanslaw.com.

Bloomquist Law Firm announces Rowland, St. Lawrence as new shareholders in firm

Bloomquist Law Firm, P.C., is pleased to announce two new shareholders in the firm.

Patti Rowland has managed the firm's Dillon office since 1998. With 10 years of adjudication experience as a water master with the Montana Water Court, Rowland's practice focuses on mediation and litigation of water-right matters before the Montana Water Court and Department of Natural Resources and Conservation, along with water right distribution controversies and ditch disputes before district courts. Rowland utilizes her background in agriculture and water rights to assist clients with various farm and ranch issues, including real estate transactions, access and easement issues, and ranch business matters. She may be reached at prowland@helenalaw.com or 406-683-8795.



Rowland



St. Lawrence

Originally from Great Falls, Abigail St. Lawrence has built on past experience with the Office of Counsel in the U.S. Army Corps of Engineers and with the Oregon Department of Environmental Quality working on Clean Water Act permitting. St. Lawrence returned to Montana in 2004 and worked as an attorney with Doney Crowley Payne Bloomquist PC in Helena until 2012. She then managed her own practice until becoming a shareholder in Bloomquist Law Firm.

She practices exclusively in water rights, natural resources, environmental and administrative law, and government relations, serving a broad range of clients in regulatory and litigation matters and representing her clients' interests before the Montana Legislature. She can be contacted in Helena at

astlawrence@helenalaw.com or 406-502-1244.

Bloomquist Law Firm, P.C., 44 West 6th Ave., Suite 100, Helena, MT 59601; and 220 S. Pacific St., Dillon, MT 59725. Web: www.helenalaw.com.

Bruner joins Doney Crowley as senior counsel

Doney Crowley P.C. has welcomed Lee Bruner to the firm as senior counsel.



Bruner

Prior to joining Doney Crowley P.C., Bruner was a partner with the Butte law firm of Poore, Roth & Robinson P.C. for 14 years, having started with the firm in 1995.

Bruner holds an associate degree in computer science and a bachelor's degree in physics from Montana State, and graduated from the University of Montana School of Law in 1995. He has taught environmental permitting at the college level.

Bruner is a former member of the Montana Petroleum Tank Release Compensation Board and worked with scientists and regulatory agencies to provide funding for cleanups, determine the source and scope of petroleum contamination, and develop strategies to efficiently manage contamination.

Lee and his wife, Pollann, are the fifth generation to operate the family ranch near Whitehall. They are raising four boys, are active in 4-H, youth activities, statewide agricultural organizations and various community service organizations. Bruner also serves on the board of directors of a veterans group providing housing to low-income families in southwest Montana.

Bruner's law practice with Doney Crowley will focus on civil litigation defending health care providers before licensing boards, before the Montana Medical Legal Panel, at trial and before the Montana Supreme Court. He can be contacted at lbruner@doneylaw.com.

Huso is shareholder in Matovich, Keller & Murphy

Matovich, Keller & Murphy, P.C. has announced that Katherine (Katie) Huso has become a shareholder in the firm.

Huso graduated with a J.D. from the University of Montana School of Law in 2007, and obtained a Bachelor of Arts degree in Political Science from California State University, Long Beach in 2003. She practiced law in Butte from 2007-2009 before joining Matovich, Keller & Murphy, P.C. in 2010. Huso's law practice focuses on general personal injury defense/civil litigation, insurance coverage and insurance bad faith defense.



Huso

Huso is admitted to practice before all Montana state courts, the U.S. District Court for the District of Montana, and the U.S. Court of Appeals for the Ninth Circuit. She can be reached at 406-252-5500 or khuso@mkmfir.com.

Haffeman elected president of MDTL

Paul R. Haffeman, shareholder with Davis, Hatley, Haffeman and Tighe, P.C., Great Falls, was recently elected president of the Montana Defense Trial Lawyers. Haffeman, an honors graduate of the University of Montana Law School, has practiced law in Great Falls since 1988. He is currently president of the Cascade County Bar Association, secretary/treasurer of the American Board of Trial Advocates and the Montana State Representative to the Defense Research Institute.

Randall J. Colbert, Garlington, Lohn and Robinson, Missoula was elected vice president; and Stephanie Hollar of Great Falls, attorney with the Montana State Fund, was elected secretary/treasurer.

Other board members include Lee Bruner, Doney Crowley, P.C., Helena; Jared S. Dahle, Nelson & Dahle, P.C., Billings; Jill Laslovich, Crowley Fleck, PLLP, Helena; Sean Goicoechea, Moore, Cockrell, Goicoechea & Axelberg, Kalispell; Jordan Crosby, Alexander, Zadick and Higgins, P.C., Great Falls; Brooke B. Murphy, Matovich, Keller & Murphy, Billings; Nicholas J. Pagnotta, Williams Law Firm, Missoula; and John J. Russell, Brown Law Firm, P.C., Billings.

Turner, Wanderscheid join Coalition Against Domestic and Sexual Violence

The Montana Coalition Against Domestic and Sexual Violence (MCADSV) has hired UM law school graduates Robin Turner and Rachel Wanderscheid to support their mission to end domestic and sexual violence through advocacy, public education, public policy, and program development.

Rachel Wanderscheid represents survivors of sexual violence as the managing attorney of MCADSV's new Sexual Assault



Wanderscheid

Legal Services Program. This statewide legal services program staffs two attorneys and provides civil legal services to survivors of sexual assault. During law school Wanderscheid completed legal internships with the American Civil Liberties Union of Montana and the U.S. Attorney's Office for the District of Montana. She also participated in the American Indian Law clinical program, competed for two years on the trial team, and served as the Law School Representative on the ACLU-MT's board of directors.



Turner

Robin Turner is MCADSV's public policy and legal director. In addition to providing policy and legislative leadership for the Coalition, Turner is also the supervising attorney on MCADSV's

Legal Assistance for Victims Sexual Assault Legal Services Program. She is licensed in Montana, Oregon, the Confederated Salish & Kootenai Tribal Court, and the Blackfeet Tribal Court.

Since law school, Turner has clerked for the Hon. Holly Brown of the 18th Judicial District, litigated as a staff attorney

for DOVES Lake County, (where she represented survivors of domestic violence, sexual assault and stalking in both district and CSKT Court), and litigated as an associate at the law firm Bohyer, Erickson, Beaudette & Tranel, P.C.

MCADSV represents over 50 programs across Montana that provide direct services to victims and survivors of domestic and sexual violence and their children. In addition, MCADSV membership includes other nonprofit and government organizations and individuals (professionals and members of the general public) who are interested in addressing domestic and sexual violence in a way that holds offenders accountable and provides support for the people they victimize.

Missoula Municipal Court seeks judge pro tem

Missoula Municipal Court is looking for attorneys who are interested in serving as a judge pro tem.

To qualify you must be a member of the bar in good standing and must not appear regularly in Missoula Municipal Court. Experience in Criminal Law is preferred.

Please send letters of interest to Judge Kathleen Jenks, 435 Ryman, Missoula, MT 59802.

Former Broadwater county attorney launches new general practice law firm

Karla Mae Bosse, former Broadwater county attorney (2012-2014), has launched a general practice law office in Townsend, serving clients in Broadwater, Lewis and Clark and surrounding counties. She will be Broadwater County's first full-time general law practitioner since the passing of Pat Hooks in 2006.

Bosse, also a Georgetown Law graduate (2004), previously worked as a Deputy Hill County Attorney from 2010-2012, as an assistant public defender for the Office of the State Public Defender in Region Six/Havre from 2009-2010, and as a staff attorney with Montana Legal Services in Cut Bank/Browning from 2007-2009. Bosse was admitted to the Montana Bar in 2008 and is also admitted before the Blackfeet Tribal Court, the US District Court for the District of Montana, and the 9th Circuit Court of Appeals.

Bosse hails from rural New England, but has made Montana her home. Prior to law school, she obtained bachelor's and master's degrees from University of Maine in Orono, Maine. At Georgetown Law she clerked with the Public Defender Service of D.C., the ABA's Death Penalty Moratorium Project in D.C., Pine Tree Legal Services in Bangor, Maine, and Verrill Dana LLP in Portland, Maine.

She will be representing clients in criminal defense, family law, wills & estates and other general practice legal matters, and true to her public interest legal background, she plans to be an active participant in MLSA's modest means program and the 1st Judicial District Bar's pro bono program. She can be reached at karla@bosselawoffices.com or 406-266-3325.

Encryption needs to be on every lawyer's radar

By Sharon D. Nelson, Esq. and John W. Simek

Lawyers tend to cringe when they hear the word "encryption." To most lawyers, encryption is a dark art, full of mathematical jargon and incomprehensible to the average human being.

When South Carolina suffered a major data breach of taxpayer data, what did Gov. Nikki Haley say? "A lot of banks don't encrypt. It's very complicated. It's very cumbersome. There's a lot of numbers involved with it." Leaving aside the laughable notion that a lot of banks don't encrypt data, the rest of her quote is in keeping with what we hear from lawyers. What we hear always translates into the same thing: Encryption is hard.

So let's make this more fun with some things you can relate to.

Encryption is designed to secure data from prying eyes. It keeps secrets secret. Think about your childhood. Did you play with invisible ink? Did you watch the mailbox for a magic decoder ring? Perhaps you spoke Pig Latin with a sibling so your parents remained clueless about what you were plotting.

You've seen secrets hidden in the movies — remember the World War II Navajo code talkers in "Windtalkers?" Cryptography has been featured in many movies, including the "National Treasure" movies, "Sneakers" and, perhaps most famously, in "The Da Vinci Code."

In the simplest terms, cryptography is the science of secret communication. It involves transmitting and storing data in a form that only the intended recipient can read. Encryption is one form of cryptography.

Encryption is the conversion of data into a form, called a ciphertext, that cannot be easily understood by unauthorized people. Decryption is the process of converting encrypted data back into its original form (plain text), so it can be understood.

Encryption can protect stored data (on servers, desktops, laptops, tablets, smartphones, portable devices, etc.) and transmitted data (over wired and wireless networks, including e-mail). Today's cryptography can be found in streams of



binary code that pass over wired networks, wireless networks and Internet communications pathways.

Fortunately, you don't have to understand the math and computer science behind encryption in order to use it. There are now many easy-to-use encryption tools available for end-users. Many of our clients are adopting ZixCorp for e-mail encryption, which integrates with Outlook. You don't need to use it all the time — just when you are transmitting sensitive data. Bottom line — it is EASY (press the "Encrypt and Send" button) — and inexpensive. Clients love it.

Trust us, it has now reached the point where all attorneys ethically should have encryption available for use, where appropriate, to protect client data.

Nelson and Simek have been frequent presenters at ABA TECHSHOW. Nelson served as Chair of the 2006 TECHSHOW Planning Board. Together, they are the principals of Sensei Enterprises.

At TECHSHOW 2015, Simek will be co-presenting "Decrypting Encryption – Gaining Competence on Encryption for Your Practice," along with David Reis, on Thursday, April 16, at 10:30 a.m.

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registration form at montanabar.org and include this unique discount code: **TECHSHOWEP2015** to receive a discount.

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Also, see the ad on page 11 for more details on ABA TECHSHOW and discounts that are available for State Bar of Montana members.

Understanding data breach liability: The basics every attorney should know

"I am convinced that there are only two types of companies: those that have been hacked and those that will be. And even they are converging into one category: companies that have been hacked and will be hacked again."

—Former FBI Director Robert Mueller, III¹

By Peter J. Arant

I. INTRODUCTION

In July, four letters from the Montana Department of Public Health and Human Services (DPHHS) arrived in my mailbox — one addressed to each member of my family.

The letters warned that our sensitive personal data might have been compromised in a breach.

DPHHS sent the same letters to 1.3 million individuals.² Although it had no evidence hackers used or even accessed anyone's information, DPHHS sent the letters "[o]ut of an abundance of caution."³ It also offered free credit monitoring and insurance to eligible individuals.⁴

At a national level, we continue to hear stories of massive data breaches involving millions of records. Some of these incidents include Target (40 million records), TJX (100 million records), and Home Depot (56 million records).⁵ Sony Pictures Entertainment recently suffered a cyber attack in connection with its movie, "The Interview."

The financial consequences of a data breach are astounding. According to one study, the average cost of a data breach in the U.S. is \$201 per compromised record.⁶

Smaller organizations,⁷ including our own law firms, are by no means immune from data breaches and their financial threats either. In fact, to small organizations, breaches can be even more

catastrophic. These organizations often lack proper insurance coverage and the financial reserves necessary to weather an attack.

The purpose of this article is to provide an overview of key laws and topics pertaining to an organization's use, storage and transmission of sensitive personal data. The article could be helpful in answering the following questions:

If an organization in Montana experiences a data breach, what kind of liability or regulatory fines might it face?

Could that organization be required to provide notification of the breach to all affected individuals, regardless of where they reside?

How could the organization have reduced its liability exposure beforehand?

Could it have obtained insurance which would have covered its losses?

Although answers to these questions will vary from organization to organization, this article is designed to provide direction and resources for attorneys in resolving these issues.

II. DISCUSSION

A. Legal framework and key principles

Data security and privacy laws are designed to safeguard sensitive personal information from unauthorized disclosure, acquisition and access.⁸ These laws do more than just outline penalties or other consequences arising from a breach. Many concern the proactive measures an organization must take to protect sensitive personal data.

Sensitive personal information is usually given one of two labels: (1) personally identifiable information (PII) (items like Social Security numbers, dates of birth, account numbers, etc.);⁹ and (2) protected health information (PHI), which consists of health information, including demographic information, relating to an individual's physical or mental health or the provision of or payment for health care, and which identifies the individual.¹⁰

At the federal level, there is no comprehensive data privacy

1 Robert S. Mueller, III, Speech, RSA Cybersecurity Conference (San Francisco, CA, March 1, 2012) (available at <http://www.fbi.gov/news/speeches/combatting-threats-in-the-cyber-world-outsmarting-terrorists-hackers-and-spies>).

2 Montana DPHHS, *State Notifies, Offers Insurance and Identity Protection Services*, <http://dphhs.mt.gov/AboutUs/News/2014/06-24-2014statenotifies> (June 24, 2014).

3 *Id.*

4 *Id.*

5 Information on these and other breaches can be found at Privacy Rights Clearinghouse, *Chronology of Data Breaches*, <https://www.privacyrights.org/data-breach> (accessed Jan. 19, 2015).

6 Ponemon Institute, *2014 Cost of Data Breach: Global Analysis 5*, <http://www-935.ibm.com/services/us/en/it-services/security-services/cost-of-data-breach/> (May 2014).

7 For simplicity, the article uses the generic term "organization" to refer collectively to businesses, government agencies, nonprofit organizations, educational institutions, etc.

8 Congressional Research Service, *Federal Information Security and Data Breach Notification Laws 1*, <http://fas.org/sfp/crs/secrecy/RL34120.pdf> (Jan. 28, 2010).

9 See e.g. National Institute of Standards and Technology, U.S. Department of Commerce, *Special Publication 800-122, Guide to Protecting the Confidentiality of Personally Identifiable Information (PII)* 2-1, <http://csrc.nist.gov/publications/nistpubs/800-122/sp800-122.pdf> (accessed Jan. 19, 2015). Note that state notification statutes use the term "personal information," as opposed to PII.

10 This is merely a distilled definition of PHI under HIPAA/HITECH. For a more complete definition of PHI thereunder, consult, as a starting point, 45 CFR § 160.103 and 45 C.F.R. § 164.402.

or security law.¹¹ Instead, the U.S. follows a “sectoral” approach, meaning there are federal laws that apply to specific sectors.¹²

For example, data privacy and security laws applicable to financial institutions are found in Title V of the Gramm Leach Bliley Act of 1999 (GLBA) and accompanying regulations.¹³ Meanwhile, health care providers are subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA)¹⁴ and the Health Information Technology for Economic and Clinical Health Act (HITECH) and related regulations.¹⁵ Various other sectors operate under specific data privacy and security laws.¹⁶

Outside of these regulated sectors, federal law could still apply to data security and privacy practices in a more general sense. The Federal Trade Commission (FTC), which is tasked with enforcing GLBA, among other laws, is also given the broad mission of preventing unfair or deceptive business practices.¹⁷ The FTC considers lax security and privacy practices to be such unfair or deceptive practices.¹⁸

State laws might also apply to a specific industry or type of record already covered under federal law. California, for example, has various laws relating to medical information.¹⁹ So too does Montana.²⁰

Some states require certain safeguards be in place if their residents’ personal

Protect against a breach

Following is a list of steps organizations can take to reduce liability exposure from a data breach, shift the risk and mitigate damages from a future breach.

Contractual protections

Provisions in agreements with third-party service providers can outline how the provider should handle sensitive data and can contain provisions detailing consequences of a breach.

Records management

Reduce data that could be the subject of a breach. Stay on top of how records are stored and who accesses them. Don’t keep more records – or keep them longer – than needed.

Security policies

Adopt policies to cover the day-to-day security measures of an organization. These can speak to IT requirements, employee behavior and emergency steps in the event of a breach.

Cyber Insurance

Having proper insurance is critical. When shopping for a policy, organizations should review exclusions, policy limits and how the policy interacts with other policies.

11 Anjili Garg & Demetrios Eleftheriou, *How to Tackle Data Security Issues for In-House Counsel in The ABA Cybersecurity Handbook* 129,136 (Jill D. Rhodes & Vincent Polley eds., ABA 2013).

12 *Id.*

13 15 U.S.C. §§ 6801–6809.

14 Pub. L. No. 104–191.

15 Pub. L. No. 111–5.

16 For example, the Fair Credit Reporting Act (15 U.S.C. § 1681) and its amendment by the Fair and Accurate Credit Transaction Act (Pub.L. No. 108–159) apply to consumer reporting agencies.

17 15 U.S.C. § 45.

18 From 2002 until the present, the FTC has brought 50 enforcement actions relating to data security. FTC, *Federal Trade Commission 2014 Privacy and Data Security Update*, http://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2014/privacydatasecurityupdate_2014.pdf (last accessed Jan. 19, 2015).

19 California Patient Access to Health Records Act, Cal. Health and Safety Code §§ 123100–123149.5; Confidentiality of Medical Information Act, Cal. Civ. Code § 56; California Information Practices Act of 1977, Cal. Civ. Code § 1798.

20 Mont. Code Ann. §§ 50–16–501 through 553.

information is involved.²¹ Many states also have breach notification laws, discussed at length later in the article.²²

An organization could also face traditional causes of action such as negligence and breach of contract.²³ These claims might be brought by individuals or other organizations affected by a breach.

With this framework in place, the next two sections explore some of these concepts in more detail. The first section involves government enforcement of data security and privacy laws. The second section involves claims by and between private parties.

B. The government as enforcer of data security and privacy laws

1. Regulatory fines, enforcement

21 Massachusetts, for example, requires “comprehensive security programs” be put in place if personal information regarding its residents is owned, stored, maintained, or licensed. 201 Mass. Code Regs. § 17.03.

22 See e.g. Mont. Code Ann. § 30–14–1704.

23 John Black, *Developments in Data Security Breach Liability*, 69 Bus. Law 199, 200 (2013).

actions and compliance costs

Many organizations, especially those belonging to a specific sector governed by federal law, face the threat of fines and penalties assessed by regulatory bodies.

And even if no data breach has occurred, ongoing compliance with regulations aimed at preventing or mitigating data breaches can be costly.

HIPAA provides some of the more alarming examples of regulatory fines. For instance, New York and Presbyterian Hospital, along with Columbia University, settled with the Department of Health and Human Services, Office of Civil Rights (OCR), for a combined \$4.8 million due to the disclosure of PHI belonging to 6,800 individuals.²⁴

Other HIPAA fines include Alaska DHHS (\$1.7 million due to hard drive

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stolen from vehicle); CVS Pharmacy

24 HHS, *Data Breach Results in \$4.8 Million HIPAA Settlements*, <http://www.hhs.gov/news/press/2014pres/05/20140507b.html> (May 7, 2014).

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(\$2.25 million for improper disposal of records in public dumpsters); Cignet Health Center (\$4.3 million for failure to cooperate with OCR investigation and failure to cooperate with records demands).²⁵

The FTC has also dealt major blows to companies arising from privacy enforcement actions. In one such action, ChoicePoint settled with the FTC, agreeing to pay \$10 million in civil penalties and \$5 million for consumer redress.²⁶

2. Breach-notification requirements

Following a data breach, an organization might be required to provide notification to those affected. This obligation to notify could arise from a particular statute or regulation.²⁷ At the federal level, notification requirements can be found in HIPAA regulations and even in Internal Revenue Service regulations, among other places.²⁸

Though notification requirements might be found in sector-specific federal statutes and regulations, there is currently no uniform breach notification law applicable across the board. As a result, many states have enacted their own breach notification laws.

While President Obama has called for a uniform national breach notification law,²⁹ no such federal law has been passed as of this writing.

Forty-seven states, including Montana, currently have some form of a breach notification law.³⁰ Generally speaking, these laws require a person, entity or government agency to notify affected individuals of breaches involving their unencrypted “personal information.”³¹ This obligation to notify is analogous to the common law duty to warn.³²

If an organization determines notification is not required, it might save thousands or even millions of dollars in costs and reputational damage. Then again, failing to notify when legally

mandated might, in the long run, be the more costly decision in terms of fines and liability.

Deciding whether notification is required often means wading through multiple breach-notification statutes. Most of these statutes are outdated and poorly worded, and worst of all, they lack uniformity.³³

If an organization has customers or clients in multiple states — which is not uncommon even for small businesses these days — the legal obligations might vary drastically, depending on which states’ laws are triggered.

Given the heterogeneous nature of state breach notification laws, simultaneous compliance with multiple laws can be a logistical nightmare — and an expensive one at that. As a result, these laws largely undermine the very purpose for which they were created: to inform affected individuals of a breach.

Even if Congress passes a uniform breach-notification law, all is not solved. For one, questions as to whether it applies to a given situation will inevitably arise. Providing notification within the required time period will also continue to be a challenge. Last but not least, compliance will still be an expensive endeavor. Some organizations simply will not have the resources or insurance coverage to properly comply.

C. Claims and lawsuits of private parties

1. Class action lawsuits

Most high-profile data breach incidents are immediately met with a barrage of class action lawsuits. Lawyers now race to the courthouse to file suit, even before a breach has been confirmed. For example, Home Depot was hit with a class action just days after merely stating it was investigating “unusual activity.”³⁴

Plaintiffs in class-action lawsuits assert a wide variety of claims: negligence, breach of express or implied contract, violation of consumer protection laws, unfair competition, invasion of privacy, emotional distress and bailment.³⁵

From the outset, plaintiffs in these class-action lawsuits face several hurdles. Multiple courts have dismissed cases for lack of standing, finding that the potential risk of identity theft due to loss of personal information is not an “injury-in-fact” within the meaning of Article III of the United States Constitution.³⁶

Plaintiffs have had at least some momentum in establishing standing. In *Krottner v. Starbucks Corp.*, employees sued their employer after a laptop containing employee PII was stolen.³⁷ The Ninth Circuit stated that “if a plaintiff faces ‘a credible threat of harm,’ and that harm is ‘both real and immediate, not conjectural or hypothetical,’ the plaintiff has met the injury-in-fact requirement for standing under Article III.”³⁸ The court said if no laptop had been stolen, for example, and the suit was based on the risk

25 Information on these and other incidents involving HIPAA violations and corresponding penalties can be found at <http://www.hhs.gov/news/index.html> (accessed Jan. 19, 2015).

26 FTC, *ChoicePoint Settles Data Security Breach Charges; to Pay \$10 Million in Civil Penalties, \$5 Million for Consumer Redress*, <http://www.ftc.gov/news-events/press-releases/2006/01/choicepoint-settles-data-security-breach-charges-pay-10-million> (January 26, 2006).

27 While it is outside of this particular discussion, an obligation to notify might also arise based on a contract.

28 Thomas J. Smedinghoff & Ruth Hill Bro, *Lawyers’ Legal Obligations to Provide Data Security Arising from Generally Applicable Law* in *ABA Cybersecurity Handbook* 59 (Jill D. Rhodes & Vincent I. Polley eds., ABA 2013) (citing 45 CFR § 164.314(a)(2)(1)(C); 45 CFR § 164.410; IRS Rev. Proc. 98–25, § 8.01).

29 Michael D. Shear and Natasha Singer, *The New York Times*, *Obama to Call for Laws Covering Data Hacking and Student Privacy*, http://www.nytimes.com/2015/01/12/us/politics/obama-to-call-for-laws-covering-data-hacking-and-student-privacy.html?_r=0 (Jan. 11, 2015).

30 Montana’s main breach notification law is found at Mont. Code Ann. § 30–14–1704. A breach notification law pertaining to insurance companies is found at § 33–19–321. Meanwhile, a state agency’s notification obligations are found at § 2–6–504. House Bill No. 74, which is currently before the Montana Legislature, would amend all three statutes. Among the proposed amendments is the requirement to provide simultaneous notification of the breach to the Montana Attorney General’s Office.

31 Andrew B. Serwin, Peter F. McLaughlin & John P. Tomaszewski, *Privacy, Security and Information Management: An Overview* 285 (ABA 2011).

32 Smedinghoff & Bro, *supra* n. 28, at 59.

33 Links to state breach notification laws are located at <http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx> (accessed Jan. 19, 2015).

34 Jonathan Randles, *Law 360*, *Home Depot Breach Suit Shows Plaintiffs Firms’ Jockeying*, <http://www.law360.com/articles/574262/home-depot-breach-suit-shows-plaintiffs-firms-jockeying> (Sept. 5, 2014).

35 Black, *supra* n. 23, at 200.

36 See e.g. *Randolph v. ING Life Ins.*, 486 F.Supp. 2d 1, 8–9 (D.D.C. 2007); *Hammond v. The Bank of NY Mellon Corp.*, 2010 WL 2643307, slip op. at 2 (S.D.N.Y. 2010).

37 628 F.3d 1139, 1140 (9th Cir. 2010).

38 *Id.* at 1142 (internal citations omitted).

it might be stolen in the future, the threat would be “far less credible.”³⁹

Some plaintiffs have bypassed the injury restrictions under Article III by pleading violations of federal statutes that do not have an injury requirement, including the Wiretap Act or the Stored Communications Act.⁴⁰

As for common-law negligence claims, several courts have ruled that the “economic loss doctrine” bars such claims. The economic loss doctrine, where recognized, operates to preclude recovery of economic damages unless such damages are accompanied by either personal injury or property damage.⁴¹ Under the economic loss doctrine, courts have ruled that having to purchase credit monitoring services amounts to a purely economic loss and is thus unrecoverable.⁴²

Additionally, courts have also held that credit monitoring services are “not the result of any present injury, but rather anticipation of future injury that has not yet materialized.”⁴³ Future harm,

39 *Id.* at 1143.

40 Black, *supra* n. 23, at 200; see e.g. *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040 (N.D. Cal. 2012); *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 711–12 (N.D. Cal. 2011).

41 See e.g. *In re Sony Gaming Networks and Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 961 (S.D. Cal. 2012).

42 *Id.* at 960–962.

43 See e.g. *Forbes v. Wells Fargo Bank, N.A.*, 420 F. Supp. 2d 1018, 1021 (D. Minn. 2006).

in and of itself, has been ruled insufficient to establish the damage requirement under a negligence theory.⁴⁴

In summary, plaintiffs still face an uphill battle in getting their class-action cases beyond the initial stages of litigation. Nonetheless, such cases pose a major threat to organizations based on the amount of damages at issue. They are also extremely expensive to defend, making settlement an enticing option for defendants.

2. Other private suits and claims

Besides consumer class-action suits, data breaches can also lead to numerous other lawsuits and claims brought by private parties. After all, sometimes one organization’s breach can financially harm a second organization. Further, while one organization might be the public face of the breach (e.g. Target or Home Depot), behind the scenes, there could be another party partly responsible for the incident’s occurrence.⁴⁵

44 *Id.*

45 For example, in the Target breach, it appears hackers gained network access through a third party HVAC company which had done work at several Target locations. Krebs on Security, *Target Hackers Broke in Via HVAC Company*, <http://krebsonsecurity.com/2014/02/target-hackers-broke-in-via-hvac-company> (Feb. 5, 2014).

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The banner features a dark blue silhouette of a city skyline with a Ferris wheel on the left and a yellow sun setting behind a building in the center. The text is in white and yellow. The main title 'ABA TECHSHOW 2015' is at the top left, with 'CONFERENCE AND EXPO • APRIL 16-18, 2015' below it. On the top right is the 'ABALAW PRACTICE DIVISION' logo with the tagline 'The Business of Practicing Law'. The center text reads: 'Members receive up to a \$355 Discount', 'Get the best legal technology with a discount on registration to ABA TECHSHOW for the members of State Bar of Montana.', and 'Register for ABA TECHSHOW under the Event promoter rate and enter your Association's unique code TECHSHOWEP15.'

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Consider the consequences to financial institutions following a breach at a major retailer. Banks and credit card companies are sometimes forced to issue new cards to their customers. They might also incur thousands or even millions of dollars in fraudulent purchases. To recoup their losses, financial institutions sometimes sue the organization that experienced the breach.⁴⁶

In terms of one organization passing the blame to another, the case of *Colorado Casualty Insurance Co. v. Perpetual Storage Inc.*⁴⁷ provides an apt illustration. In that case, the University of Utah had given backup tapes containing PHI of 1.7 million individuals to its data-storage company, Perpetual Storage.⁴⁸ The backup tapes were stolen while under Perpetual's watch.⁴⁹ As a result, the university expended \$3.3 million in notification costs, credit monitoring services and other services.⁵⁰

The university then demanded Perpetual reimburse it for these amounts.⁵¹ Perpetual, in turn, tendered the claim to its carrier, Colorado Casualty.⁵² The latter filed a declaratory judgment action alleging there was no coverage for the incident.⁵³

Perpetual Storage never reached trial; however, the case is important because it signals what the future holds for data-breach litigation. Data-breach lawsuits will increasingly involve defendants who are not multibillion-dollar corporations. Many of these lawsuits will also concern the role of third-party service providers as well as insurance coverage issues.

D. Preventive maintenance:

Exploring ways of reducing liability exposure

No matter how diligent an organization is in safeguarding its data, it is impossible to be 100 percent immune from a breach. Nevertheless, organizations can take several proactive measures to reduce their liability exposure from a data breach, shift the risk of a breach to a third party, mitigate damages from a future breach, and even expand the time periods required under state notification laws.

1. Contractual protections

Organizations often hire third-party service providers to use, store or transmit sensitive personal information on their behalf.

But what would happen if a service provider is responsible for a breach?

To prepare for that possibility, organizations can protect themselves, at least to some extent, by including certain provisions in their agreements with service providers. These

46 See e.g. *Lone Star Natl. Bank, N.A. v. Heartland Payment Systems, Inc.*, 729 F.3d 421 (5th Cir. 2013).

47 *Colorado Casualty Insurance Co. v. Perpetual Storage Inc.*, 2011 WL 1231832 (D. Utah 2011).

48 *Id.* at slip op. 1.

49 *Id.*

50 *Id.*; Jaikumar Vijayan, Computerworld.com, *Insurer Says It's Not liable for University of Utah's \$3.3M Data Breach*, <http://www.computerworld.com/article/2518592/data-security/insurer-says-it-s-not-liable-for-university-of-utah-s-3-3m-data-breach.html> (June 4, 2010).

51 *Perpetual Storage*, at slip op. 1.

52 *Id.*

53 *Id.*

agreements can contain provisions detailing the consequences of a breach, including:

- indemnification
- which party must pay breach investigation and remediation costs
- which party must pay notification costs and credit monitoring services

Service provider agreements can also outline how the provider is to conduct itself when handling sensitive data. These provisions could include:

- the standard of care required of the service provider
- the technical safeguards required when handling sensitive data
- the right to audit the security practices of the service provider
- how data is to be returned or destroyed upon the agreement's expiration

These are just a handful of contractual provisions worth considering.⁵⁴

2. Records management and information governance

An organization with sound record-keeping practices is able to not only reduce its chances of experiencing a data breach, but it can also minimize the damage should one occur. The idea here is to eliminate security vulnerabilities in the record-keeping process and to reduce the amount of data that could be the subject of a breach.

The term "information governance" is often used when referring to an organization's systems and processes for managing records.⁵⁵ Generally speaking, information governance is concerned with the following: what constitutes a "record;" how records are to be created, categorized, filed, transmitted and stored; which departments or individuals should be granted access to which particular categories of records; how long records should be retained; and how records should be destroyed.

Electronic storage is increasingly inexpensive; however, there is no excuse to keep more records than necessary or to keep records longer than necessary. Likewise, it might make sense to reduce an employee's ability to access records. Does a person in one department need access to another department's records? Does an employee need the ability to access the organization's entire network from a smartphone?

Attorneys can provide valuable input to organizations interested in overhauling their record-keeping practices. For example, certain laws mandate how long certain types of records must be retained — and also how and when they must be destroyed.⁵⁶

Additionally, attorneys can advise an organization of its legal obligations to preserve records if a lawsuit is filed or even threatened. They can also make recommendations concerning

54 For information on these and other provisions in service provider agreements, see Dana B. Rosenfeld & Alysa Zeltzer Hutnik, Kelley Drye & Warren LLP, Practical Law Company, *Data Security Contract Clauses for Service Provider Arrangements (Pro-customer)*, http://www.kelleydrye.com/publications/articles/1502/_res/id=Files/index=0/Rosenfeld_Hutnik_Data+Security+Contract+Clauses+for+Service+Provider+Arrangements+%28Pro-customer%29.pdf (2011) (last accessed Jan. 19, 2015).

55 To learn more about information governance, see ARMA International's website <http://arma.org>. ARMA describes itself as a nonprofit professional association focused on managing information as a strategic asset.

56 See e.g. Mont. Code Ann. §§ 32-1-491 and 30-14-1703; 16 C.F.R. § 682.

how to make e-discovery requests in future litigation less costly and burdensome.

3. Information security policies and breach preparedness

Adopting written security policies is another way of reducing both the likelihood of a data breach and the resulting damages. In fact, some organizations are legally required to have such policies in place.⁵⁷ These policies are intended to cover day-to-day security measures. They can also outline the emergency steps required following the discovery of a suspected breach.

Policies that detail everyday security measures can include a wide variety of protocols. For example, these policies can speak to measures required of the IT department for safeguarding the organization's network. They can also govern employee behavior to some degree. For instance, they can disallow employees from visiting certain online sites. They can also mandate that employees use complex passwords and that they change them on a prescribed schedule.

Policies covering an organization's breach response should identify the following:

- the individuals within the organization in charge of overseeing the breach response;
- the protocols for containing and remediating the breach, including the use of a cybersecurity firm;
- how evidence of the breach should be collected and preserved;
- how the breach response should be documented;
- when the breach should be reported to an insurance carrier;
- when to retain outside counsel;
- how and when the organization will determine its notification obligations.⁵⁸

On the latter point, an organization's information-security policy may allow it to extend the normal time requirements for notification under some state statutes. States that provide this exception, including Montana, allow an organization to follow its own notification procedures, provided unreasonable delay does not result.⁵⁹

Attorneys can assist organizations in drafting and reviewing information security policies to ensure compliance with all legal obligations.

Moreover, attorneys can play a valuable role starting from the moment a breach is discovered. An attorney can hire and work with a cybersecurity firm in containing and remediating the breach. While cybersecurity professionals work on technical aspects relating to the breach, counsel can assist the organization in understanding its legal obligations regarding evidence preservation, contractual and/or statutory notification requirements, and internal policy compliance, among other things. The organization's communications with the attorney and the attorney's cybersecurity firm could be considered privileged in

future litigation.

4. Cyber insurance

When it comes to evaluating insurance in this context, there are a few key things to remember. First, an organization's standard policies might not cover a data breach. Second, there is a wide range of cyber insurance products on the market. As such, coverage under cyber policies can vary significantly. Third, even with the proper insurance in place, an organization could be required to take certain actions following a suspected breach or else risk losing coverage.

Organizations with standard insurance policies such as commercial general liability (CGL), directors and officers (D & O), and errors and omissions (E & O), might find they have little or no coverage for a data-security incident. For instance, a CGL policy might preclude coverage on the basis that there is no physical injury to person or property.⁶⁰ An E & O policy might be limited based on how it defines the "professional services" covered.⁶¹

To fill in the gaps, there are now policies that address data-security incidents. These are sometimes referred to as "cyber risk" policies.⁶² These cyber policies can provide first-party and third-party coverage for a variety of events. For example, cyber policies can cover business interruption, breach-notification costs, credit monitoring for affected individuals, regulatory expenses, assistance from a cybersecurity firm, and more.⁶³

When shopping for a policy, organizations should carefully review exclusions, policy limits and how they interact with other policies. As for exclusions, a policy might deny coverage for acts of dishonest insiders or failure to follow required system-security practices.⁶⁴

Other exclusions might cover "acts of foreign enemies."⁶⁵ As an illustration, if Sony Pictures had a cyber policy with the latter exclusion—and assuming North Korea was, in fact, responsible for the breach relating to "The Interview"—it might not have coverage for the incident.

Finally, organizations should bear in mind that following a breach, a cyber policy will often require notifying the carrier as soon as possible.⁶⁶ This is especially true if the policy provides coverage for breach investigation and remediation costs. In that scenario, the carrier will want to provide the insured with immediate services from a cybersecurity firm and sometimes legal counsel. Delaying containment and remediation services might result in further damages, which is why coverage

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60 For an example of litigation involving whether a CGL policy covered a data breach, see *Sony Computer Entm't Am. Inc. v. Am. Home Assur. Co.*, 532 F.3d 1007 (9th Cir. 2008).

61 James L. Rhyner and H. Wesley Sunu, *Cyber Liability Insurance for Law Firms and Legal Organizations*, in *The ABA Cybersecurity Handbook* 193 (Jill D. Rhodes & Vincent Polley eds., ABA 2013).

62 Lorelie S. Masters, *Insurance Protection for Security Breaches*, in *Data Breach and Encryption Handbook* 280 (Lucy Thompson ed., ABA 2011).

63 Mary Thompson, CNBC, *Why Cyber-Insurance Will Be the Next Big Thing*, <http://www.cnbc.com/id/101804150> (July 1, 2014).

64 Masters, *supra* n. 62, at 280.

65 Joshua Gold and Cort T. Malone, Anderson Kill, *Data Security: Tips and Red Flags When Buying Cyber Insurance*, <http://www.mondaq.com/unitedstates/x/286846/Insurance/Data+Security+Tips+And+Red+Flags+When+Buying+Cyber+Insurance> (last updated Jan. 17, 2014).

66 Masters, *supra* n. 62, at 280.

57 See e.g. 45 C.F.R. § 164.308(a); 201 Mass. Code Regs. § 17.03.

58 For information on these and other provisions to include in a breach response policy, see Christopher Wolf, Hogan Lovells US LLP, *Introduction to Data Security Breach Preparedness with Model Data Security Breach Preparedness Guide*, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/22-15_intro_to_data_security_breach_preparedness.authcheckdam.pdf (April 2012).

59 Mont. Code Ann. § 30-14-1704(6).

Evidence rules in Montana's Tribal Courts, Part I of II

By Professor Cynthia Ford¹

Happy New Year! I have spent quite a bit of time in these columns over the past couple of years discussing evidence topics and treatment in Montana's state court system under the Montana Rules of Evidence, with comparisons to the Federal Rules of Evidence. One of my New Year's resolutions (besides growing up to 5'10" and down to a proportionate weight) is to include Montana's tribal courts and their rules of evidence in this discussion. Another 2015 resolution is to shorten my columns so I don't unduly tax your valuable time and/or attention span, so this month I will discuss general concepts applicable to all the tribes and then provide more specifics for the first three tribes. Next month I will finish this two-part series by looking at the remaining four tribes.

General information

As you know, there are seven tribal court systems in Montana. In alphabetical order, they are²:

Blackfeet Tribal Court, Browning:

www.blackfeetnation.com

Chippewa-Cree Tribal Court (Rocky Boy's Reservation),

Box Elder:

www.chippewacree.org

Confederated Salish and Kootenai Tribal Court, Pablo

www.cskt.org/gov/court.htm

Crow Tribal Court, Crow Agency:

www.crowtribalcourts.org

Fort Belknap (Assiniboiné and Gros Ventre Tribes),

Harlem:

www.ftbelknap.org

Fort Peck (Assiniboiné & Sioux Tribes), Poplar:

www.fortpecktribes.org, tribal court website: www.fptc.org

Northern Cheyenne, Lame Deer:

www.Cheyennation.com

(The Little Shell Chippewa Tribe is recognized by the state of Montana, but has not yet obtained federal recognition, and does not yet have a tribal court. The Little Shell Tribe headquarters is in Black Eagle; its website is www.littleshelltribe.us. Montana's senators both support federal recognition of this tribe.)

Each tribal court system has its own rules for admission to

practice, own constitution and ordinances, and own set of rules of evidence. **Neither the state nor federal rules of evidence necessarily apply in tribal court.** If you have, or want to have a case, in any particular tribal court, you of course must check that court's rules for admission to that tribe's bar, and then research and observe its rules of evidence. My goal here is to present an overview of each tribal court system for you to use as a starting point. Caveat: as with other court systems, these rules may change over time, so be sure to check for updates and do not rely on this brief article alone.

In every tribal court system, that system's highest court is the final arbiter of the meaning and application of its evidentiary rules. If you are filing a brief on an evidence issue in a tribal court, you should first refer to that tribe's applicable rule and then to that tribe's judicial opinions. Those are the only binding authorities in that tribe's court. For persuasive authority, you can check to see if the tribal rule emulates either a state or federal corollary, and then use that jurisdiction's comment and cases. In my view, however, the more persuasive authority would be another tribe with a similar rule, and its court's opinions. Of course, "it is not an either/or world³," so the optimal brief would start with the deciding tribe's authorities and then inform the court what other tribal systems have done on that subject, ending with a comparison to the state⁴ and federal authorities.

Tribal law research

As listed above, each tribe has its own website and most (if not all) have links to the tribe's Constitution and laws. A couple also include their court's judicial opinions. Obviously, these are primary sources and thus the most useful. I still would call the Clerk of the Tribal Court to ensure that the website has the most current version of the tribe's Evidence Rules⁵.

The Governor of Montana Office of Indian Affairs maintains a Tribal Nations Directory website which is a good starting point for current contact information for each court: www.

1 Copyright Cynthia Ford

2 These are the official websites for the tribes and, where provided, for the tribal court. I tested each website as I wrote, but several of them lead nowhere. Hopefully, the links will be restored by the time you need them.

3 I heard this several years ago from a much wealthier friend, and it hasn't been that helpful in my retail life, but certainly it yields a better brief in a contested legal brief. And I was never very good at deferring gratification in the first place...I do own two cars now, one for fun and one for winter.

4 I myself would use Montana as the state to which I referred, but there is no logical reason other than geographic proximity. Technically, Arkansas could be equally relevant inasmuch as no state has power over tribal governments, but my experience is that judges do tend to look closer to home.

5 The Native American Rights Fund has an online step-by-step guide for tribes to construct a tribal legal history: www.narf.org/nill/legalhistory/archives.html.

tribalnations.mt.gov/Portals/34/docs/Chief_Judges.pdf.⁶

The site also has links to each tribe's constitution, laws and judicial opinions, although several of these don't actually lead anywhere. The State Law Library also has a useful website: <http://indianlaw.mt.gov/default.mcp.x>. This has opinions from the appellate courts for the CSK&T, Crow, and Assiniboiné and Sioux (Fort Peck) systems, but the links to the other tribes' opinions show "No material at this time."

Both of these state resources are secondary, so obviously you should directly contact the tribal court itself to be sure you have the most current information.

Luckily, the UM Law School's amazing law librarian, Stacey Gordon, is an expert on researching tribal law. The Jameson Law Library has prepared a number of subject-matter research guides, including one on "Indian and Tribal Law Research⁷." The research guide helpfully defines "tribal law," which is what we are researching when dealing with an evidence issue in tribal court:

Tribal Law is the internal law of each sovereign tribe:

"Each Indian nation has the authority, often expressed in an organic document such as a tribal constitution or a treaty with the United States, to legislate for the general welfare of the tribe, its people, and its land... In short, every Indian nation is free to adopt its own laws and be ruled by them, to paraphrase the United States Supreme Court. *Williams v. Lee*, 358 U.S. 217 (1959)." Matthew L.M. Fletcher, *American Indian Tribal Law* xxi (Wolters Kluwer 2011).

Stacey also asked me to add some sources which are not in the current research guide:

There is a print reporter called the Indian Law Reporter that publishes tribal cases from many (but not all) tribes. Unfortunately, there is no electronic version of it. It is, however, indexed by the National Indian Law Library (NILL, from Boulder, Colorado) — I have the link (in the current UM research guide) to the National Law Library, but not a separate link to the index, which is at www.narf.org/nill/ilr/index.html. The full text of the cases still isn't available online (some may be available on Westlaw) but if attorneys contact us with a citation, we can easily scan and send them and are happy to do so.

Since the state has a Lexis contract and most state lawyers only have access to that, you may or may not⁸ want to mention Lexis tribal law coverage too.

Lexis purchased the old Montlaw, including the tribal law cases (from the same tribes that Westlaw has). But here's why you might not want to even mention it — (1) they are hard as heck to find in the new Lexis Advance; and (2) they stopped updating the tribal law cases when they bought it.

I did a search of the NILL database for the term "Evidence" and found only one case under "Evidence" itself and two others under "Rules of Evidence." One of the cases was from CSK&T in Montana; the others were from Hopi Tribal Court and from the Juvenile Tribal Court for the Confederated Tribes of Grand Ronde (in Oregon). However, because the cases themselves are not online, there is a delay in contacting the Jameson Law Library and asking them to locate the case and then email it to you.

For money, Westlaw has a database called "West's American Tribal Law Reporter" which contains materials from a total of 21 tribes across the U.S., two of which are the Confederated Salish and Kootenai Tribes and the Fort Peck Tribes. You can search this database for specific terms in cases from all or some of these courts, and you then have immediate access not just to the citation but also to the content of each decision you find. As Professor Gordon indicated, Lexis used to have some Montana tribal materials but they are now limited and difficult to find. Fastcase, the new service accessible for free through the State Bar, "do [es] not have those Tribal Courts in our databases⁹."

BLACKFEET RULES OF EVIDENCE

The Blackfeet Tribal Code was promulgated in 1999.¹⁰ Chapter 1 of the code is entitled "Administration of Law and Order (Tribal Court)". Section 4 of Chapter 1 covers "Court Procedure," including a lengthy discussion of the principles of evidence¹¹. The principles are familiar, but are not identical to either the state or federal rules of evidence. Instead, it appears that the evidence rules have been simplified and expanded explanations provided, suitable for use by those without formal legal training. For example, with regard to "Real or Physical Evidence," the code explains:

Real or demonstrative evidence is that proof which can be brought into court and exhibited to the court and jury, such as the instruments devices used in the commission of crime, and the exhibition of the person as well as objects; the use of photographs, moving pictures and xrays, and the conducting of experiments and tests either in or out of Court. It is always proper, when a fact in issue may be explained by producing an article or object to which the testimony relates, to bring such articles or objects to Court and exhibit them.

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⁶ This site worked fine when I started this column, but on my final proof had been corrupted. Hopefully, the state will get it up and running again by the time you read this.

⁷ <http://law.umt.libguides.com/content.php?pid=377901>

The Gallagher Law Library at the University of Washington also has an Indian and Tribal Law Research Guide, which contains several references to Montana tribes: <https://lib.law.washington.edu/content/guides/indian>.

⁸ I do, on the theory that more avenues are better.

⁹ Email 1/9/2015 from Fastcase Customer Service representative Lucas Aldefer.

¹⁰ The website www.indianlaw.mt.gov/content/blackfeet/codes says "circa 1999."

¹¹ The exact language may be found at <http://indianlaw.mt.gov/content/blackfeet/codes/1999/chapter01.pdf>

Evidence, from previous page

There are other specific provisions in Section 4 that deal with oral testimony of witnesses, privileged communications, judicial knowledge/notice, presumptions, documentary evidence (including the Best Evidence Rule), opinion evidence, relevancy, materiality, competency, evidence of other offenses and the hearsay rule (providing both the policy behind the general inadmissibility of hearsay and a set of only six exceptions).

Chapter 1 appears to be mostly about criminal actions, although it does not say so explicitly, nor are there any limitations of the evidentiary principles in Section 4. Chapter 2 of the Blackfeet Tribal Code is entitled “Civil Actions” and states, in Section 2 thereof:

Section 2. Law Applicable.

In all Civil cases and in all cases arising under Chapters 3[] and 7[], the Court shall apply any Law of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances and customs of the Tribe, not prohibited by such Federal Law.... Any matters that are not covered by the traditional customs or by ordinances of the Tribal Court, shall be according to the law of the State.

However, there are no provisions at all in Chapter 2 about court procedure, nor are there any evidentiary rules. Thus, it appears that the evidence principles set forth in Chapter 1 under Administration (Tribal Courts), discussed above, are meant to apply to both civil and criminal actions. Finally, Chapter 9 of the Blackfeet Tribal Code is explicitly applicable to all types of cases: “Rules of Procedure, Civil and Criminal.” The Chapter is divided into three parts, the first dealing with both kinds of cases and the other two confined to civil procedure and criminal procedure respectively. Rule 5 of the first part, applicable in all cases, is entitled “Evidence.” It addresses how a trial is to be conducted, such as requiring that evidence come orally from witnesses in open court and that direct examination ordinarily occur by non-leading questions. A competent attorney or litigant in Blackfeet Tribal Court must be aware of the provisions of both Chapter 1 and Chapter 9.

Although the subjects discussed in the evidentiary provisions are similar to those in the Montana and the Federal Rules of Evidence, the Blackfeet version differs markedly from both in many specifics, including the hearsay exceptions and type and number of privileges allowed. The Blackfeet Tribal Code, Chapter 11, sets forth the tribal appellate process. The Blackfeet Court of Appeals is the highest court in the tribal system, and thus is the ultimate arbiter of the interpretation and application of the rules of evidence. Unfortunately, it is difficult to search and find opinions from this court. The Montana Indian Law website link to Blackfeet tribal court decisions says only “currently we have no materials on this topic.” Westlaw Next does have a searchable database for several tribes’ opinions, including Fort Peck and CSK&T, but does not include Blackfeet. NILL turned up one Blackfeet Tribal Court opinion¹², but it was in-

dexed under “Housing” and does not appear to have anything to do with admissibility or rules of evidence.

CHIPPEWA-CREE (ROCKY BOY’S) RULES OF EVIDENCE

The Chippewa Cree Tribal Code now in effect¹³ was promulgated by the Tribal Business Committee on February 4, 1987. It should be available on the Tribes’ website, but as of Jan. 9, 2015, the link to that website, www.chippewacree.org, appears to be broken. The only online access right now is through the Montana state tribal law portal, which contains a pdf version: www.indianlaw.mt.gov/content/chippewacree/codes/law_order_code_1987.pdf. Note, however, this caveat from the current chief judge:

The Montana state tribal law portal copy would not be accurate as we have made changes and updates since then and have not submitted those changes to the website so I would not want anyone to depend on the legal accuracy of that information.

Title 1, Section 1.4 of the Code itself states that the Clerk of Court’s office will provide copies of the Code “at cost to anyone who requests the Code¹⁴.” I recommend this route to anyone practicing in any Tribal Court, particularly here where changes are afoot.

Title 1 of the code sets up the court system; Title 2 is entitled “Civil Procedure” and Title 3 “Criminal Procedure.” Title 15 deals with the Court of Appeals (including Appellate Rules of Procedure¹⁵) and Title 23 is the “Attorneys and Lay Advocate Code¹⁶.” Title 2, “Civil Procedure,” Section 3.4 provides “The court shall establish Rules of Evidence, which shall apply in all proceedings.” (Nothing in Title 3, “Criminal Procedure,” discusses rules of evidence). However, I cannot find any such Rules of Evidence in my copy of the code, and the mt.gov tribal law portal shows nothing under “Chippewa Cree Court Rules¹⁷.” Chippewa Cree Chief Judge Storm Olson advises me that the Tribal Court currently applies the federal Rules of Evidence, which is consistent with Code Section 1.9:

Choice of Law

The Tribal Court and appellate court, in all actions, shall apply the laws, ordinances, customs, and traditions of the Chippewa-Cree Tribe. In the absence of Tribal Law in civil matters the court

¹³ I understand that the tribes are in the process of revising/amending a new version of the Code, but that has not been completed nor ratified by the Tribal Business Council.

¹⁴ I myself have a hard copy of this Code supplied by the Clerk of Court, in conjunction with my appointment as a Special Judge for the Tribal Court. I have used this version as the basis of this section of the column, rather than the online version.

¹⁵ Note, however, that Chapter 6 of Title 3, “Civil Procedure” also deals with “Procedure for Appeals.” Similarly, Chapter 9 of Title 4, “Criminal Procedure,” contains “Procedures for Criminal Appeals.”

¹⁶ My version of the Code contains a tab for this Title, but no content; this is also true of the online version of the Code. Since writing this, I have received an electronic copy of the contents of this Title from the Chief Judge. No provisions deal with any evidentiary issues.

¹⁷ The www.indianlaw.mt.gov links for Chippewa Cree Court Rules, Court Forms, and Court Opinions all state: “Currently we have no materials on this topic.”

¹² 89-API (Bkft. Tr. Ct. App., Dec. 19, 1989) 17 ILR 6036.

may apply laws and regulations of the United States or the State of Montana. Where doubt arises as to customs and traditions of the Tribe, the Tribal Court may request the advice of recognized Tribal elders.

Apparently, the Tribal Court is currently working on a Tribal Evidence Code, which it intends to apply to both civil and criminal cases.

The Chippewa Cree Court of Appeals opinions are not readily available. The tribal website is down as of this writing, and the NILL online link for Chippewa Cree Tribal Court Opinions shows only “none available.” Similarly the Montana State Law Library’s website (<http://indianlaw.mt.gov/default.mcp.x>;) entry for Chippewa Cree Tribal court opinions states: “Currently we have no materials on this topic.” Thus, as with the actual code, your best bet is to contact the Clerk of Court in Box Elder and request copies of any opinions.

CONFEDERATED SALISH AND KOOTENAI RULES OF EVIDENCE

The Confederated Salish and Kootenai Tribes of the Flathead Reservation have an active website, www.cskt.org. There are links to:

- the Tribal Code (CSKT Laws Codified 2013), www.cskt.org/gov/court-triballawcode.htm;
- the trial level court, www.cskt.org/gov/court.htm and
- the appellate court, www.cskt.org/gov/appellate.htm.

Code section 1-2-611 sets forth the tribes’ evidentiary privileges, which appear to be similar to some of the Montana statutory provisions that apply in state court and to some of the federal court privileges, established by federal common law per FRE 501. However, the CSKT statutory privileges protect some communications not privileged in state and/or federal courts, such as: an accountant-client privilege (not in either state or federal court); a privilege for licensed social workers (found in federal court, but not in Montana); complete spousal testimonial as well as communications privileges in all cases, not just criminal; and doctor-patient privilege (exists in Montana but not in the federal system). This is an excellent example of the need to research specific tribal provisions and to not rely on prior-acquired knowledge of the law of privilege in other court systems.

The Tribal Code has specific provisions regarding evidence in criminal and civil cases. For criminal prosecutions, section 2-2-1004 states:

2–2–1004. Rules of evidence in criminal cases. Unless otherwise directed by a specific code provision, the Federal Rules of Evidence apply in criminal actions. Privileges will be those recognized under Tribal Law.

I could not find a civil corollary to 2-2-1004, stating clearly that the FRE apply in civil actions. However, another section (located Title 3, “Domestic Relations,” Chapter 2 “Child Abuse and Neglect”) provides:

3-2-111. Federal Rules of Evidence. The Tribal Court shall apply federal rules of evidence in **all proceedings**, except where otherwise indicated.

(Emphasis added).

(The “where otherwise indicated” caveat signals the existence of some specific provisions in the code that differ substantially from the FRE (and the MRE), such as Section 3-2-303, which says that in a child abuse proceeding, “Hearsay evidence of statements made by the affected child is admissible¹⁸.”) A section in Title IV, Civil Proceedings, specifies the choice of law for such cases, without referring to the FRE per se:

41104. Laws applicable in civil actions. (1) In all civil actions, the Tribal Court shall first apply the applicable laws, Ordinances, customs and usages of the Confederated Salish and Kootenai Tribes and then shall apply applicable laws of the United States and authorized regulations of the Department of the Interior.

Similarly, a section located in the Court of Appeals section of Title 1 also provides for the application of the FRE in original proceedings for mandamus:

1-2-819...(2) Application of rules of procedure.

Except as otherwise provided in this Ordinance or inconsistent herewith, the **federal rules of evidence** and civil procedure relative to new trials and the Rules of Appellate Procedure herein apply to the proceedings mentioned in this Part. (Emphasis added)

Based on all these sources, I would bet the farm (if I had a real one) that the Federal Rules of Evidence apply in all cases in the CS&KT Tribal Court, but I would be a lot happier if there were a clear statement to that effect located in the Civil Proceedings Title IV of the code.

The decisions of the Tribal Court of Appeals are helpful in resolving this type of statutory uncertainty. The CS&KT Court of Appeals decisions are readily available. The CS&KT Tribal Code, section 1-2-802 specifically requires organization and publication of the Court of Appeals’ opinions. Although the official tribal website does not appear to have a link to the opinions, the State Law Library does, in alphabetical order, at www.indianlaw.mt.gov/salishkootenai/decisions/default.mcp.x. The State Law Library also cosponsors, with the Montana Historical Society Research Center, a website called The Montana Memory Project, which contains PDF files of CS&KT opinions: <http://mtmemory.org/cdm/ref/collection/p15018coll30/id/186>.

Neither of these is searchable, however, limiting their usefulness, although there are not very many opinions in total; a person could skim them all. This is where the NILL resource comes in, because it includes the CS&KT court opinions in its subject matter index, even though there are no images of the cases themselves: www.narf.org/nill/tribes/confederated_salish_and_kootenai.html. Once you have located a citation to a CS&KT tribal court case that seems relevant, the Jameson Law Library can obtain the case from the off-line Indian Law

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¹⁸ See also, 3-2-608, which repeats the preceding language and adds a reference to the FRE, confusing because it is not at all clear under the FRE that child hearsay is automatically admissible.

Study finds state's access-to-justice gap is 'as vast as Big Sky Country'

By Iris Marcus

AmeriCorps VISTA, Montana Justice Foundation¹

In June 2014, a report authorized by the Montana Access to Justice Commission (ATJC) was completed. This study, "The Justice Gap in Montana: As Vast as Big Sky Country,"² is a powerful tool for furthering the goals of ATJC. Justice Beth Baker, the commission chair, said "This study is key to the Access to Justice Commission's work to close the justice gap in Montana. The study shows that all segments of Montana's low- and moderate-income populations need legal help but cannot afford it."

According to the report, those segments include the elderly, persons with disabilities, veterans, low-wage workers, victims of domestic violence, Native Americans residing both on and off reservations, and many others who need help with legal problems.

"All of us are affected when our justice system fails to offer every member of our communities equal opportunity to protect their legal rights," Justice Baker said. "The study provides a clear framework for moving our efforts forward to meet the legal needs of Montanans." This article serves as an introduction to "Gaps and Barriers" and is the first of a series of articles based on the study to be published in the Montana Lawyer in 2015. But first, some background.

The Montana Access to Justice Commission was created by an order of the Supreme Court in May 2012. The commission is part of an access to justice movement that has been gaining momentum across the country. One by one, states have faced the reality that the services, funding and providers necessary to meet the civil legal needs of their citizens fall far short of the demand. Thirty-eight states have launched their own access to justice initiatives. The increasing importance of access to justice as a national issue is underscored by a variety of national law organization efforts to address the issue through development of resources in support of state-based initiatives. For instance, the American Bar Association developed a Resource Center for access to justice initiatives.³ Likewise, the Public Welfare Foundation, in its own study of the key strategies by which different states are tackling access to justice issues, took the

Read the report

To read the study "The Justice Gap in Montana: As Vast as Big Sky Country," visit www.mtjustice.org/gaps-and-barriers-study/

lead in forming a communications hub called "Voices for Civil Justice"⁴. The United States Department of Justice (DOJ) also has a dedicated site focused on the issue⁵. On its website DOJ suggests several principles that should govern access to justice efforts. These identify common challenges and goals across the states: promoting accessibility; eliminating barriers; ensuring fairness by delivering just outcomes for all parties, including those facing financial and other disadvantages; and increasing efficiency by promoting effective responses to the unique needs of each state.

As identified by the Montana Supreme Court, among the first duties of the Montana ATJC was to "Assess the legal needs of low- and moderate-income Montanans, evaluate the extent to which those needs are going unmet, and coordinate efforts to better meet those needs."⁶ In response, the commission authorized a comprehensive study to bring the condition of civil legal needs into focus. The title of the study, "The Justice Gap in Montana: As Vast as Big Sky Country," paints the picture. As the country is vast, so is the task of preserving and furthering the health and vitality of all within its borders. In the study's Executive Summary, several legal assistance gaps and barriers are explored: cost of services; paucity of free and reduced fee legal assistance; lack of full representation, advice, mediation and pro se assistance available; shortage of in-person services, intensified by long distances; difficulty using phone and Internet services; lack of awareness of legal services; and issues regarding personal desire to access services.⁷ "Gaps and Barriers" presents the facts that inspired its title and conveys the cost to the citizens of Montana who suffer the consequences of unmet civil legal needs. It describes the enormity of needs that go unattended, why these gaps and barriers exist, and possible strategies to address the problem. While the challenges it presents are daunting, the study also serves as a call to action.

The study lends itself to mobilizing action by providing a comprehensive list of populations in Montana that encounter an extra burden in accessing legal resources. Taken together, these groups are inclusive of a sizable population of Montana.

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¹ The Montana Justice Foundation (MJF) has a close relationship with the Montana ATJC. Although the content of our work is different, the goals are the same: to increase knowledge of, and resources for, equal access to justice. MJF serves these goals primarily by funding grants to service providers who offer free or low cost legal resources. MJF also pursues other law-related projects to further access to justice goals. One of these is to provide administrative support to the Montana ATJC.

² "The Justice Gap in Montana: As Vast as Big Sky Country, A Report on the Gaps and Barriers to legal assistance for low and moderate income Montanans," Carmody and Associates, June 2014. Hereafter, "Gaps and Barriers"

³ www.americanbar.org

⁴ www.voicesforciviljustice.org

⁵ www.justice.gov/atj

⁶ Montana Supreme Court Order No. AF 11-0765: IN RE The Establishment of an Access to Justice Commission, May 22, 2012.

⁷ *Gaps and Barriers*, p. 29

2015 Nomination Petition

State Bar President, Secretary/Treasurer and Trustee Election

I, _____, residing at _____, am a candidate for the office of () President-Elect; () Secretary/Treasurer; () Area E Trustee; () Area F Trustee; () Area H Trustee at the election to be held on June 5, 2015. I am a resident of Montana and an active member of the State Bar of Montana. I request my name be placed on the ballot. The term of office of the President-Elect is one year. The term of office of the Secretary/Treasurer and of the Trustee is two years.

Signature _____

The following are signatures of active members of the State Bar of Montana supporting my candidacy. Trustee candidates include the area of residence. No fewer than 10 signatures must be provided for a Trustee; and no fewer than 25 signatures for a President-Elect or Secretary/Treasurer candidates.

NAME

ADDRESS

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25. _____

Return this petition to State Bar of Montana, PO Box 577, Helena MT 59624, postmarked no later than April 6, 2015.

Ballots will be mailed to Bar members on May 6, 2015, and must be returned to the Bar by May 26, 2015.

What's not to love about the State Law Library?

By Lisa Mecklenberg Jackson

In this month of hearts, candy, and all things loveable, the State Law Library is probably not the first entity to spring to your mind. I'm here to ask you—why the heck not?! I suggest that there are a number of resources available to you through the State Law Library that are just going to make you fall in love with the law — in February and beyond!

Love old court pictures?

Then you're going to be interested in one of the law library's latest projects: Justice Under the Big Sky at <http://mtmemory.org/cdm/landingpage/collection/p16013coll44>. The Justice Under the Big Sky photo collection pulls together various facets of the Montana legal system in a never-seen-before photo ensemble. Included in the collection are group photos of the Montana Supreme Court, individual portraits of Montana Supreme Court Justices and Montana district court judges, as well as Montana Judges Association group photos and historic photos of the State Law Library. Of particular interest in the collection are photos memorializing the groundbreaking of the current Montana Justice Building.

Love knowing what your personal injury case is worth?

The State Law Library subscribes to many monthly periodicals on a variety of legal topics. One periodical personal injury practitioners might find particularly useful is Personal Injury Verdict Reviews: Tracking Trends in Personal Injury Litigation (at KF1256.A8 J88). This periodical will tell you what juries have awarded for certain types of injuries in various states helping you determine what might be reasonable to expect for your client in terms of damages.

Love free CLE?

Then come to the state law library on Tuesday, Feb. 24 at 1 p.m. for a free CLE entitled "Legal Research: What's Not to Like?" We'll be looking at various legal research tools available to you through the state law library and from your desktop. Learn about legal research resources that are going to make your jobs much easier. Feel free to bring your lunch!

Love having the latest legal information available to you for free?

We have thousands of books at the State Law Library free to borrow by any lawyer/paralegal/judge/state employee in the state! All you need is a law library card to access them. Call 444-3660 or e-mail lawlibcirc@mt.gov to get a card. Looking for a little legal fiction? We have some of that too.



Photo courtesy of the Montana Memory Project

Montana Supreme Court Chief Justice Frank I. Haswell and Montana Gov. Thomas Judge hold a discussion draft of the Montana Youth Act in a photograph taken in the Governor's Office in the Montana State Capitol Building in Helena on April 4, 1973. The picture is part of the collection "Justice Under the Big Sky," one of the State Law Library's latest projects.

Here are some of the most recent additions to the State Law Library collection:

"Damages: A State by State Summary: Bodily Injury, Wrongful Death, Survival, Compensatory, Punitive." Chad Marchand, ed., 2014.

"Evidentiary Foundation." Edward Imwinkelried, 2015.

"FinTech Law: A Guide to Technology Law in the Financial Services Industry," 2014.

"Internet Legal Research on a Budget: Free and Low-Cost Resources for Lawyers," 2014.

"Magna Carta: Muse & Mentor." Carole A. Levitt, 2014.

"On Democracy's Doorstep: The Inside Story of how the Supreme Court Brought 'one person, one vote' to the United States." Douglas J. Smith, 2014.

"Products Liability in a Nutshell." David G. Owen, 2015.

"Reinventing the Practice of Law: Emerging Models to Enhance Affordable Legal Services." Luz Herrera, ed., 2014.

If you are in need of any legal research assistance or materials, please do not hesitate to contact the State Law Library by calling 444-3660 or e-mailing mtlawlibrary@mt.gov. We are YOUR law library and we are always happy to help.

Lisa Mecklenberg Jackson is State Law Librarian and Director of the State Law Library

It's time to make a change in selecting judges in a post *Citizens United* world

I have always been a strong proponent for electing Montana's judges and justices. But, I've changed my mind.

It is clear from this last election cycle that campaigns for Montana's Supreme Court — and, potentially, other State judicial offices — will henceforth be characterized by huge expenditures of dark money, attack ads, misleading mail stuffers, and the involvement of out of state money and organizations — all directed to the end of influencing Montana's elections and buying a seat or seats on the Court.

Indeed, some \$1.63 million was spent to influence just one Supreme Court race this election cycle — the candidates themselves, collectively, only raised \$250,000. *Citizens United* and the mischief it has spawned will, from now on, be a fixture of Montana's judicial elections.

This time we got lucky: the two incumbents, Mike Wheat and Jim Rice were well qualified and experienced. I served with both justices; they adjudicate fairly, impartially and independently; and, while, perhaps, of differing judicial philosophies, both men interpret and apply the law in a principled, nonpartisan fashion. Neither decide cases with a personal agenda in mind, nor is either man beholden to any person or organization.

Their respective opponents, however, could not match up on any of those qualifications. Thankfully, the challengers lost. But, next time we may not be so lucky.

The destructive fallout from *Citizens United* has poisoned campaigns and elections across the nation. There are, however, two particularly pernicious effects that appertain to state judicial elections.

First, *Citizens United* discourages qualified attorneys from running for judicial office. Think about it. Why would a qualified and experienced attorney choose to run for a judicial office that pays a fraction of that in the private sector; that requires the candidate to raise and spend a small fortune; and that demands the candidate, for months on end, subject herself or himself (along with their families) to a barrage of lies, misinformation and abuse from out-of-state organizations that know nothing — and care less — about the targeted candidate, Montana, its people or its Constitution and laws?

Second, *Citizens United* actually encourages unqualified and inexperienced candidates to run. These types know that if they play to the out-of-state dark money folks; that if they promote the party or special interest agenda as their *raison d'être* for running; and that if they mislead, dissemble and conceal their true selves, platform and motivation, then they will be able to count on the support and mega-bucks of the likes of the

Republican State Leadership Committee, the Koch Brothers and the U.S. Chamber of Commerce.

Add to that the state of the law in Montana. Present jurisprudence, for example, would permit a law student to graduate from law school, take the Montana Bar Exam and pass it, immediately go on inactive bar status, flip pancakes at a Montana dude ranch for five years, and then enter the race for a seat on the Montana Supreme Court. And, with the right backing and a million dollars, that person could be elected — never having appeared in a Montana court; never having sat across the desk from a client; never having taken a CLE course, read a case or opened a law book; and never having practiced a day of law.¹ Extreme example? Probably. But, we saw some parts of that in this last election.

Montanans got lucky this time. But, what happens when there is an open seat on the Court, and those attorneys or judges actually qualified to run say, "To hell with it; it's just not worth the time, trouble, expense and abuse that I'll have to put myself and my family through to maybe get elected." That's when we have a problem. Because, you can be sure that there will be plenty of the default candidates ready, willing and able to step up and tap into the resources of the dark side of unlimited funds and "political free speech" a la' *Citizens United*.

In point of fact, in the next election cycle three seats on the Supreme Court will be up for election. Imagine if dark out-of-state money decides to drop into those races with \$10 million and three cherry-picked candidates. Is that really the way we want justices "elected" to Montana's only appellate court?

Apparently, not. Since Election Day, every major newspaper in the state has decried the effect of dark, out-of-state-money and its devastating impact on our state's elections and democracy. People are fed up. Indeed, on Nov. 7, 2014, focusing on the Supreme Court race in particular, the Billings Gazette urged Montana to join its sister states in implementing a merit system for selecting our judges and justices.² I agree with the Gazette. The time has come for Montana to do exactly that.

I believe that Montanans want — and deserve — judges and justices who are qualified to serve by reason of their character, experience, and intellectual rigor. Montanans are entitled to jurists committed to our Constitution, our laws, and courts — not to out-of-state corporate and special interests who care nothing about our State. Montanans rightfully demand fair, impartial,

Judges, page 26

¹ See, *Cross v. VanDyke*, 2014 MT 193, 375 Mont. 535.

² See, http://billingsgazette.com/news/opinion/editorial/gazette-opinion-time-to-rethink-montana-supreme-court-contests/article_770afb6e-48c6-53cf-abab-0b43d2a53d0a.html

Montana's muddled Medicaid undue hardship law: A trap for the unwary

By Jared M. Le Fevre

The March 2014 featured article *Medicaid look-backs and undue hardship: Are the elderly being denied access to basic human rights due to exploitation* was accurate in many respects and provided a solid overview of the problem Montana elders face while trying to qualify for Medicaid benefits. However, the article contained a key inaccuracy: that Montana had adopted Medicaid undue hardship rules consistent with federal law. In fact, Montana undue hardship law blatantly violates federal law. Montana law must promptly be changed.

Montana has strict rules for granting a Medicaid undue hardship exception, while federal rules are much more favorable to the Medicaid applicant. The simmering conflict between federal and state undue hardship rules burst to flame in a case currently before the Office of Fair Hearings of the Department of Public Health and Human Services. In *In the Matter of Agnes Graham*,¹ the Montana Department of Public Health and Human Services ("DPHHS") imposed a \$190,000 uncompensated asset transfer penalty and a 1,010-day penalty period during which the state of Montana refused to pay for necessary nursing home care for the elderly, penniless, 84-year-old Agnes Graham. The penalty was the result of Graham's "transfer" by exploitation of over \$190,000 by her convicted felon yard worker, whom she reportedly met when he was her meals on wheels delivery driver, and who later bilked her out of her life savings.

During the course of litigation over this "transfer," DPHHS has finally, unequivocally acknowledged that DPHHS' undue hardship rules do not comply with federal law. But thus far DPHHS has not changed those rules.

What is a Medicaid uncompensated transfer?

A Medicaid applicant is generally permitted to have no more than \$2,000 of countable resources in order to qualify for Medicaid nursing home care.² In order to prevent people from giving away all their assets in order to qualify for Medicaid, federal and state Medicaid laws disqualify certain past asset transfers by Medicaid applicants.

A disqualifying or uncompensated transfer of assets occurs when assets were transferred for less than fair market value during the Medicaid look-back period, and the transfer was not exempt.³

Transfers made by a Medicaid recipient within 60 months⁴ of applying for Medicaid are generally still counted as the applicant's resources for Medicaid eligibility.⁵ When the Medicaid applicant has made a disqualifying uncompensated transfer, the applicant must serve a penalty period during which time payment for nursing home services is denied.⁶ The length of the penalty period is determined by taking the total value of the uncompensated transfer and dividing it by the average daily cost of nursing home care.

The Medicaid undue hardship exception rules kick in when the Medicaid applicant would otherwise be required to serve a penalty period for an uncompensated asset transfer. The undue hardship exception is designed to waive this penalty period. However, under present Montana law, this undue hardship waiver is exceedingly difficult to obtain.

The good news is that state undue hardship law is much too restrictive to pass muster with governing federal law and is therefore invalid. The bad news is that the state has yet to formally repeal and replace the illegal hardship rules. Hence, the rules are still on the books and are a trap for the unwary.

Montana's Medicaid undue hardship law

A Medicaid undue hardship exists, in relevant part, when:

The individual was the victim of fraud, misrepresentation or coercion, and the transfer was based upon such fraud, misrepresentation or coercion, provided that the individual has taken any and all possible steps, including legal action, to recover such property or the equivalent thereof in damages.⁷

Montana law also requires the applicant to pursue all reasonable legal recourse to acquire the transferred asset or its value. Legal recourse may be considered to not be reasonable if the cost of pursuing such recourse exceeds the value of the transferred asset, but such a determination cannot be based solely on attorney's fees due to potential pro bono or reduced fee services.⁸

For many elderly or disabled victims of financial exploitation, these victims cannot take the necessary steps to recover their property because they are without capacity to act — they may lack the mental capacity, the physical capacity, or the financial capacity to pursue all possible avenues of recourse. While the

⁴ MA 404-1, p. 2, ABD Manual.

⁵ MA 404-1 pp. 1-2, ABD Manual.

⁶ MA 404-2, p. 1, ABD Manual.

⁷ ARM § 37.82.417(8)(b)(v); see also ARM §37.82.417(1)(f). Subparts (b)(i)-(iv) of ARM § 37.82.417(8) contain additional hardship grounds which are not discussed in this article.

⁸ MA 404-1, pp. 8-9, ABD Manual.

¹ Case No. 12-0933, Office of Fair Hearings, Montana Department of Public Health and Human Service.

² MA 005, p. 1, Aged, Blind and Disabled Manual, Montana Department of Public Health and Human Services (ABD Manual).

³ MA 404-1, p. 1, ABD Manual; ARM § 37.82.417.

undue hardship exception may be helpful in theory to exploited seniors, it is almost always fatal in fact when put to practice. But federal undue hardship law is not as challenging a hurdle.

Federal Medicaid undue hardship law

The federal undue hardship exception was enacted in 2006 when Congress passed the Deficit Reduction Act of 2005 (“DRA”).⁹ In § 6011(d) of the DRA, Congress required states to provide for hardship waivers and defined the minimum standard for finding a hardship waiver.¹⁰ In pertinent part, the DRA provides:

(d) AVAILABILITY OF HARDSHIP WAIVERS.

-- Each State shall provide for a hardship waiver process in accordance with section 1917(c)(2)(D) of the Social Security Act¹¹ -

(1) under which an *undue hardship exists when application of the transfer of assets provision would deprive the individual -*

(A) *of medical care such that the individual’s health or life would be endangered; or*

(B) *of food, clothing, shelter, or other necessities of life;...*

(emphasis added).

Thus, the DRA established that “undue hardship” must at the very least be defined to exist in situations where imposing a penalty would deprive an applicant of necessary medical care or deprive an applicant of necessary food, clothing, or shelter. When these hardships are shown, a Medicaid applicant should receive a waiver of the uncompensated transfer penalty. Furthermore, 49 USC § 1396p(c)(2)(D) (emphasis added) provides that a penalty shall not be applied where:

“the State determines, under procedures established by the State (*in accordance with standards specified by the Secretary*), that the denial of eligibility would work an undue hardship as *determined on the basis of criteria established by the Secretary.*”

Thus, if the Secretary of Health and Human Services establishes standards detailing how a state must administer Medicaid, the state must, at a minimum, comply with those standards. The federal agency charged with administering the Medicaid program is the Centers for Medicare and Medicaid Services (“CMS”).¹²

The standards specified by the Secretary, in delegating authority to CMS, are published in § 3258.10(C)(5) of the State

Medicaid Manual.¹³ It provides as follows:

Undue hardship exists when application of the transfer of assets provisions would deprive the individual of medical care such that his/her health or his/her life would be endangered. Undue hardship also exists when application of the transfer of assets provisions would deprive the individual of food, clothing, shelter or other necessities of life.¹⁴

Thus, in language that is near-verbatim to that of the DRA, the CMS defines “undue hardship” to include situations where penalties would deprive an applicant of necessary medical care or necessary food, clothing, or shelter.

Montana is bound to follow the standards set out by the DRA and the CMS’s State Medicaid Manual. Consequently, Montana must recognize undue hardships whenever application of the transfer of assets provisions would deprive an applicant of necessary medical care, food, clothing, shelter, or other necessities of life. Montana must also give notice to applicants that an undue hardship exception exists and explain their right to claim the undue hardship exception.¹⁵ But Montana’s Medicaid program does not provide either required provision.

In Re Agnes Graham:

Challenging Montana’s undue hardship rules

The undue hardship definition problem is illustrated by *In the Matter of Agnes Graham*. The 84-year old Graham was financially exploited out of more than \$190,000 of assets by a convicted felon employed as her yard worker. The Cascade County Attorney filed a petition for appointment of a conservator for Graham on the basis of financial exploitation, lack of mental capacity, lack of family to look after her needs, and inability to pay for the level of care needed for her safety. Adult Protective Services, a division of DPHHS, was appointed as conservator.¹⁶

Graham should have qualified for the federal undue hardship exception because she was unable to pay for her medical care and the basic necessities of food, clothing, and shelter. However, when her court-appointed conservator applied for Medicaid, DPHHS imposed a 1,010 day penalty because she had uncompensated “transfers” consisting of the assets taken from her by exploitation during the 5-year lookback period.

Graham’s case brought to the forefront the woeful state of Montana’s undue hardship law. Graham’s nursing home challenged the uncompensated transfer before the Office of Fair Hearings of DPHHS. During the pendency of the litigation, DPHHS eventually approved Medicaid on the basis that Graham’s nursing home had proven that the perpetrator of

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9 Prior to the 2006 DRA amendments, the undue hardship provision allowed states to determine, in accordance with standards specified by the Secretary of Health and Human Services, their own definitions of undue hardships. See 42 U.S.C. § 1396p(c)(2)(D).

10 § 6011(d), DRA.

11 42 U.S.C. 1396p(c)(2)(D)

12 *Arkansas Dept. of Health & Human Services v. Ahlborn*, 547 U.S. 268, 275 (2006) (“[Medicaid’s] administration is entrusted to the Secretary of Health and Human Services (HHS), who in turn exercises his authority through the Centers for Medicare and Medicaid Services”).

13 The State Medicaid Manual may be referenced at <http://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Paper-Based-Manuals-Items/CMS021927.html>

14 DPHHS takes the position that the State Medicaid Manual is not binding upon state Medicaid agencies. See Brief in Opposition to Motion for Summary Ruling, p. 8, *In the Matter of the Fair Hrg. of Agnes Graham*, Case No. 12-0933 (Off. of Fair Hrg. Mont. Dept. of Pub. Health and Human Serv.).

15 DRA, *supra* n. 2, at § 6011(d) (amending 42 U.S.C. § 1396p(c)(2)(D)).

16 *In the Matter of the Conservatorship of Agnes Graham*, Cause No. ADG-11-032 (Montana 8th Judicial District Court).



Would you like to boost your income while serving low- and moderate-income Montanans?

We invite you to participate in the Modest Means program {which the State Bar sponsors}.

If you aren't familiar with Modest Means, it's a reduced-fee civil representation program. When Montana Legal Services is unable to serve a client due to a conflict of interest, a lack of available assistance, or if client income is slightly above Montana Legal Services Association guidelines, they refer that person to the State Bar. We will then refer them to attorneys like you.

What are the benefits of joining Modest Means?

While you are not required to accept a particular case, there are certainly benefits!

You are covered by the Montana Legal Services malpractice insurance, will receive recognition in the Montana Lawyer and, when you spend 50 hours on Modest Means and / or Pro Bono work, you will receive a free CLE certificate entitling you to attend any State Bar sponsored CLE. State Bar Bookstore Law Manuals are available to you at a discount and attorney mentors can be provided. If you're unfamiliar with a particular type of case, Modest Means can provide you with an experienced attorney mentor to help you expand your knowledge.

Questions?

Please email: Kathie Lynch at klynch@montanabar.org or Erin Farris-Olsen at erin@montanabar.org

You can also call us at 442-7660.



Are You Interested in Joining The Modest Means Program?

To get started, please fill in your contact info and mail to: *Modest Means, State Bar of Montana, PO Box 577, Helena, MT 59624.*

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

Name: _____

Address: _____

City, State: _____

Email: _____

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 side of the home page. We do mail out fliers for all multi-credit CLE sessions, but not for one-hour CLE or webinars. The best way to register for all CLE is online.

Real Estate CLE planned for Feb. 13 at Fairmont

The State Bar of Montana Continuing Legal Education Institute is offering its annual Real Estate CLE on Friday, Feb. 13, at Fairmont Hot Springs Resort near Anaconda.

The program will feature 6.5 hours of CLE (.5 ethics). Faculty presenters are Michele Crepeau of the Montana Department of Revenue Legal Services Office; Sally Johnson, pro se clerk at the Montana Supreme Court; Rachel Kinkie, Bloomquist Law Firm, Helena; Dick O'Leary, president of Montana Abstract & Title Co., Butte; Bruce Bekkedahl, Patten, Peterman, Bekkedahl & Green, Billings; and Colleen Dowdall, Worden Thane PC, Missoula.

Presentation topics will be "Property Tax Discussion: Reappraisal Issue; The Continuing Legacy of the "Anaconda Deed"; Additional Filing Period for Certain pre-1973 water rights in Montana; Title Insurance Update; Estate Planning for Mineral Owners; and Updates on Litigating Roads, Easements and Access.

Upcoming State Bar of Montana Live CLE Events February

Friday, Feb. 13 — Annual Real Estate CLE, Fairmont Hot Springs Resort

March

Friday, March 13 — Annual St. Patrick's CLE, Fairmont Hot Springs Resort
Friday, March 27: e-Discovery Through Trial – A Practical Approach, Missoula

April

Friday, April 10 — Criminal Law – Prosecution and Defense, Great Falls
Friday, April 24 — Family Law, Billings

May

Friday, May 1: Bench-Bar Conference, Bozeman
Wednesday, May 8: Case Evaluation, Settlement & Mediation, Helena
Wednesday, May 13: Technology CLE presented by Paul Unger (topics to be determined), Helena
Friday, May 15: Technology CLE presented by Paul Unger (topics to be determined),

Billings

Friday, May 22: Indian Law CLE, Great Falls

June

Saturday, June 5: New Lawyers Workshop, Bozeman
Tuesday, June 16: Internet for Lawyers, Billings
Thursday, June 18: Internet for Lawyers, Great Falls

August

Thursday-Friday, Aug. 21-21: Bankruptcy Law CLE, Great Falls

September

Wednesday-Saturday, Sept. 9-12: Annual Meeting, Missoula

October

Thursday-Friday, Oct. 1-2: Women's Law Section CLE, Chico Hot Springs
Tuesday
Friday, Oct. 9: DR Committee, site TBD
Friday, Oct. 16: New Lawyers Workshop/ Road Show, Kalispell
Friday, Oct. 23: Family Law Section, Missoula

Bar kicks off new Wednesday Webinar CLE series

The State Bar of Montana is offering a series of Wednesday Webinars that started in January and will continue throughout the year.

The next scheduled webinar is a presentation titled "SB 333 Update— New Developments in Exempt Water." The one-hour program is presented by Rachel Kinkie of Bloomquist Law Firm in Helena.

The series kicked off in January with a presentation by Carl

Mendenhall on Trust Account Management. The informative, one-hour program, which has 1.0 ethics credit, is now available on demand. To access this webinar, go to the drop-down menu under "Store" and click on "On Demand CLE."

Watch the Montana Lawyer for announcements about future programs in the series.

For more information, contact Tawna Meldrum at 406-447-2206.

Did you know?

State Bar members now have free access to searchable archives of Montana Lawyer through HeinOnline. HeinOnline provides exact page images of the documents in PDF format just as they appear in the original print. Bar members can access the first issue published of

Montana Lawyer up through the most current issue. To access the archives, go to **MONTANABAR.ORG** and click on the link for the archives under the Montana Lawyer icon. You must log in to the website to access the archives. If it is your first time logging in since our new website launched last June, you will need to create a password. Instructions are available on the home page..

fraud would be unable to repay the debt.¹⁷ In a legal brief, the state has now admitted its undue hardship rules do not meet the minimum federal standard: “Missouri River [Graham’s nursing home] contends that the Departments’ hardship exception does not comply with federal law because it does not incorporate the minimum definition of undue hardship. Unfortunately, Missouri River is correct.”¹⁸

As the *Graham* case illustrates, Montana’s failure to implement the undue hardship exception established by federal law causes harm to Montana’s elderly and can leave them literally out in the cold.

Current state law must change because it violates the minimum undue hardship exceptions established by federal law. As of the preparation of this article, DPHHS has verbally stated that it will change its undue hardship rules, though such changes have not yet been promulgated more than a year and a half after the undue hardship law was first challenged before the Office of Fair Hearings. Instead, in the *Graham* case, the State moved to dismiss on the basis of mootness since it had approved Medicaid benefits on other grounds. The Office of Fair Hearings agreed that that case was moot since DPHHS had already approved benefits.¹⁹ However, the Office of Fair Hearings acknowledge that DPHHS admitted that its undue hardship rules did not comply with federal law.²⁰

The *Graham* case provides an egregious, but all-too typical

17 DPHHS Brief in Opposition to Motion for Summary Ruling, *supra*, p. 2.

18 *Id.*, p. 6.

19 Proposed Decision, p. 12-14. Case No. 12-0933, Office of Fair Hearings, Montana Department of Public Health and Human Service.

20 *Id.*, pp. 12-13.

example of Montana’s failure to implement the federal standard for Medicaid undue hardship. The notice letters DPHHS sent to Graham imposing the penalty did not contain any language notifying her conservator of a possible undue hardship exception or appeal process for claiming it. Ms. Graham was fortunate because her conservator and legal counsel from the nursing home in which Graham was a resident²¹ were able to convince DPHHS that she should qualify for an exception. But this process took months before DPHHS was finally convinced that Ms. Graham’s exploiter would not be able to repay the taken funds.

Graham was financially exploited because she lacked the capacity to stop the exploitation. After her exploitation, she had no means to pay for her care, much less the resources to investigate and prosecute a legal action. Without the necessary Medicaid benefits, Graham was left unable to pay for her care. Fortunately, Graham’s conservator and nursing home were able to appeal the decision and establish Medicaid benefits to pay for her care. Unfortunately, many Montana seniors and disabled are not as fortunate.

Jared Le Fevre is a partner in the Commercial Department and Tax, Trusts, Estates & Wealth Planning Practice Group in the Billings office of Crowley Fleck PLLP. He has advised nursing homes for more than a decade in areas of Medicaid compliance and controversy. Jared graduated from the University of Utah School of Law and received his LL.M. in Taxation from the University of Alabama School of Law (Magna Cum Laude).

The author acknowledges with gratitude the research and drafting assistance of Bradley C. Sweat, associate at Crowley Fleck PLLP, and Jeanne Torske, third-year student at the University of Montana School of Law.

21 The author of this article represented Missouri Care and Rehabilitation Center in the referenced Fair Hearing.

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and independent judges and justices — not persons attached at the hip to a political, special interest, or religious ideology from the day elected. No Montanan should be forced to appear in a court where the wheels of justice have been liberally greased with money and obligation.

For all of these reasons, we need to confront head-on an unpleasant, but necessary reality: we should no longer elect our state court judges and justices. We need to amend the Montana Constitution, by way of a citizens’ initiative, to provide for the selection of jurists through a purely merit-based system.

I suggest that this system should require that judges and justices be selected on the basis of three core criteria: (a) character, (b) experience and (c) intellectual rigor. To that end, I would increase the experience requirement to 10 years of *actual, active* practice of law in Montana—that would necessarily include office practice and trial and appellate practice in the courts of Montana. The candidate’s pleadings, briefs and other writings, and, if applicable, court decisions and opinions should be scrutinized so as to assess his or her knowledge of the law and writing ability. The candidate’s character and fitness should be, likewise, closely examined and considered.

And, to keep politics and money out of the process to the extent humanly possible, the selection should be made by

a committee composed of the leaders of organizations and categories of individuals — for example only, and not by way of limitation: the president of the State Bar; the presidents of the trial lawyers, defense trial lawyers, criminal defense trial lawyers and county attorneys association; the presidents of the Montana Judges Association and Magistrates Association; the dean of the University of Montana School of Law; representatives of the print and broadcast media chosen by them; the president of the Montana Taxpayers Association; the president of the League of Women Voters; the president of Montana Association of Counties; school board representatives; and representatives of the public from different sections of the state. In establishing a selection committee in this manner whose members will change periodically by reason of their office or employment or by term limits, the committee will represent a broad and diverse cross-section of political and social views and will be populated with those who actually have the greatest stake in placing quality judges on the bench.

Moreover, the use of this sort of selection committee will insure to the extent possible, that the eroding effect of politics and money will be minimized. Importantly, this approach also keeps the executive and the legislative branches out of the judicial selection process. Judges don’t choose the governor or

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members of the legislature, and there is no principled reason why the executive and legislative branches should have a role in choosing members of the judicial branch — which is, after all, a *separate and co-equal branch*.

Jurists so selected should be accountable for their service. Therefore, I suggest fixed terms (the present ones are probably sufficient) at the end of which the judge or justice would be subject to evaluation by the selection committee following a written survey of the bench and bar and the consideration of public comment. A judge or justice would be reappointed only if three-fourths of the entire selection committee concurred. I suggest that jurists serve no more than twenty-five years total service. As is the case now, a judge or justice could always be removed from office or disciplined for misfeasance, malfeasance,

misconduct, criminal conduct or violation of the Code of Judicial Conduct by the Supreme Court following examination and recommendation of the Judicial Standards Commission.

Obviously, the devil is in the details, but I suggest this approach as a point of departure for discussion and debate — again keeping in mind that it will not be “if” but “when” we are going to have to address the need to reconsider and revise the way judges are selected in this state. Hopefully, this process will take place before our luck runs out and there is a real train wreck.

I never thought I would change my position 180 degrees on the matter of electing judges and justices. But, I have. *Citizens United* and this last election cycle made me a true believer. It is time for a change.

James C. Nelson is a retired Montana Supreme Court justice.

Lawyer Referral & Information Service

When your clients are looking for **you** ... They call **us**

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

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

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

You pick your areas of law: The LRIS will only refer prospective clients in the areas of law that you register for. No cold calls from prospective clients seeking help in areas that you do not handle.

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

COMMENT PERIODS

Court extends comment period to Feb. 23 for proposed Substitution of Judges changes

Summarized from Jan. 21 (AF 09-0289)

The Chairman of the Public Defender Commission has moved for leave to submit a supplemental public comment on behalf of the Office of the Public Defender (OPD) with regard to the proposed changes to Mont. Code Ann. § 3-1-804. The Montana Judges Association does not oppose the filing of the supplemental public comment by OPD provided it has an opportunity for rebuttal.

Therefore, and with good cause appearing, IT IS HEREBY ORDERED that leave is granted for the filing of the supplemental public comment by OPD. The Montana Judges Association and other interested parties are given until **Feb. 23, 2015**, to file any rebuttal comments

Court extends comment period until Feb. 28 for proposed reciprocity rule change

Summarized from Jan. 6 ruling (AF 11-0244)

In accordance with the provisions of Section VI, Montana Supreme Court's Operating Rules (2006) and the State Bar of Montana's ("Petitioner") petition to this Court to amend the November 5, 2014, Order wherein it sent a 90-day comment period on the Montana Supreme Court's proposed amendment to the Rules on Admission on Motion, and for good cause, IT IS ORDERED that an extension of the comment period for all Bar members is made to April 28, 2015.

Court orders comment period through March 2 on proposed in-house counsel provision

Summarized from Dec. 2 ruling (AF 09-0688)

The Montana Petroleum Association has asked the Court to revise the Montana Rules of Professional Conduct by adding a provision to address multijurisdictional practice by attorneys who provide legal services exclusively to one client as an employer.

The proposed provision, which appears in the Model Rules of Professional Conduct as Rule 5.5(d)(1), would be added to the Montana Rules of Professional Conduct as Rule 5.5(b). That rule would then read as follows:

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW

(a) A lawyer shall not:

- (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

[Proposed new language is highlighted.]

IT IS ORDERED that public comments will be accepted on the above proposed revision to the Montana Rules of Professional Conduct for 90 days following the date of this order. Such comments shall be filed, in writing, with the Clerk of this Court.

Court orders comment period on proposed Judicial Standards Commission rules

Summarized from Jan. 6 ruling (AF 14-0356)

Comments accepted on proposed rules of the Judicial Standards Commission

The Judicial Standards Commission has asked the Court to approve proposed rules of the Judicial Standards Commission.

IT IS ORDERED that the Court will accept comments on the proposed rules of the Judicial Standards Commission for a period of 90 days following the date of this Order.

RULE CHANGES

Court orders voluntary pro bono reporting process for Bar applicants

Summarized from Dec. 16 ruling (No. AF 11-0765)

Following this Court's directive at its Feb. 15, 2014, public meeting, the Access to Justice Commission (ATJC)'s Standing Committee on Law School Partnerships re-evaluated the ATJC's November 2013 recommendation regarding reporting of pro bono activity by applicants for admission to the Montana Bar. The Committee reviewed the comments that had been submitted to the Court regarding the prior proposal, met with representatives of the Character and Fitness Commission and the State Bar of Montana, and explored alternatives to the proposal in light of the Court's concerns.

Among the rules governing a lawyer's conduct is Rule 6.1 of the Rules of Professional Conduct, which states in part, "every lawyer has a professional responsibility to provide legal services to those unable to pay." This Court places a high value on the thousands of hours that are donated by Montana lawyers every year to meet the legal needs of Montanans who cannot afford legal services. Through the joint efforts of the Court's Statewide Pro Bono Coordinator and the State Bar of Montana, Montana attorneys are afforded the opportunity to report their pro bono publico services voluntarily each year. For the calendar year 2013, more than 2,000 Montana attorneys reported 157,463 hours of free and reduced fee legal services — a value exceeding

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\$19.8 million in donated services. The reporting rate in Montana has increased by 150 percent since 2001, and hours reported have increased as well.

Total hours reported in 2013 grew by 10.4 percent over hours reported in 2012. Reporting has been a key component both in evaluating efforts to improve statewide pro bono services and in promoting and advancing pro bono initiatives and awareness. The data shows that most attorneys, particularly those newly in practice, provide services only when they are made aware of available opportunities and have been provided appropriate training. Extending a voluntary reporting tool to aspiring Montana lawyers will facilitate the exchange of information regarding the interests and needs of new lawyers and will assist the Court and the Bar in evaluating pro bono activities generally, in planning and implementing better training and educational efforts for law students and lawyers alike, and in reaching out to successful bar applicants with opportunities to assist in closing the justice gap in Montana.

Having reviewed the provided sample of the Voluntary Law-Related Pro Bono Activity Statement developed by the Standing Committee with input from the State Bar staff, the Court approves of the general process envisioned by the ATJC for this voluntary reporting process and directs its staff to work with the State Bar of Montana to ensure that the reporting form is compatible with the existing Bar admissions process and with the reporting process now in place for attorneys already admitted to the State Bar of Montana.

IT IS THEREFORE ORDERED that this Court's Statewide Pro Bono Coordinator and the State Bar of Montana shall develop a process to give all applicants for the bar examination the opportunity to submit voluntarily a statement of any pro bono law-related activities they have performed as of the date of their application. Neither the information provided in the statement nor an applicant's choice not to submit a statement will be allowed to affect the applicant's candidacy for admission to the Montana bar in any way. The reporting period for student applicants should cover the three years prior to the application, and the reporting period for lawyer applicants should cover at least one year prior to the application.

The voluntary statement should serve three purposes:

1. To inform bar applicants of the high value Montana places on the obligation imposed by Rule 6.1 of the Rules of Professional Conduct and to notify them that admitted attorneys are encouraged to submit similar reports annually;
2. To gather non-identifying information and data about pro bono opportunities available to law students and about volunteer services already being provided by bar applicants in order for the Court and the State Bar to evaluate pro bono activities generally and to develop resources for pro bono attorneys; and
3. To provide bar applicants with an opportunity to indicate their interest in receiving information about training and their willingness to be contacted about pro bono opportunities upon admission to the Bar.

IT IS FURTHER ORDERED that the State Bar of Montana monitor any costs associated with this activity and report any recommendations to the ATJC for further report to and consideration by this Court.

IT IS FURTHER ORDERED that the reporting process shall be implemented beginning with the February 2016 Montana Bar Examination.

Clerical corrections to Rules of Civil Procedure

Summarized from Dec. 16, 2014, order (AF 07-0157)

Several necessary clerical corrections have been brought to the Court's attention since the Court adopted new Montana Rules of Civil Procedure effective Oct. 1, 2011. This Order addresses those. The Court also has received suggestions for modifications to the Rules of Civil Procedure based on matters of policy; those suggestions will be addressed in a subsequent order including a comment period.

Effective immediately, IT IS ORDERED that the Montana Rules of Civil Procedure are amended as indicated below:

The Committee Notes to M. R. Civ. P. 4(t) is corrected, as shown below, to reflect Rule 4(t)'s three-year time limit, rather than a one-year time limit:

Rule 4(t) removes reference to issuance of summons in favor of a single deadline regarding service of process for simplicity. For process to be served in three years, summons must also have been issued within three years.

Several changes to M. R. Civ. P. 26 are necessary to eliminate references to "disclosure requirements," because of the Court's decision not to adopt disclosure requirements included in the corresponding federal rule. To that end, M. R. Civ. P. 26(e)(2) is amended to read:

Expert witness. For an expert whose opinion is produced in response to an interrogatory served under Rule 26(b)(4), the party's duty to supplement extends both to information included in the response and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time of the preparation and submission of the pretrial order to the court.

Also, M. R. Civ. P. 26(g) is amended to read:

(g) Signing Discovery Requests, Responses, and Objections. (1) Signature Required; Effect of Signature. Every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name – or by the party personally, if unrepresented – and must state the signer's address. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry, it is:

(A) consistent with these rules and warranted by existing law or by a good faith argument for extending, modifying, or reversing existing law;

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(B) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(C) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney fees, caused by the violation.

In addition, in the Committee Notes to M. R. Civ. P. 26, the second sentence of the second paragraph is stricken, so that the paragraph reads in its entirety as follows:

Rule 26 is adopted from Rule 26 of the Federal Rules of Civil Procedure with several important distinctions, particularly in the area of automatic preliminary pretrial disclosures and expert disclosures.

Finally, it has come to the Court's attention that some sources for the M. R. Civ. P. show incorrect subsection references in M. R. Civ. P. 45(a)(1)(A)(iv). The subsection references in M. R. Civ. P. 45(a)(1)(A)(iv) are corrected to (d) and (e), rather than (c) and (d).

APPOINTMENTS

Hon. Bradley Newman reappointed to Sentence Review Division

Summarized from Dec. 2, 2014, ruling (AF 06-0185)

The term of the Hon. Bradley G. Newman as a member of the Sentence Review Division of the Montana Supreme Court expires on December 31, 2014. The Court thanks Judge Newman for his service.

Pursuant to § 46-18-901, MCA, the expiration of the term of Judge Newman requires the Chief Justice of this Court to appoint a new member to the Sentence Review Division.

Therefore, and with the consent of the appointee, IT IS ORDERED that the Honorable Bradley G. Newman of the

Second Judicial District Court is reappointed as a member to the Sentence Review Division, effective Jan. 1, 2015, for a term of three years, expiring Dec. 31, 2018.

Swandal named to Access to Justice Commission

Summarized from Dec. 2 ruling (AF 11-0765)

The Access to Justice Commission's seat for a member of the Montana Senate has been vacant since the resignation of Senator Rick Ripley, whose term expired September 30, 2014. With the consent of the appointee,

IT IS HEREBY ORDERED that Sen.-elect Nels Swandal is appointed immediately to fill the vacant Senate seat on the Access to Justice Commission for a three-year term ending Sept. 30, 2017.

Halverson, Munro reappointed to Uniform District Court Rules Commission

Summarized from Dec. 2 ruling (AF 06-0652)

The terms of Elizabeth Halverson and Gregory Munro as members of the Uniform District Court Rules Commission expired on Oct. 1, 2014.

Elizabeth Halverson and Gregory Munro have agreed to be reappointed as members of the Commission. The Court thanks Ms. Halverson and Professor Munro for their previous and continued service on the Commission.

IT IS ORDERED that Elizabeth Halverson is reappointed to the Commission as a civil trial attorney representing plaintiffs, for a term ending Dec. 2, 2018.

IT IS FURTHER ORDERED that Gregory Munro is reappointed to the Commission as a Law School member representing the University of Montana School of Law, for a term ending Dec. 2, 2018.

DISCIPLINE

Censure ordered for Laurence W. Stinson

Summarized from Jan. 21 ruling (PR 14-0746)

On Nov. 19, 2014, the Office of Disciplinary Counsel filed with this Court a petition for reciprocal discipline of Montana attorney Laurence W. Stinson pursuant to Rule 27A of the Montana Rules for Lawyer Disciplinary Enforcement. The petition stated Stinson has been disciplined by the Supreme Court of Wyoming, before which he also is licensed to practice law, and it included a certified copy of an Oct. 29, 2014, order in which the Wyoming Supreme Court publicly censured Stinson for violation of Rule 3.1(c) of the Wyoming Rules of Professional Conduct.

Stinson has filed a response in which he consents to the imposition of a public censure by this Court identical to that imposed upon him in Wyoming.

Based upon the foregoing, IT IS HEREBY ORDERED that Laurence W. Stinson shall appear before this Court for a public censure to be administered in the Supreme Court courtroom, at 1:15 p.m. on Feb. 17, 2015.

New 9th Circuit Chief Judge Thomas feted by who's who of lawyers, judges at Billings reception

A special sitting of a panel of the Ninth U.S. Circuit Court of Appeals in Billings on Jan. 22 kicked off a day of events that served as a homecoming celebration for Chief Judge Sidney R. Thomas.

The hearing was the first sitting in Montana since Thomas, who maintains chambers in Billings, was installed in December as the new chief of the nation's largest federal circuit.

In addition to the sitting of the San Francisco-based Ninth Circuit, events included a CLE presented by the Federal Practice Section of the State Bar of Montana; a question-and-answer with the three judges on the panel hearing the oral arguments; and a reception for Judge Thomas hosted by the State Bar, the Federal Practices Section and the Yellowstone Area Bar Association.

Dignitaries that attended Thursday's events included Montana U.S. Attorney Mike Cotter, who hosted a morning reception after the oral arguments; Montana Supreme Court Justice Pat Cotter; Justice Mike Wheat; former Justice Karla Gray; Ninth Circuit Judge Morgan Christen of Anchorage, Alaska, and Senior Circuit Judge Michael Daly Hawkins, who sat with Thomas on the panel; Magistrates Keith Strong and Carolyn Ostby; U.S. District Judge Susan Watters; retired U.S. District Judge Jack Shanstrom; Gov. Steve Bullock; Dave and Monica Paoli of

Missoula; Andy Suenram of Dillon; UM Interim Law School Dean Greg Munro and John Mudd of the law school; ABA Delegate Damon Gannett; the Hon. Russell Fagg; the Hon. Ingrid Gayle Gustafson; the Hon. Mary Jane Knisley; Tony Gallagher of the Federal Defenders; State Bar of Montana President Mark Parker; State Bar President-Elect Matt Thiel; State Bar Past President Pam Bailey; State Bar Chair of the Board Leslie Halligan; State Bar Trustee Ross McLinden; State Bar Trustee Juli Pierce; State Bar Trustee Eric Nord; State Bar Executive Director Chris Manos; State Bar Counsel Betsy Brandborg; YABA President Jessica Fehr; and many more.

According to a Billings Gazette article, more than 50 attorneys, state and federal judges and members of the public filled the Bighorn Courtroom of the James F. Battin Federal Courthouse to hear arguments in three Montana cases on appeal before the San Francisco-based Ninth Circuit.

Before Thomas was confirmed to the bench in 1996, special sittings of Ninth Circuit panels in Montana were rare — there had only been one. Since joining the circuit, Thomas has arranged for 11 hearings, including Thursday's, which have been held in Billings, Bozeman and Missoula.

State Bar tracking several bills in legislative watch list

This is the list of bills that the State Bar of Montana is currently following closely during the 2015 Montana Legislature. The bills would affect the practice of law and the operation of Montana's courts. Only the bills that the Bar actively monitors, opposes or supports are listed here.

HB 12 — Provide for a decree of dissolution without a hearing when uncontested — **monitoring**

HB 26 — Adjust debt limit allowed for summary dissolution — **monitoring**

HB 74 — Require notice to the attorney general regarding data breaches — **support**

HB 133 — Authorize the public defender to award fixed-fee contracts — **monitoring**

HB 139 — Authorize certain public defender involvement in eligibility determination — **monitoring**

HB 143 — Suspend payment of public defender fee during incarceration — **monitoring**

HB 220 — Revise recall provision laws for local and district elected officials — **monitoring**

HB 255 — Referendum regarding disqualification of judges receiving certain contributions — **oppose**

HB 261 — Revise laws regarding clerk of court fees for transmitting records — **monitoring**

HB 272 — Adoption of the uniform collaborative law act — **oppose**

Wolken also elected to Legislature

The Montana Lawyer reported in the December/January issue that 11 State Bar of Montana members were elected to the 2015 Montana Legislature. We missed one.

Democrat Cynthia Wolken of Missoula was elected to represent Senate District 48.

Wolken, a first-term legislator, has been a member of the Bar since 2013.



SB 15 — Clarify laws relating to the call of a retired judge or justice — **support**

SB59 — Clarify the court's consideration of the eligibility process — **monitoring**

SB 72 — Allowing political party endorsements and expenditures in judicial races — **monitoring**

SB89 — Require supreme court justices/district court judges to file financial reports — **monitoring**

SB 139 — Revise jury selection laws — **monitoring**

SB 199 — Prohibit the application of foreign law in state courts — **monitoring**

Track the progress of these bills at montanabar.org, with daily updates on hearing schedules and votes.

Renewing New Lawyers Section membership has many benefits

By Jamie Iguchi

By the time you read this, it will have been about a month since many of us resolved to make changes for 2015. If you are a newer lawyer, your resolutions might have included certain career-related items such as strengthening your network, building your marketable skill set, and achieving that ever-elusive “work-life balance.” As president of the New Lawyers Section of the State Bar of Montana (NLS), I want to take a few moments to show you how the section can help you achieve all of those goals and why renewing your membership for the upcoming fiscal year is therefore worth the cash.

NLS is an active section that produces CLEs and networking events that are specifically tailored to the needs and interests of Montana’s newer lawyers. Last year, we had maximum attendance at our annual spring CLE, with a star-studded faculty imparting details that registrants could use immediately in their practices. Additionally, the social we hosted after the CLE featured then Bar President Randy Snyder, who graciously led a wine-tasting event where attendees could exchange both tasting notes and contact information.

This year, our spring CLE will take place at the same date and location — on the Friday afternoon of Law Week at the University of Montana School of Law — with current Bar President Mark Parker to be our honored guest at the social. Of course, the syllabus will feature all-new content, in line with our goal to provide you with practical and timely information. We are also expanding the spring CLE in two exciting ways this time around. In a partnership with the law school’s Student Bar Association, we are pleased to offer Section members a \$10 discount on tickets to the Barrister’s Ball Centennial for registering to attend the spring CLE. Also, with our more eastern constituents in mind, we plan on

offering a satellite CLE in Billings consisting of a live video feed of the spring CLE, with a social at a Billings establishment following immediately thereafter.

Now here’s where I need to talk about the funding aspect. As you know, NLS membership has always been free for the first year of admission to the Montana bar. However, since the exact meaning of “first year” was ambiguous, the NLS board recently clarified this to mean both (1) the duration of the current fiscal year for those admitted in the spring and (2) the duration of the current and subsequent fiscal years for those admitted in the fall. To aid in the transition period for this definition, all attorneys eligible to join NLS have been granted free admission through the end of the fiscal year ending on March 31, 2015.

That means if you are a member of the Montana bar in good standing with 10 or fewer years of practice as such, all 1,700 of you are currently members of NLS. We would like to keep as many of you on board as possible and to continue to be able to offer the kinds of resources that I’ve just described. Accordingly, renewing your NLS membership this April 1 is vital and an incredible value, at only \$10 per year. (The dues may increase to a modest \$15, subject to the State Bar Board of Trustees’ approval.)

Although the spring CLE is our flagship production, NLS actively seeks out many other kinds of resources for its members. For a glimpse into what we’ve offered in the past and have planned for the future, the NLS page on the State Bar website is updated regularly with handouts from NLS events and details of upcoming opportunities. “Liking” our Facebook page is another great way to stay informed. For any questions or suggestions on ways NLS can better serve you, please feel free to contact me at any time. Thanks for reading, and we’ll see you this spring in Missoula!

Jamie Iguchi is president of the State Bar’s New Lawyers Section.

4th Judicial District judge applications being sought

Chief Justice Mike McGrath has notified the Judicial Nomination Commission that the Hon. Ed McLean, district judge for the Fourth Judicial District, will retire effective May 1. The Fourth Judicial District covers Missoula and Mineral counties.

The commission is now accepting applications from any lawyer in good standing who has the qualifications set forth by law for holding the position of district court judge. The application form is available electronically at <http://courts.mt.gov>. Applications must be submitted electronically as well as in hard copy. The deadline for submitting applications is 5 p.m., Thursday, Feb. 19. 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 Monday, Feb. 23, and close Wednesday, March 25.

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 McLean’s term, which expires in January 2019.

The Judicial Nomination Commission members are: District Judge Richard Simonton of Glendive; Mona Charles of Kalispell; Patrick Kelly of Miles City; Lane Larson of Billings; Ryan Rusche of Columbia Falls; and Nancy Zadick of Great Falls.

MJF issues call for grant proposals

The Montana Justice Foundation (MJF) announces its call for grant proposals. MJF works to achieve equal access to justice for all Montanans through effective funding and leadership.

One way in which MJF strives to fulfill its mission is through its Legal Aid Grants Program. The MJF awards grants to nonprofit organizations qualified to carry out the following charitable objectives of MJF:

- Support and encourage the availability of legal services to vulnerable and underserved populations;
- Increase public understanding of the law and the legal system through education;
- Promote the effective administration of justice; &
- Raise public awareness of and access to alternative dispute resolution.
- The deadline for submission of grant proposals is Tuesday, March 31, 2015.

MJF recently moved to an electronic, paperless grants process. Organizations interested in applying for a grant will



*Making Justice Accessible
to All Montanans*

need to contact MJF by **Tuesday, March 17, 2015**, to register for an online account. For further information on the application process, please contact the MJF at 406.523.3920, or visit us online at www.mtjustice.org/grant-programs/.

Gaps, from page 18

From this comprehensive list, six especially vulnerable groups are highlighted: victims of domestic violence; persons with a mental illness or mental disability; Native Americans; persons with limited English proficiency or who are hearing impaired; older Montanans; and veterans. As the study states, "Some groups of people...are more intensely affected by one or more of the barriers or gaps, have some specific barriers that make accessing legal assistance even more difficult, or have a challenge that makes obtaining legal assistance even more important."⁸

From the beginning, ATJC has considered its priority to be

⁸ *Gaps and Barriers*, p. 29

Evidence, from page 17

Reporter, and scan and email it to you.

Alternatively, although expensively, WestlawNext contains a searchable database¹⁹ of CS&KT opinions beginning in 1997. When I searched this database for the term "evidence," I found 24 CS&KT cases. When I searched for "Federal Rules of Evidence," I got several criminal cases (where the statute is clear: the FRE apply) and one civil case, *Lutes v. Yellow Kidney*, a negligence action. The Court of Appeals opinion addressed two evidentiary issues, resolving both by reference to the FRE:

Rule 403 of the Federal Rules of Evidence provides that relevant evidence "may be excluded if its probative value is *substantially* outweighed by the danger of *unfair* prejudice, confusion of the issues, or misleading the jury..."

¹⁹ The library, West's Tribal Law Reporter, contains decisions from several different tribal courts. The only Montana tribes represented are CS&KT and Ft. Peck. Once you navigate Westlaw to get to the Tribal Law Reporter, you can choose to search a specific tribal court or all of them.

an agent of change. Building support for access to justice is a critical part of this goal. Key to this effort is building connections between bar associations, policymakers, and other groups that support issue-specific legal needs. "Gaps and Barriers" provides a platform from which to launch a campaign of communication, outreach, education and engagement. The goal of these articles is to widen the scope of the effort to address the issues. As a community of policymakers, funders, legal services providers and local partner organizations, it is our duty to raise high the banner of Montana's commitment to ensuring access to justice that is as vast as Big Sky Country.

Iris Marcus is an Americorps VISTA with Montana Justice Foundation.

Lutes v. Yellow Kidney, No. AP 98-175-CV, 1999 WL 34964430 (Salish-Kootenai C.A. Mar. 15, 1999)²⁰ Both parties and the Court appeared to assume that the FRE applied, as there was no discussion of any alternative evidentiary scheme, and their assumptions buttress my own conclusion that the FRE apply in all cases, civil and criminal, in this tribal court system.

CONCLUSION

That is enough (more than?) for this month. Next month, I will complete this survey of evidence law in the remaining tribal courts located in Montana. See you then.

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

²⁰ In the interest of full disclosure, I should indicate that I was one of the Associate Justices on this case way back when, and had forgotten about it until I found it for this article.

Charles 'Timer' Moses

Montana lost one of its grand old trial lawyers when Charles "Timer" Moses passed on Dec. 18, 2014, in Billings at age 90. Timer graduated from UM School of Law in 1949 and joined Franklin Longan in trial practice in Billings. Subsequently, he was a partner in Sandall, Moses, Cavan & Battin and later formed Moses, Kampfe, Wright, Tolliver & Guthals. In 1982, he formed the Moses law firm with his sons, Mike and Steve. Mike continued to practice with his dad until Timer retired in 2003. Mike subsequently took the bench as District Judge in the 13th Judicial District in Billings in 2014.

Throughout his career Timer's practice consisted entirely of representation of criminal defendants and injured persons. He was a flamboyant courtroom orator who became renowned throughout the state because of his jury trials in high-profile criminal cases. A Montana jury acquitted his client Archie Warwick in the much publicized case in which Warwick was accused of murdering an MSU co-ed. He represented Tony Boyle, president of the United Mine Workers in a trial in which Boyle was accused of masterminding the murder of his challenger for the presidency, Jock

Yablonski. Boyle was convicted, but the verdict was overturned on appeal after which he was convicted again. In a federal jury trial in 1974, when defending members of the UM coaching staff indicted for mishandling funds, he wore a special suit from which, during closing argument, he tore the arms, collar and lapels to illustrate the missing pieces of the government's case. The coaches were acquitted.

Timer was fascinated by law and, long after retiring, still attended CLE seminars on topics that interested him. Judge Moses recalls a meeting in Timer's hospital room the Friday before his death. The doctor came to the room to advise Timer of the severity of his condition and that he would have to make a major decision regarding his care pending his death. Timer was quiet for a moment and then said, "I'll take that under advisement." He then turned to Mike to continue the discussion of motions to suppress which Timer had initiated.

He is survived by his wife, Betty Moses, who resides in Billings. The couple raised six children, Stephen (Roundup), Terri (deceased), Mike (Billings), Richard (Sacramento) Peggy (Missoula), and Liz (Billings).

William T. Kelly

Bill Kelly, (aka William T. Kelly) was born in Thermopolis, Wyo., on April 2, 1924. His parents, Ralph and Edna Kelly, moved from Los Angeles to Billings when he was 12 years old. Bill graduated with honors from Billings Senior High School in 1942.

He enlisted in the Army in 1942 and was discharged in 1945. He served as a rear machine gunner in a Sherman tank with Gen. Patton's 3rd Army. He landed in Omaha Beach with the 1st Army Division on D plus 3, and was hit with a shell fragment in his left leg. He earned five Battle Stars for being in five major battles in France, Belgium, Holland and Germany, including the Battle of the Bulge, at Metz, Germany, to rescue the 101st paratroopers.

He graduated from the University of Montana Law School in 1949 and practiced in Billings. He met Jim Battin in high school, and they became law partners for 14 years before James F. Battin became a United States federal judge.

During Bill's career as a big-verdict personal-injury attorney, he was elected as president of the Montana Trial Lawyers and also received a career lifetime achievement award from the Montana Trial Lawyers. He also received a 50-year Trial Award for his services as an attorney.



Kelly

Jim Battin, Bill's law partner, was appointed city attorney, and Bill served as assistant city attorney. Two years later, Bill was appointed as attorney for the City County Planning Board for a four-year term.

After his retirement, he was elected president of Centennial Reserve Life Insurance Co. and moved to Palm Desert, Calif., for 23 years.

He has requested to be cremated with no funeral services.

Bill passed away on 11/26/14 at 90 years old from CHF. He was preceded in death by his parents, Ralph and Edna Kelly; an infant brother; and three wives, Edith, Betty and Marge.

He is survived by his children, Barb (Rod) Kunze, James, and Sandy (Don); six grandchildren and five great-grandchildren. Dad enjoyed his two really good friends, Tom Mangan and Ivory Robinson.

Memorials may be made to Rocky Mountain Hospice or a charity of your choice.

Thank you to the caregivers at St. Vincent Healthcare, Billings Health and Rehabilitation, AMR, Highgate Senior Living and Rocky Mountain Hospice for taking good care of our Dad.

Remembrances may be shared with the family by visiting www.michelottisawyers.com.

1-406-683-6525

Montana's Lawyers Assistance Program Hotline

Call if you or a judge or attorney you know needs help with stress and depression issues or drug or alcohol addiction .

Don Matthews

Don Matthews, 91, passed away from pneumonia at St. Patrick Hospital on Dec. 7, 2014.

Don was born in Los Angeles to Justina and Euel Matthews. He always wanted to be a cowboy, so he spent a year on a ranch in Fort Benton. He returned to L.A. and joined the Civilian Conservation Corps. Realizing that he wanted more, he took a welding course, becoming a certified welder working for the shipyards in Long Beach. Shortly after that, he enlisted in the Marines at the onset of World War II including the atoll of Tarawa in the west Pacific, where he proudly served his country.

After the war he got his GED and enrolled in City College, where he met his life partner, Gloria. He got his bachelor's degree at Cal State while working for the L.A. County Sheriff's Department, where he made sergeant.



Matthews

In 1954, Don and Gloria moved to Missoula, where he attended law school. He graduated from the University of Montana in 1957. They then moved to Helena, where he was an attorney for the Highway Department and VA. Don wanted a different path in his life, so he moved his family back to Missoula in 1965, where he practiced as a private attorney, retiring in 1990.

Don had a passion for the outdoors and loved hunting and fishing. He especially loved fishing the Pacific Ocean and made many trips to Westport, Washington.

Don is survived by his wife, Gloria; his four children, Pam Matthews, Mark (Cathy) Matthews, Marcy Fisher (Bud deceased) and John (Katia) Matthews; brother, Dr. Wayne (Julie) Matthews; and sister, Marilyn (Dan) Vintch.

A private family memorial will be held in the summer of 2015.

Bryce Roger Floch

Bryce Roger Floch of Kalispell, passed away Nov. 16, 2014, of natural causes, at the age of 41.

He was born May 10, 1973, in Kellogg, Idaho, and adopted at birth by Gary and Deanna Floch. He attended school in Lewiston, Idaho, graduating in 1991. He participated in several sports growing up, including wrestling and soccer. He also took part in the Mr. LHS competition, and was a member of the mock trial team his junior and senior years, winning state competitions in Boise, Idaho. He graduated from the University of Idaho in 1996 with Bachelor of Science degrees in criminal justice and sociology and was on the dean's list. He worked for the Fund for Public Interest for two years and made application to several law schools, finally going to the University of Montana, where he graduated in 2001 with his law degree.

He married Angela Jacobs in 2001 after both graduated from law school. He worked for law firms in Missoula and Kalispell before starting his own law firm in 2011. He was later divorced.



Floch

Bryce loved his children, Dane and Ava. He had good friends from high school and college who went camping and fly fishing every year after college. He enjoyed skiing — especially with Dane — fly fishing, camping and whitewater rafting.

He is survived by his two children, Dane, 7, and Ava, 3; parents, Gary and Deanna Floch, of Lewiston; grandmother, ElmoEtta Floch, of Clarkston, Wash.; biological mother, Jone Krulitz, of Wallace, Idaho; biological father, Pat Dickinson, of Florida; sisters, Lisa Byers of Lewiston, Jessica Krulitz of Pinehurst, Idaho, and Kirsten Voorhees of Coeur d'Alene, Idaho; and brother, Jerrod Krulitz, of San Diego. He has many aunts, uncles, nieces and nephews and friends — too many to count.

A celebration of life was held in Kalispell and another in Clarkston in December.

Memorials may be made to Dane and Ava Floch at Potlatch Federal Credit Union, 1015 Warner Ave., Lewiston.

Earl M. Genzberger

Earl M. Genzberger, 84, passed away peacefully at home on Jan. 5, 2015, in Post Falls, Idaho.

Earl was born on Nov. 6, 1930, in Butte, to Earle N. Genzberger and Anna Miller. With his mom dying young, he was so very thankful to have Mildred "Babe" Scovil as his cherished adopted mother.

Earl attended McKinley Elementary School and graduated from Butte High School, where his proudest moment was marching in the 1948 Rose Bowl Parade. He went on to attend Montana State University, and after three years of service in the Coast Guard, thereafter graduated from the University of Michigan. He then earned a degree from the University of Montana School of Law and entered into the practice of law with his father in 1957.

Earl will be remembered for his dedication to community, including Outstanding Young Man of America, two terms as District Governor of Kiwanis, an honored member of Masonic



Genzberger

Lodge #23, past potentate of the Bagdad Shriners, Jesters and vestry of St. John's Episcopal Church. Among his most treasured accomplishments is as a founding member of the Mother Lode Theatre in Butte.

Earl continued his legal profession until 2002, when he and his beloved wife moved to Post Falls.

He was preceded in death by his beautiful wife, Ramona, this past September — a courtship and union of nearly 60 years.

Earl is survived by sons, Marc Genzberger and Cory Genzberger; daughters, Janna Leaf and Christine Genzberger; son-in-law, Gary Leaf; and daughter-in-law, Roxana Genzberger.

In lieu of flowers, donations can be made to the Bagdad Temple Transportation Fund, 314 W Park St., Butte, MT 59701 or of the donor's choice.

A memorial service will take place in Post Falls in the spring for Earl and Ramona Genzberger together.

The Montana Justice Foundation remembers Dick Morgan, longtime IOLTA program supporter

By Amy Sings In The Timber
Executive Director, Montana Justice Foundation

Richard “Dick” Morgan passed away unexpectedly Wednesday, Dec. 3, 2014. Dick’s family moved to Helena when he was a boy and he began a lifetime career in banking while he was still in high school.

Many in the legal community who knew Dick met him through his work with Mountain West Bank (MWB). Dick helped to found Mountain West Bank in Helena, and was instrumental in the institution’s growth and development into a well-respected, community-based bank.

I came to know Dick through my work with the Montana Justice Foundation and the Montana Interest on Lawyers Trust Accounts Program (IOLTA). Dick was the very first banker I met with when I came on with the MJF.

I am not the least bit embarrassed to say that I was nervous going into that first meeting. Despite then MJF board member, Jon Motl’s assurances that Dick was a “great guy”, I was about to ask a banker for unprecedented support for a program that I had been told by many, only resonates with lawyers.

Ten seconds into that meeting I could not have been more at ease.

Dick welcomed me with a smile and manner suited for old friends. I found myself telling him how nervous I had been just moments before I walked into his office and he chuckled, saying, “[He]



Morgan

couldn’t imagine anyone being nervous at meeting [him]”, and that “maybe it is [he] who should be nervous; after all, how much money are we talking about here?”

That meeting was the continuation of an already great partnership between the MJF and MWB that had been forged by Jon Motl and Dick prior to my hire. Mountain West Bank was a pioneer in the Leadership Bank movement in Montana. In 2005, largely due to MWB’s actions, the average interest rate return on IOLTA accounts rose three-fold over previous program years. As other banks followed MWB’s lead, IOLTA income continued to rise, allowing MJF the ability to significantly increase grant funding to legal aid providers and other access to justice initiatives throughout the state.

However, the impact that that first meeting, and Dick’s ongoing support, had on me has benefitted the Montana IOLTA Program, the MJF, and ultimately Montana communities over the years through the outreach and stewardship of dozens more MJF-banking partnerships in support of equal justice for all Montanans.

Dick ensured that MWB’s support for the IOLTA Program and MJF remained strong, even through the extended economic recession. He truly understood and cared about the mission and work of the MJF. The last time I had the privilege to meet with Dick I mentioned to him that there were one or two of his peers that had expressed discontent with MWB’s stalwart position on supporting the MJF through difficult economic times. Dick flashed me that warm smile and replied, “If you’re upsetting folks by carrying through in tough times then you know you’re doing the right thing.”

Dick, you are missed.

IV. FURTHER READING

For more information regarding the topics discussed in this article, readers may wish to consult the following resources:

Print

ABA Cybersecurity Handbook (Jill D. Rhodes & Vincent I. Polley eds., ABA 2013).

Data Breach and Encryption Handbook (Lucy Thompson ed., ABA 2011).

Andrew B. Serwin, Peter F. McLaughlin & John P. Tomaszewski, *Privacy, Security and Information Management: An Overview* (ABA 2011).

Online

ABA Cyberspace Law Committee, <http://apps.americanbar.org/dch/committee.cfm?com=CL320000>

ARMA International, <http://arma.org>

Council on CyberSecurity, <http://www.counciloncybersecurity.org>

National Conference of State Legislatures, *Security Breach Notification Laws*, <http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx>

NIST Cybersecurity Framework, www.nist.gov/cyberframework

Ponemon Institute, <http://www.ponemon.org>

Peter J. Arant is an attorney at Garlington, Lohn & Robinson in Missoula.

Breach, from page 13

could be affected.

Insurers do not have sufficient data to accurately predict their claims activity related to these policies. New types of data breaches are uncovered almost daily, and the scope and nature of damages also continue to change. Consequently, cyber insurance products will continue to evolve in terms of what kinds of events they cover, the limits of liability available and the exclusions they contain.

Despite the constantly evolving nature of cyber policies, organizations should not wait to obtain coverage. As the odds of suffering a data breach continue to rise, having proper insurance is critical.

III. CONCLUSION

As the examples in this article demonstrate, organizations must change how they assign value to sensitive personal data. After all, the data residing on an organization’s servers, hard drives and other equipment is often “worth” far more than the equipment itself. In fact, sensitive personal data, if compromised, could represent more in dollars and cents than the organization’s own building and all of its assets combined.

Just as organizations safeguard tangible assets through security measures and insurance policies, they must do the same with sensitive personal data. Understanding the legal context surrounding this data can help the organization institute the appropriate safeguards.

Job Postings and Classified Advertisements

CLASSIFIEDS Contact | Joe Menden at jmenden@montanabar.org or call him at 406-447-2200.

ATTORNEYS

ASSOCIATE OR PARTNER: Associate or partner for mature civil practice in resort town with emphasis on estate planning and administration, business organization, and real estate. Three years civil litigation experience preferred. Send letter of interest to scanlinlaw@msn.com. All inquiries confidential.

ASSOCIATE ATTORNEY: Parker, Heitz & Cosgrove, PLLC, a Billings litigation firm, is seeking an associate attorney for a litigation position. Applicants must demonstrate excellent research, writing and communication skills. Competitive salary and benefits. Please submit your cover letter and resume in confidence to Parker, Heitz & Cosgrove, PLLC, Attn: Mark D. Parker, P.O. Box 7212, Billings, MT 59103-7212, or via email to markdparker@gmail.com.

ASSOCIATE ATTORNEY: Great Falls firm seeking an associate attorney with 2 or more years litigation experience. We are seeking applicants with strong research and writing skills. Salary will be commensurate with experience. Benefits also offered. Please send resume, writing sample and references to classifieds@montanabar.org with the subject line 1501. All inquiries will be kept confidential.

ASSOCIATE ATTORNEY: Helena firm accepting applications for an associate attorney. Experience in litigation and trial preferred, but will work with and train qualified applicant with good work ethic and strong writing and analytical skills. Our general practice emphasizes defense litigation, personal injury, workers' compensation, and insurance regulation. Submit resume to: Keller, Reynolds, Drake, Johnson & Gillespie, P. C., 50 S. Last Chance Gulch, Third Floor, Helena, MT 59601.

DEPUTY COUNTY ATTORNEY: The Hill County Attorney's Office has one (1) full-time Deputy County Attorney position open for hire. Salary depends on qualifications and experience plus all applicable Hill County benefits. A full job description is available at Havre Job Service. Please provide a cover letter, resume, transcript, writing sample, and references to the Hill County Personnel Office, 315 Fourth St., Havre, MT 59501. This position is open until filled. For more information, please contact the Personnel Office or Gina Dahl, Hill County Attorney, at 265-5481 ext. 211.

EXPERIENCED ASSOCIATE ATTORNEY: Immediate Opening. Halverson & Mahlen, P.C., an established Billings civil defense firm, has an immediate opening for an associate attorney. Ideal candidates will have 2-3 years or more of experience practicing in a civil firm. Graduates must be licensed to practice in Montana, and all applicants must have strong research and writing skills. Starting salary D.O.E., but a successful applicant with 2-3 years of civil practice that includes trial work can expect a starting salary of \$60,000+ per year. Generous

benefit and incentive package that includes health, dental, and 401k. All applications confidential. Please send cover letter, writing sample, transcript and resume to Halverson & Mahlen, P.C., attn. Tom Mahlen, P.O. Box 80470, Billings, MT 59108-0470, or in electronic format to tmahlen@hglaw.net. Please learn more at www.hglaw.net.

HEALTH CARE REGULATORY ATTORNEY: Garlington, Lohn & Robinson, PLLP, a midsize law firm in Missoula, Montana seeks an experienced health care regulatory attorney. The ideal candidate will have at least four years' experience in transactional and/or regulatory health care and/or an advanced degree/LL.M. in healthcare. Candidates should be familiar with ACA, Stark, anti-kickback, HIPAA, health care staffing and contracting. To apply, please visit <https://garlington.submittable.com>.

LITIGATION ASSOCIATE ATTORNEY: Garlington, Lohn & Robinson, PLLP, a midsize law firm in Missoula, Montana has an immediate need for a litigation associate attorney. Although not required, ideal candidates will have experience in civil defense litigation. Applicants should have a strong academic record and excellent communication and writing skills. To apply, please visit <https://garlington.submittable.com>.

PROSECUTOR. The City of Bozeman seeks an attorney to join the City's criminal prosecution services team. F/T career position w/excellent benefits. Criminal law experienced preferred. Salary: \$63,013 – \$69,245 per year as earned DOQ. PREFERRED APPLICATION DEADLINE: 5 p.m. Monday, Feb. 16. Position open until filled. EOE/ADA/Vet Pref. See the full announcement and application instructions at www.bozeman.net/jobs.

TRUST LAND MANAGEMENT: The Department of Natural Resource & Conservation is recruiting for an Attorney to provide legal advice and representation in state and federal courts and administrative tribunals for the Trust Land Management Division of the DNRC, Director, and the Board of Land Commissioners in areas of sovereign waters and State trust lands, including title and management of land resources. The position is located in Helena. Please go to this website to see the complete vacancy announcement and apply online. Additional information regarding the Department and its mission can be found at <http://www.dnrc.mt.gov/>.

PARALEGALS/LEGAL ASSISTANTS

PARALEGAL/LEGAL ASSISTANT: FT Position, Benefit eligible. This position provides support to the Chief Legal Officer. Responsibilities include but are not limited to: administration, coordination of special projects, budget, reconciliation of expenses, research. Writing sample, resume and cover letter are required with application. If interested please apply online at: bozemandeaconess.org.

PARALEGAL: Garlington, Lohn & Robinson, a mid-sized law firm in Missoula, MT seeks an experienced litigation paralegal. Must possess strong interpersonal, administrative and organizational skills and be able to work independently as well as part of a team. Must be able to work in a fast paced, deadline driven environment with attention to detail and the ability to multi-task. Candidate should have excellent written and verbal communication skills and be proficient with Microsoft Office Suite. To apply, please visit <https://garlington.submittable.com>.

LEGAL ASSISTANT: Busy litigation/criminal practices. Resume/references to: Datsopoulos, MacDonald & Lind, P.C., Attn: Office Admin, 201 W. Main, Suite 201, Missoula, MT 59802; cwekkin@dmllaw.com. ALL INQUIRIES STRICTLY CONFIDENTIAL.

LEGAL ASSISTANT: Missoula law firm, Reep, Bell, Laird & Simpson, P.C. is seeking a full-time Legal Assistant. Must be detail oriented, able to multitask, a team player, and have excellent organizational skills. Duties include interfacing with clients, preparation of legal documents, editing and proofing, file organization, exhibit preparation, and all other attorney support as needed. Must have working knowledge of Microsoft Office software. Submit resumé and salary requirements to Stephenie Dunwell, Office Manager, P.O. Box 16960, Missoula, MT 59808.

LITIGATION PARALEGAL: Phillips Haffey PC seeks paralegal with proven experience in litigation. Must work well with team and independently, manage multiple attorneys and matters, be proficient in computer skills, drafting written documents, calendaring, time-keeping, and trial prep. Excellent salary/benefits DOE. Forward confidential application electronically or by mail by January 25, to: Priscilla J. Phillips, Administrator, Phillips Haffey PC, 283 W. Front St., Suite 301, Missoula, MT 59802; (406) 721-7880; pjphillips@phillipsmontana.com.

LITIGATION PARALEGAL: Moulton Bellingham PC is seeking an experienced paralegal for a fast-paced, largely defense, litigation practice. Position requires knowledge of discovery and document management, records indexing, witness interviews, time-keeping, trial preparation, and assistance at trial. Paralegal will work with multiple attorneys in handling large defense cases. 3 plus years in a prior law firm or legal-related position is preferred, but not required, if comparable knowledge/experience exists. Forward confidential application to Michele L. Braukmann, Moulton Bellingham PC, P.O. Box 2559, Billings, MT 59103-2559, email: Michele.Braukmann@moultonbellingham.com.

OFFICE MANAGER: Experienced Office Manager/Legal Secretary needed to work in a general practice law firm. Working knowledge of WordPerfect, Word and Excel programs helpful along with strong organizational and people skills. Attention to detail a must. Salary determined by experience. Benefits provided. Interested persons please

send resume' to Managing Shareholder, Kasting, Kauffman & Mersen, P.C. at 716 S. 20th Ave. Suite 101 Bozeman, MT 59718 or e-mail to jmersen@kkmlaw.net.

OFFICE COORDINATOR/LITIGATION SECRETARY: Hall & Evans, L.L.C. is seeking a full-time Office Coordinator/Litigation Secretary to join their growing office in Billings. This position requires functioning as the receptionist, office services coordinator and legal secretary. Responsibilities include ordering supplies, management of the break and conference room areas and processing the incoming and outgoing daily mail. We are looking for an outgoing, energetic candidate who has 3-5 years of experience as a litigation legal secretary and in general office administration. Experience with a defense firm and transportation litigation experience is a plus. For more information, please visit www.hallefans.com. To apply, please email your resume with a cover letter and salary history and requirements to: employment@hallefans.com or mail to: Hall & Evans, LLC, Attn: Human Resources, 1001 17th St., Suite 300, Denver, CO 80202. Hall & Evans is an Equal Opportunity Employer.

ATTORNEY SUPPORT/RESEARCH/WRITING

ENHANCE YOUR PRACTICE with help from an AV-rated attorney with 33 years of broad-based experience. I can research, write and/or edit your trial or appellate briefs, analyze legal issues or otherwise assist with litigation. Please visit my new website at www.denevilegal.com to learn more. mdenevi@bresnan.net, 406-541-0416.

RESEARCH, WRITING, SUPPORT: Experienced attorneys at Strickland & Baldwin, PLLP, offer legal research, writing, and support. We have over 25 years of combined experience representing both plaintiffs and defendants, and we use that experience to assist you. Find the help you need, read practice tips, obtain CLE credit, and more at www.mylegalwriting.com.

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

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

OFFICE SPACE/SHARE

BOZEMAN: Walk to Law & Justice center from law office with five exec. offices, two small private offices, conf. room, kitchen, two baths, 2nd fl. stor. space w/shower, new paint and carpet, 2900 sq. ft., ample parking. Contact Mike McKenna: mckennamt@gmail.com or call 406-587-0792.

BOZEMAN OFFICE SHARE: Professional office share available on Main Street in Bozeman. \$1,800.00 per month includes: large furnished office, brick walls with window overlooking Main Street; use of conference room; file storage; multi-line phone system with voicemail; professional legal secretary services; parking; internet; utilities; copier/fax. References may be requested. Contact James McKenna, 406-586-4994 or mckennalaw@onemain.com.

ENNIS: On Hwy 287, two minutes from downtown Ennis, 15 minutes from Virginia City, easy access. Upscale building with high-end finishes. Fully furnished large individual office spaces or half the building available. Perfect for a satellite office. Conference room with full AV equipment, teleconferencing capability, kitchen, on-site parking, lovely outdoor space. Exceptional reception area. Please contact jfanelli@ponderosa-advisors.com or 406-209-7585.

STEVENSVILLE: Professional office building downtown on Main Street available for sale or lease starting October 1. Detached 1 story building with 10-car parking lot. Approx. 2,800 sq. ft. leasable space includes full first floor and basement. Ready to occupy modern offices, conference room and reception/waiting room. Central heat, a/c, lovely landscaping. Perfect for small firm or growing solo practitioner. Contact helldorb@stjohns.edu or call 917-282-9023

MEDIATION

MEDIATION SERVICES: Effective Jan. 1, 2015, Stuart Kellner will provide mediation services under the name Kellner Mediations. He plans to operate primarily electronically regarding scheduling, engagement letters, receipt of mediation memos and billing at kellnermediations@montana.com. Any necessary mailings may be sent to P.O.Box 1166, Helena, MT 59624. His business cellphone is 406-431-1027.

MEDIATIONS & ARBITRATIONS: As former executive vice president and chief counsel of ninth largest private employer in the U.S. and with over 45 years legal experience, my practice focuses on mediation and arbitration. Available as a neutral resource for complex commercial, class-action, ERISA and governmental agency disputes. Detail of experience, professional associations and cases provided on request. Francis J. (Hank) Raucci, 406-442-8560 or www.gsjw.com.

AVAILABLE FOR MEDIATION AND ARBITRATION: Brent Cromley, Of Counsel to Moulton Bellingham P.C., Billings, 406-248-7731, or email at brent.cromley@moultonbellingham.com.

CONSULTANTS & EXPERTS

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

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

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

INVESTIGATORS

PRIVATE INVESTIGATOR: Accurate Private Investigator for civil or criminal cases. Licensed in Montana for over 30 years. Zack Belcher, 541 Avenue C, Billings, Montana, 59102. Phone: 1-406-248-2652.

INVESTIGATIONS & IMMIGRATION CONSULTING: 37 years investigative experience with the U.S. Immigration Service, INTERPOL, and as a private investigator. President of the Montana P.I. Association. Criminal fraud, background, loss prevention, domestic, worker's compensation, discrimination/sexual harassment, asset location, real estate, surveillance, record searches, and immigration consulting. Donald M. Whitney, Orion International Corp., P.O. Box 9658, Helena MT 59604. (406) 458-8796 / 7.

EVICCTIONS

EVICCTIONS LAWYER: We do hundreds of evictions statewide. Send your landlord clients to us. We'll respect your "ownership" of their other business. Call for prices. Hess-Homeier Law Firm, (406) 549-9611, ted@montanaevictions.com. See website at www.montanaevictions.com.

MONTANA LAWYER

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