MONTANA LAWYER

State Bar of Montana

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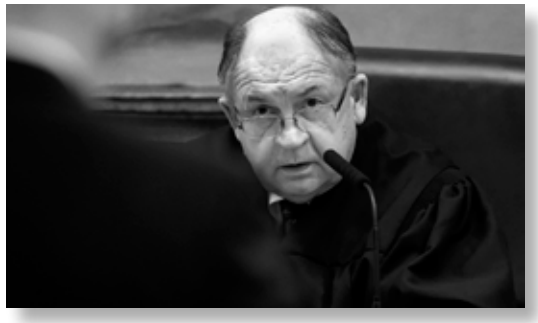

MONTANA LAWYER

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Regular Features

Montanans along the Potomac — again

Jock Schulte, Bob Carlson and I spent a week in Washington, D. C., for ABA Days. Here is my letter back home. Schulte was a veteran of the event, and Bob Carlson was the Chairman of the whole operation. I watched in awe, as Montana once again punched way above its weight on the national scene.

ABA Days is an effort by the ABA in conjunction with a long list of other bar associations and individuals to bring to the attention of our Congressional representatives those legal issues which have been identified by the ABA as worthy of pursuit for the good of the profession and the public.

The items which ABA chooses, from my perspective at least, have two central features. First, the groups being spoken for have no effective voice otherwise. Second, the matters are ones which lawyers have a particular expertise to speak on. This year the ABA made a gigantic, and it appears successful, effort to get the ear of the congressional delegations on issues involving the over-incarceration of nonviolent and juvenile offenders; the funding of Legal Services Corporation and the failure to provide counsel for immigrant children appearing in American courts without a speck of representation.

We did all that, and it was hard and fun work. At day's end the ABA would wine and dine us a bit in pleasant settings — the first night at the National Archives and the second in the Supreme Court.

Let me make one bipartisan political observation. Our representatives are so much more engaging and real than you would think from the single dimension you get from the political ads (both for and against) and the media, that there is no substitute for using all five senses, even as briefly as their schedules permit.

But the "Potomac-Montana" connection did not begin with us three. It probably began with Jefferson and the Louisiana Purchase, followed quickly by Lewis and Clark. From there, no President's Message could contain it all. From Jeanette Rankin rejecting the popular trend and declaring "I cannot vote for war" (twice as it turns out) to Mike Mansfield's leadership over a long arc of time, where it can be said he did vote for war — an unpopular one at that. But these two have statues in our State Capitol so every schoolkid knows about them — as does every reader of the Montana Lawyer.

A few words about Sen. Thomas Walsh might be in order then. The ABA and Montana did not always arrive in Foggy Bottom on the same side of things. In 1916 when President Woodrow Wilson nominated Louis Brandeis to the United States Supreme Court, many past presidents of the ABA reacted in horror, writing in opposition to the appointment. Montana's Sen. Walsh, stood up for nominee Brandeis, carried the nomination and the nomination went through. Brandeis served with distinction, and history often noted that as the first Jewish American to serve on the court, his work was subject to a bit — perhaps more than a bit — of strict scrutiny.

Justice Samuel Alito meets with some of the Montanans who attended ABA Days in Washington, D.C., in April during a reception at the U.S. Supreme Court. Shown above are Carlene Taubert, Alito, State Bar of Montana President Mark Parker, Cindy Carlson and Bob Carlson, who was the chairman of the event. Taubert is Parker's wife.

Why would Walsh, certainly not playing to the massive Jewish constituency back home, stick his neck out so far, when it could do him so little good.? I guess, why would the crowd of attorneys who came to champion the cause for prisoners and poor immigrant children do the same thing today? I think Walsh knew, and put it best, when he said, nearly 100 years ago:

"It is easy for a brilliant lawyer so to conduct himself as to escape calumny and vilification. All he needs to do is to drift with the tide. If he never assails the doer of evil who stands high in the market place, either in court or before the public, he will have no enemies or detractors or none that he need heed."

— Mark D. Parker.

Snipes makes partner at Great Falls firm Lewis, Slovak, Kovacich and Snipes

Lewis, Slovak, Kovacich and Snipes, P.C., is pleased to announce that Ben A. Snipes recently made partner in the firm.

Snipes joined the firm as an associate in 2008. He has experience in complex civil litigation, including environmental litigation, asbestos litigation, insurance bad faith and workplace safety litigation. Snipes also maintains a substantial workers' compensation practice. A graduate of the University of Montana-Western (B.S., 2005) and the University of Montana School of Law (J.D., 2008), he is admitted to practice in Montana state and federal courts and the Ninth Circuit Court of Appeals.


Snipes

The firm of Lewis, Slovak, Kovacich and Snipes, P.C., has extensive experience successfully representing personal injury victims throughout Montana.

Holland & Hart Billings office expands with addition of attorney Brian Murphy

Associate Brian Murphy has joined the Holland & Hart LLP Billings office as a commercial and environmental litigator with cross-industry experience. His practice will enhance the litigation services in the Billings office and include a wide range of commercial and regulatory matters.

A Billings native, Murphy earned his B.A. from the University of Notre Dame and his J.D. with honors from the University of Montana School of Law where he was co-editor-in-chief of the Montana Law Review. Before joining Holland & Hart, he clerked for the Honorable Charles Wilson of the United States Court of Appeals for the Eleventh Circuit and for the Honorable Donald Molloy of the U.S. District Court, District of Montana.


Murphy

"We are pleased to welcome Brian to Holland & Hart," said Shane Coleman, administrative partner for the Billings office. "Brian's courtroom experience and his knowledge of federal practice adds valuable depth to our talented team of litigators that focus on providing the highest client service."

Holland & Hart's Billings office has served clients with significant operations and investments in Montana since 1980.

Lawyers in the Billings office specialize in areas such as resource development, environmental law, commercial litigation, intellectual property, bankruptcy, labor and employment, employee benefits, mergers and acquisitions, real estate, tax, and trusts and estates.

Bar submits supplement to reciprocity comment

The State Bar of Montana on April 28 submitted a supplement to its earlier comment to the Supreme Court on a proposal to allow reciprocity rules for admission to the bar.

The comment requests that if the court chooses to adopt reciprocity, that the Court adopt interim rules "pending further study and real-life experience."

The comment also states that the Bar is willing to develop interim rules to govern reciprocity and that the Bar will create a working group to address the many rules that might be affected by adopting reciprocity. Examples of rules that reciprocity could impact are admissions and professional conduct, State Bar By-Laws, membership categories and "practice of law" definitions. The Bar would recommend permanent rules, bylaws amendments and fee structures to the Court after two years' experience under interim rules and based on proposals from the working group.

You can read the Bar's March 30 comment and its April 28 supplement at montanabar.org.

Amendments to State Bar By-Laws approved

Also at the April meeting, the board passed two amendments to the State Bar By-Laws.

The first amendment is to include a new class of membership, inactive/disability.

The class of inactive/disability members includes members who have been transferred to such status as per Rule 28 of the Rules for Lawyer Disciplinary Enforcement.

Rule 28 says that a lawyer subject to the disciplinary jurisdiction of the Supreme Court will be put on disability/inactive status if the lawyer asserts an inability to assist in the defense of disciplinary proceedings; the lawyer is determined, upon hearing, to have a physical or mental condition that adversely affects the lawyer's ability to practice law; or the lawyer is judicially declared incompetent or involuntarily committed on grounds of incompetency or disability.

The second amendment to the By-Laws that the board approved details the duties of the Immediate Past President. The amendment states:

"The Immediate Past President is a member of the Executive Committee. Responsibilities include:

(1) organizing the local bar leadership conference; (2) chairing the Past Presidents Committee; (3) serves as a liaison with out of state Bar members; (4) performs other duties assigned by the State Bar President or Board of Trustees."

Bar, Law School, OPI honored for civics education program

The State Bar of Montana, the Montana Office of Public Instruction and the University of Montana School of Law received a 2015 Curriculum & Instruction Partnership Award from the University of Montana's Phyllis J. Washington College of Education and Human Sciences. The award was for a civics education program the Bar, the law school, OPI and the College of Education have collaborated on, reaching out to high school students who observe Montana Supreme Court arguments. Shown at the College of Education's awards gala on April 10 are, from left: Roberta Evans, dean of the UM College of Education; Royce Engstrom, president of the University of Montana; Terry Kendrick, special projects director for OPI; Anthony Johnstone, associate professor at the UM School of Law; Chris Manos, executive director of the State Bar; Adrea Lawrence, associate professor at the UM College of Education; and Georgia Cobbs, College of Education's Curriculum and Instruction Department chair.

Orders of protection myths dispelled; practical tips for all Montana lawyers

By Diana E. Garrett and Shannon Fuller[1]

According to FBI statistics, an incident of domestic violence occurs every nine seconds in this country. Approximately one in four women and nearly one in seven men in the U.S. have experienced severe physical violence by an intimate partner at some point in their lifetime.[2]In a recent survey conducted by the Centers for Disease Control, almost 7 million women in the United States reported experiencing rape, physical violence, and/or stalking by their intimate partner in the twelve months prior to being surveyed.[3] One only needs to turn on the evening news to see the horrific nature of these crimes, and the devastating effects on families and communities.

Domestic violence affects everyone, no matter their socio-economic status, education, age or geographical location. With that said, most attorneys in Montana will know somebody affected by domestic violence, whether it is a family member, friend, client, neighbor or co-worker. Even if you do not practice in family law, you will likely encounter this issue in your work or home life. In order to fully understand the depth of this area of law, it is important to recognize societal myths that devalue the serious nature of family violence. This article will address the common myths associated with domestic violence and orders of protection, and provide practical tips for Montana lawyers.

Myth #1: I know domestic violence is a problem, but is it really happening in my community?

One common misconception about domestic violence is that it only happens in big cities and dangerous neighborhoods. The truth, however, is that domestic violence is a problem everywhere, even in small communities in Montana. Over 7,000 assaults were reported to Montana law enforcement between 2012 and 2013.[4] Of these, 53.3 percent were committed by a partner or family member of the victim. Almost 2,000 aggravated assaults were reported, of which 13.6 percent were committed by a partner or family member. While these statistics are alarming, they only represent the incidents that were reported to law enforcement. In reality, the numbers may be much higher due to the large percentage of violent crimes that go unreported every year, many of which are committed against intimate partners and family members.

Historically, domestic violence has been considered a private family matter. It is only recently that a paradigm shift has occurred, and family violence has been recognized as a societal issue that affects everybody. The 1994 passage of the Violence Against Women Act (VAWA 1994) offered the first large-scale federal protections designed to protect and prevent stalking, sexual assault and domestic violence against women.[5] VAWA continues to evolve, and its latest enactment includes, among other things, greater protections and means for prosecuting intimate partner crimes on Indian reservations.[6] As awareness of domestic violence and the need for protections grew, the Montana Legislature created the Montana Domestic Violence Fatality Review Commission (MDVFRC) in 2003.[7] This commission seeks to identify gaps in Montana's system for protecting domestic violence victims, and to better coordinate multi-agency efforts to protect those most at risk of domestic homicide.[8] Recently, a Native American Domestic Violence Fatality Review Team was established in order to specifically address the severity of domestic violence affecting Native Americans in Montana.

Another way of tackling this egregious problem is to allow victims of domestic violence the ability to seek a civil order through the courts to protect themselves and their children from the abuser. In 2014, over 3,400 orders of protection were filed in Montana courts of limited jurisdiction.[9] This does not include orders of protection that were filed as a part of domestic relations cases within Montana district courts. Although this number has been slowly decreasing from a high of 3,905 in

Domestic Violence series

This is the third in a series of articles on domestic violence that will run in the Montana Lawyer in 2015. Previous articles: **March** — High profile cases have started a national discussion on domestic violence, but are we discussing it the right way? **April** — Attorneys often dread taking domestic violence cases, but sometimes the cases no one wants can have the greatest impact.

1 This article is part of a series of articles on domestic violence and civil legal issues that will run in the Montana Lawyer.

2 Black, M.C., et al., *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*, (National Center for Injury Prevention and Control, Centers for Disease Control and Prevention 2010).

3 *Id.*

4 *Crime in Montana: 2012-2013 Report* (Montana Board of Crime Control Statistical Analysis Center, August 2014).

5 Violence Against Women Act of 1994, 42 U.S.C. §§ 13701-14040 (1994).

6 Violence Against Women Reauthorization Act of 2013, 113 P.L. 4, 127 Stat. 54 (2013).

7 Mont. Code Ann. § 2-15-2017.

8 Mont. Dept. of Justice, https://dojmt.gov/victims/domestic-violence-fatality-review-commission/ (accessed Apr. 20, 2015).

9 *Courts of Limited Jurisdiction Case Filing Statistical Summary* (Montana Office of the Court Administrator, 2014).

2008, there is still a significant need for court intervention to help ensure the safety of victims of domestic violence, stalking and assault.

According to the Missoula Municipal Court Clerk, their court has had more than 400 orders of protection filed since Jan. 1, 2014, and more than half were dismissed. Many of these temporary orders of protection are dismissed due to lack of evidence, at the request of the petitioner, or because the petitioner failed to appear at the hearing. However, 66 were granted for 6 months or longer, and 72 were made permanent. Another 27 were transferred to district court where there was a domestic relations case pending. This is a just a small snapshot of the orders of protection filed in Montana in a given year, and illustrates how large this issue really is. Even in a state as breathtakingly beautiful as Montana, domestic violence is an ugly issue that demands attention.

Myth #2: Only victims of violent and reported crimes qualify for an order of protection

It is a common misperception that an order of protection is only granted in circumstances where the abuser is charged with a violent crime against the victim. In reality, the petitioner in an order of protection proceeding need only be in reasonable apprehension of bodily injury by a partner or family member. Often a petitioner will be granted an order of protection in cases where she reasonably fears for her safety after receiving threats of violence. Even in cases of violent incidents, there are no requirements that the petitioner report the crime to police, that criminal charges are filed, or that the petitioner participate in the criminal prosecution against the abuser.[10] Many times, the petitioner's statements of abuse during testimony are the strongest evidence a court has to consider in making the determination of whether an order of protection should be made permanent.[11]

The petitioner may also file if she was a victim of an offense committed by a partner or family member, such as assault, intimidation, criminal endangerment, or kidnapping. For an inclusive list of offenses that qualify, see MCA § 40-15-102(1)(b). Regardless of relationship status, a person may still qualify for an order of protection if she is the victim of assault, stalking, or various sex crimes.[12] If the victim is a minor child, a parent or guardian may file on behalf of the child who meets the statutory requirements.[13]

It is also a common belief that the abusive incident need to have occurred relatively near to the filing of the petition. Actually, the length of time between the abusive incident and the filing of a temporary order of protection is irrelevant, as long as the petitioner is still in reasonable fear of the abuser.[14] In a recent non-citable case by the Montana Supreme Court, the petitioner testified to a brutal history of domestic abuse by the respondent, in addition to two recent threatening events that caused her to fear for her safety. Although the abuse had occurred years before she filed her most recent order of protection, the court found the petitioner was in reasonable apprehension of fear due to the uncontroverted history of violence.[15]

Myth #3: Attorney representation is not needed at an order of protection hearing

Because these types of matters are often heard in courts of limited jurisdiction, it is commonly believed that a petitioner does not need representation, or that extensive preparation is unnecessary. However, this belief undermines the emotional toll a hearing may have on the petitioner. Often, a victim receives a temporary order of protection, but is terrified of facing her abuser in the mandatory hearing that usually occurs within 20 days of the judge issuing this order.16 If the victim does not follow through, the temporary order of protection is dismissed. In the cases where the victim does follow through, the court hearing can be a very daunting and negative experience.

In abusive relationships, there is a power imbalance that continues in the courtroom and can greatly influence the outcome of the proceedings. Often, abusers present a very calm demeanor to the court, and come across as very credible and nonviolent. In contrast, the court may see the victim as either overly emotional or withdrawn. The petitioner may be unable to express the severity of the abuse and the importance of continuing the order of protection when the abuser is sitting in the same courtroom. Having an attorney advocating for the petitioner may help to equalize this power imbalance and allow the victim's voice to be heard. In addition, a petitioner who represents herself in court is often the recipient of cross-examination of the respondent. This is a way of revictimizing the victim, who may already be in a fragile emotional state. Having an attorney as an intermediary who is advocating for the client's best interests can help reduce the chance of revictimization, which can lead to more just results.

Attorneys have the legal knowledge to present evidence to the court, elicit testimony from the victim and witnesses, as well as the ability to effectively cross-examine the respondent and his witnesses. In addition to these skills, having the opportunity to object as necessary can help ensure the petitioner receives a fair hearing. These cases can be very rewarding to attorneys who not only have the opportunity to exercise their skills in a relatively short hearing process, but also help an individual who truly needs the protection of the courts.

Myth #4: Orders of protection are the only way to keep a victim safe

While orders of protection are one way to help keep a victim safe from her abuser, they are not appropriate in every case. In some cases, filing an order of protection may actually inflame the situation and increase the risk of danger to the victim. The victim may feel that filing an order of protection may enrage the abuser and increase the lethality risk, or notify the abuser of the location of the victim. It is important to listen to your client, while weighing the pros and cons before proceeding. One tip

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10 Mont. Code Ann. §40-15-102(5).

11 *Marriage of Lockhead*, 2013 MT 368, ¶ 10, 373 Mont. 120, 314 P.3d 915.

12 Mont. Code Ann. § 40-15-102(2).

13 Mont. Code Ann. § 40-15-102(3).

14 Mont. Code Ann. § 40-15-102(6).

15 *Sampson v. Sampson* (2013).

16 Mont. Code Ann. § 40-15-201.

Michael Gallacher photo/Courtesy of the Missoulian

District Judge Ed McLean of Missoula addresses defense attorney Brian Smith Dec. 11, 2014, during the Markus Kaarma murder trial. McLean retired May 1 after 26 years on the bench.

A 'constant' says goodbye

McLean retires after 26 years on 4th Judicial District bench

By Leslie Halligan

District Court Judge Ed McLean grew up in Anaconda, a third-generation Irishman, a scrappy young man who learned street justice with other Goosetown kids, sometimes getting a kick in the rear or tossed in a car and taken home, with a clear directive to stay home.

"I think Anaconda, my father and my mother had a real influence on me," he remarked. "My father was an example of integrity, a leader in the community who taught me not to be afraid to take a stand. He stood up for things whether they were popular or unpopular, and always did what he thought was right," McLean said. His mother taught him the importance of family, and he remembers her always saying, "Your friends will come and go, but your family is here forever. Take care of family."

Judge McLean will retire from the bench this summer, after 26-year tenure. In his work as a judge, McLean saw himself as a "constant," willing to put in the time to keep work from piling up, and always looking for a common-sense solution. "As a general rule, if you do the right thing, the law is there to back you up," he explained.

As it did with others of his generation, the Vietnam

War had a profound influence on his desire to become involved in public service. McLean had the chance to go to several military academies, but was unable to pass the physical exams because of an eye injury, the result of being hit with an arrow as a young boy. In 1965, Sen. Mike Mansfield, a friend of his father's, wrote him a letter asking if he was interested in West Point, but at that time, he had become disillusioned and declined the opportunity. "The Vietnam War was just starting to get cooking in 1965 and you could see the writing on the wall and my thoughts were second lieutenants don't live very long," he said.

Like many others, he grew frustrated with the Vietnam War. That disenchantment played out in him becoming angry at God and no longer going to church. While he didn't join with protesters, he believes those protesters got America out of that war, along with the work of Martin Luther King. McLean said that without the peaceful desegregation efforts of King, he believed several of our largest cities would have been burned to the ground. "Our generation, we grew up watching all of that, and that sucked us in—we had to do something so we would have some control, some say and some direction," he said.

McLean attended Catholic grade school and a public high school, and graduated in 1969 from the University of Montana with a degree in business, with an emphasis in accounting. He received his law degree in 1973 from the University of Montana School of Law. He became a prosecutor in the Missoula County Attorney's office, working there until 1989. After spending about 10 years as a prosecutor, he began to see his next career move as becoming a judge. He had turned down opportunities to work for the CIA and as a federal prosecutor. Although the wages would have been greater, he couldn't see himself too far from Georgetown Lake and the lifestyle he enjoys in Montana.

> *"I have a soft spot for (kids). I think we are making a mistake when we put all our resources into adult incarceration and we ought to be worrying more about our young children and kids under 25."*

In his work as a prosecutor, and later a as a judge, McLean made it a priority to protect victims of violent crime. He recalled the case of Douglas Doll, who was convicted of deliberate homicide in the stabbing death of his wife, Trudy, for which he was given a very lengthy prison sentence. McLean observed the traumatic effect the crime had on Trudy's family. McLean reflected that working as a prosecutor gave him a good understanding of how certain minds work, and what works and what doesn't work for rehabilitation. Further, over the years he came to believe it was important to do what you could for young people who got in trouble, because once a person reached a certain age, there wasn't much you could do to change them. "You pray for girls until they are 21 and for boys until they are 25. After they reach these ages, they are through with the justice system and become responsible contributing members of society. It is generally just a question of getting them to maturity."

Considers 1973 Montana Constitution 'a godsend'

McLean assumed the bench on Feb. 7, 1989, after being appointed by Democratic Gov. Ted Schwinden before he left office, but he then had to secure the approval of the Republican-led Senate. Chief Justice Jean Turnage, a former senator, helped him "break the ice" with newly elected Republican Gov. Stan Stephens, who in turn recommended his confirmation to the Senate. Democratic Sen. Fred Van Valkenburg and Republican Sen. Bruce Crippen championed his confirmation. Looking back on the process, he remarked, "I think with the luck of the Irish and the blessings of God, I just slipped in at the right time, with a lot of help from good people."

As a judge and a Montanan, he believes the 1973 Montana Constitution was a godsend. In addition to protecting individual rights, it strengthened private property rights, especially when challenged by government. "Some people consider themselves liberal with regard to individual rights, but [they] are the same people that are going in and infringing on other constitutional rights," he stated. He noted that the government has to have a very compelling interest to take someone's property, and when it is appropriate, government better be ready to compensate that person for the property at fair market value. Citing some of the issues that have come before him, he expects government to be fair and not try to extort property from individuals.

He also looked to the rights of individuals when he was presented with an issue regarding the adoption of children by a same-sex couple. McLean said he recognized the need to acknowledge the contributions of both parents, no matter their sexual orientation. At that time, Montana allowed either single people or married people to adopt children, but same-sex couples could not adopt. In the case before him, the adoptive mother put her partner in the role of a parent, but when the relationship ended, the adoptive mother wanted to deny her partner the right to parent their two children. McLean said he felt strongly about the issue. "If a parent puts another person in a parenting role, that person's rights need to be recognized, and to discriminate against them in this day and age is no different than in the 1950s, no different than telling Rosa Parks to get in the back of the bus because of the color of her skin," he said. "It is no longer feasible to discriminate against someone because of their sexual preference."

He wasn't surprised when editorials were published opposing the decision, saying what a horrible thing he had done. He thought the case, *Kulstad v. Maniaci*, would go to federal court and was surprised when it didn't. And, in an interesting afternote, he said, after her partner was granted equal parenting rights, the adoptive mother moved out of state and never came back to see the adopted kids.

A strong advocate for children

McLean has a soft spot for kids, and recently received recognition from the Court Appointed Special Advocates (CASA) organization as the 2015 Judge of the Year, acknowledging his focus on the needs and issues of children who are victims of abuse and neglect. While over the years he has been cautious about ex-parte communication, when it comes to kids, he said he is happy to talk to them. "When kids say, 'I want to go talk

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to my Judge,' I think that is exactly where I want to be. I have a soft spot for them. I think we are making a mistake when we are putting all of our resources into adult incarceration and we ought to be worrying more about our young children and kids under 25."

He said that he came to believe while working in the Missoula County Attorney's Office that the philosophy of charging young people with serious crimes and then reducing the charges was not a good practice. He wasn't in a hurry to charge someone under age 25 with a felony. He thought charging a felony and then plea bargaining was a terrible philosophy, remarking that it didn't hurt to give a kid a chance, as long as it didn't involve an offense against a person. "What is the rush to charge the kid?" he asked. "The bad ones will always come back." The long-term effect of a felony charge can compromise a young person's future. "What happens when the person goes to apply to graduate school and someone says, 'What is this felony for?' Why do that to someone when it isn't necessary?" Part of that philosophy, he said, comes from his youth when people took a chance on him. It worked for him, so he is not afraid to try it with someone else.

McLean was no stranger to youthful indiscretions

And he's not shy about recounting some of the trouble he got himself into as a kid in Goosetown. "We weren't bad, but we were into things," is how he puts it. As young boys, he and his pals did things that he realizes were dangerous, like hopping the train from Anaconda to Butte, and sneaking into the foundry to get the steel balls that were cast for use in the ball mills, never thinking that the balls could have dumped out of the machinery on top of them.

Other capers may have been more mischievous.

While going to a high school dance as a freshman, McLean and his friends saw a car with no license plates, which they didn't recognize and thought it may have been from Butte. As teenagers in a small town, they knew all the cars in Anaconda. This car had classic Moonie hubcaps, smooth chrome hubcaps that looked like shiny moons. The boys popped the hubcaps and then went into the dance. There they saw Tuffy Driggs, who had a car just like the one they saw, but a different color. "And we say to Tuffy, 'We got some hubcaps that we will sell ya.' He was a senior and we were freshman. He says, 'You do?' And we say, 'Yeah, and we will sell them to you for $12,' or whatever it was. And he asks, 'Where did you get 'em?' And we say, 'We stole them off this car outside.' And he asks, 'What did the car look like?' And we give him a description of the car, and he says that he had his car repainted and that the hubcaps were his. We try to negotiate with him, and then we decide that maybe we shouldn't charge him for his hubcaps. And instead of giving us a thumping, he says, 'Put the hubcaps back on.'"

McLean recalls scrapping as a young man in what was an age-old ritual of sorting out the pecking order among the teenagers. Every once in a while the odds would get too big and the fights out of hand. When that happened, older kids like Ed Cummings and Wayne Estes, who kept an eye out for the younger kids, would break things up and make certain that nothing got too serious. "It was good, small town stuff," McLean said.

McLean's grandfather emigrated from Ireland and worked as a crane man at the Anaconda smelter. He laughs when he recalls asking his grandfather about Ireland, and hearing, "Don't you be worrying, boy, there ain't no royal blood flowing through those veins of yours. I left Ireland for a reason and I'm not going back." He, too, worked at the smelter in the summers of 1964 and 1966. He also had summer jobs working as a grave digger, a section hand for the Butte, Anaconda & Pacific Railway, and as a truck driver for Deer Lodge County. McLean's father worked as the bargaining agent for several unions, and then the unions ran against each other and the Mine, Mill and Smelter Workers prevailed. After that, his dad started the Anaconda Federal Credit Union, which became the Anaconda Butte Federal Credit Union and then the Southwest Federal Credit Union, with branch offices in mining areas as far away as Arizona and Nevada. When he retired, McLean's father was dubbed the grandfather of the credit union movement in Montana. "He was an example of integrity," McLean says proudly.

In 2004, McLean ran an unsuccessful campaign for the Montana Supreme Court. He said he was glad that he ran because it was an education, traveling across the state and talking to people, having to field questions and be put on the spot frequently. But he said that if he had known as much about Brian Morris before he ran as he did at the end of the race, he would not have run against him. "I am glad that I had the experience," he said. "I am glad that I lost and Brian won. I have the utmost respect for him not only as a judge but as a quality human being. He is very intelligent and caring. Sometimes when we were speaking at various forums, I asked myself, 'What am I doing running against this guy?' In hindsight, I believe that I wouldn't have made as good a justice. There is no question that I belong at the trial level."

Retirement plans include relaxing with family

McLean looks forward to spending the first three months or so of his retirement at Georgetown Lake, working to thin about 25 acres of timber, with a goal of completing 50 acres. He also has a pole barn to finish on the property. His parents built their place on Georgetown Lake in the 1950s. He and his wife, Sandy, bought some adjacent property in 1988. The property has been great, and his children spent many summers enjoying time with each other and with cousins.

"You would be hard-pressed to find a closer-knit family," he said. "The three children have three different personalities, but when one is in need, the other two are there, and all three keep a close eye on Sandy and me." He tries to spend time with each of the children, but doesn't "pass up the chance to have them come to loggerheads at a Sunday dinner, whether it is the lawyer [Dave] talking about medical malpractice [to Janelle and her husband, Tim, both physicians], or talking to the cop [Eddie] about police transgressions, a real sensitive subject because of what the cops have been doing recently." McLean recognizes that recent law enforcement confrontations may lead to officers using video recorders to get an objective account of

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Need to catch up on technology ethical obligations? Start here

Editor's note: This is the first in a series of articles from the State Bar of Montana's Technology Committee aimed at helping lawyers understand their ethical responsibilities and responsibilities under the Montana Rules of Civil Procedure regarding electronically stored information and technology.

By Gregg Smith and Chris Gray

Given recent discussions of the State Bar of Montana's Ethics Committee suggesting that a basic understanding of technology issues could be considered an ethical, competence issue, the Technology Committee of the State Bar will be reaching out to Bar members on a more regular basis to provide background related to technology. This piece is the first in our efforts, focusing on the 2011 changes to the Montana Rules of Civil Procedure governing the discovery of electronically stored information.

If these new Rules 'snuck up' on you a bit, don't feel bad. They caught some of us off guard as well. Hopefully we will be able to help you play catch up, just as we are doing.

What is "electronically stored information," or ESI? It is not defined in the Montana Rules of Civil Procedure. According to *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, Kenneth J. Withers, Northwestern Journal of Technology and Intellectual Property, Vol.4 (2), 171, ESI is "information created, manipulated, communicated, stored, and best utilized in digital form, requiring the use of computer hardware and software." Obviously, this is an extremely broad definition that could include, at a minimum, emails, electronic documents (.pdf files, .docx files, etc.), database information, social media account information, and a multitude of other types of data some of which, given the modern pace of technological change, might not even exist today.

Important, too, to the above analysis is the fact that some ESI is not a discrete 'document' or 'item,' but instead information to be drawn from a computer or electronic system. For example, one could seek all letters sent from party "A" to party "B," and those would presumably be a finite number of documents. Alternatively, someone might seek a list of all railroad workers who suffered a particular injury while working in a particular trade; in such a situation, the requesting party is not seeking a collection of 'things,' but instead information that is to be drawn from a larger 'universe' of information.

This distinction gives rise to the most significant addition to the Montana Rules of Civil Procedure, the concept of accessibility. Rule 26(b)(2)(B), provides:

> (B) Specific Limitations on Electronically-Stored Information. A party need not provide discovery of electronically-stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

As a practitioner on either end of a request for ESI, then, one must change his or her approach. As a requesting party, no longer can one merely shoot off the "produce each and every email" or "identify each and every case" requests, because in addition to the usual "overly broad and unduly burdensome" objection, now one will be faced with an objection that the information is "not reasonably accessible." Now, when seeking information stored in an electronic format, one must be cognizant of the nature and limitations of the format, and tailor the requests accordingly.

This gives rise to a new issue. Now a requesting party must first know what system or systems the information is contained in and must possess at least a passing familiarity with the features and limitations of such systems. In a cooperative litigation environment, the former might be determined merely by asking. In an antagonistic environment, though, it might first be necessary to conduct discovery about the *system*, before one is in a position to ask the substantive question(s) about the *information*.

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Montana expands psychotherapist privilege, matching federal rules

By Cynthia Ford

On April 2, Gov. Steve Bullock signed House Bill 513 into law, effective immediately. This constitutes a substantive amendment to the statutory provisions on privileges in our state's courts, extending the protection previously given only to psychologist-patient communications to a much broader range of mental health providers[1]. As a result, Montana now offers the same privilege for communications by a person seeking mental health care as the federal system does.

The amended statute

The title of M.C.A. 26-1-807 has been changed from "Psychologist-client privilege" to the more inclusive "Mental health professional-client privilege." The text of the statute was amended to cover communications between clients and mental health professionals on both ends of the spectrum: psychiatrists, licensed clinical social workers, and licensed professional counselors, as well as psychologists (which previously was the only category covered by this statute).

First-term Rep. (and third-year law student[2]) Andrew Person sponsored House Bill 513. Its original form added two new categories of protected mental health professionals: psychiatrists and licensed clinical social workers.[3] This version would have matched Montana exactly with the U.S. Supreme Court's form of the psychotherapist privilege, which I will explain below. The final version of the bill added a third new category, licensed professional counselors, and was made as a result of testimony at the hearing[4] on the bill before the House Human Services Committee.

The full text of the enacted bill, amending M.C.A. 26-1-807, follows:

> AN ACT REVISING LAWS REGARDING PRIVILEGED COMMUNICATIONS BETWEEN MENTAL HEALTH PROFESSIONALS AND CLIENTS; AMENDING SECTION 26-1-807, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
>
> **Section 1.** Section 26-1-807, MCA, is amended to read:
>
> **"26-1-807. ~~Psychologist-client~~ Mental health professional-client privilege.** The confidential relations and communications between a psychologist, psychiatrist, licensed professional counselor, or licensed clinical social worker and a client must be placed on the same basis as provided by law for those between an attorney and a client. Nothing in any act of the legislature may be construed to require the privileged communications to be disclosed."
> **Section 2. Effective date.** [This act] is effective on passage and approval.

In my view, the enactment of this bill is a big improvement in Montana law, providing clarity for lawyers and serving the larger public good of promoting mental health care for all of Montana's citizens. It also removes any discrepancy between the state and federal systems with regard to protection from compelled disclosure of communications made by client-patients to all forms of licensed mental health providers.

The further addition of licensed professional counselors

Matt Kuntz, executive director of the Montana chapter of the National Alliance on Mental Illness, educated me and the House Committee when he explained in his testimony on HB 513 that Montanans seeking mental health care also regularly access licensed professional counselors (L.P.C.s) for the same reasons that apply to LCSWs (Licensed Clinical Social Workers): economy, accessibility, and professional regulation by the state. He suggested that the bill be amended to cover LPCs on the same basis as LCWs.

After the House committee hearing, I investigated the current legal status of LPCs in Montana. It turns out that the Montana Code often discusses them in the same breath as LCSWs. For example:

> **2-15-1744. Board of social work examiners and professional counselors.** (1) (a) The governor shall appoint, with the consent of the senate, a board of social work examiners and professional counselors consisting of seven members.

1 The privilege actually belongs to the client/patient of the provider, but the variable here is the status of the provider so courts, and I, usually designate the privilege by the type of provider rather then the more cumbersome "client and his/her psychiatrist."

2 When he returns to school, Andrew will receive a big gold star.

3 For the exact wording of the several versions of this bill, see http://leg.mt.gov/bills/2015/hb0599/

4 The very interested can access video and audio recordings of the testimony at http://leg.mt.gov/css/Video-and-Audio/archives/av.asp. The testimony on this bill starts at 12:06. HB 513 was the least exciting agenda item that day, sandwiched between bills about investigation of assaults on patients at the Montana Development Center in Boulder for the developmentally delayed and about Medicaid expansion. There were no T-shirts worn by members of the audience which related to the change in the law of evidence.

(b) Three members must be licensed social workers, and three must be licensed professional counselors.

(c) One member must be appointed from and represent the general public and may not be engaged in social work….

Title 37, Chapter 22 of the Code governs social workers; Chapter 23 governs the profession of counseling. The first statute of that chapter acknowledges the important role of licensed professional counselors and professionals and describes the purpose of the chapter:

37-23-101. Purpose.

(1) The legislature finds and declares that because the profession of professional counseling profoundly affects the lives of people of this state, it is the purpose of this chapter to provide for the common good by:

(a) ensuring the ethical, qualified, and professional practice of professional counseling; and
(b) instituting an effective mechanism for obtaining accurate public information regarding an applicant's criminal background:

(i) to prevent convicted criminal offenders who committed crimes relevant to working with children, the elderly, the mentally ill, or other vulnerable persons from obtaining a Montana professional counseling license as an attempt to gain access to and perpetrate crimes against new victims; and
(ii) to protect the state from claims of negligence.

(2) This chapter and the rules promulgated by the board under 37-22-201 set standards of qualification, education, training, and experience and establish professional ethics for those who seek to engage in the practice of professional counseling as licensed professional counselors.

In order to obtain a license as a professional counselor, the applicant must first have completed a graduate program of at least 60 hours and a minimum of 3,000 hours of supervised counseling practice. In comparison, LCSWs must have either a master's or doctorate degree from an accredited program and also "24 months of supervised post-master's degree work experience in psychotherapy, which included 3,000 hours of social work experience, of which at least 1,500 hours were in direct client contact, within the past 5 years." M.C.A. 37-22-301. Both LCSWs and LCPCs must pass examinations and criminal background checks. Thus, there are similar and rigorous requirements for both of these categories of mental health professionals, and both are subject to ongoing state regulation.

My next avenue of research was empirical, if informal: I pulled my Missoula telephone directory from its musty[5] place in the kitchen cupboard above where my landline[6] telephone used to live and looked up "Counseling Services." This highly unscientific survey revealed 13 entries for LCSWs; 16 for LPCs; 3 for Ph.Ds. (I presume these are psychologists); and 1 that listed both an LPC and Ph.D. I then checked the directory under "Psychologists," and found that 22 of the 30 listings indicated that the person had a Ph.D. Thus, Mr. Kuntz's testimony seems accurate: Mental health providers are pretty evenly split between MSWs, LPCs and Ph.Ds. If we want to increase mental health by encouraging clients to communicate fully with their providers, it makes as little sense to differentiate between MSWs and LPCs as it did to privilege Ph.Ds. but not MSWs.

In my earlier article[7] on the psychotherapy privilege, and in my House testimony, I had overlooked the importance of LPCs as a resource by examining only the differences between the Montana privilege statute and the federal common law on psychotherapy providers, neither of which mentioned these folks. I was convinced by Mr. Kuntz's experience-based assertion that mentally ill Montanans use LCSWs and LPCs approximately equally, and that those clients have no idea about the difference between, much less the potential divergent evidentiary treatment of, the two categories of providers. The Legislature apparently was also convinced, and added this class of mental health practitioners to the list of providers protected by the amendment to M.C.A. 26-1-807 before the bill was passed. As a result, Montana state courts now will prohibit disclosure[8] of the communications made by a client to his or her mental health professional, whether that professional is a psychologist, psychiatrist, licensed clinical social worker or licensed professional counselor.

Montana v. federal psychotherapist privilege law now

This amendment effectively brings Montana's treatment of the communications between mental health providers and their clients into line with federal law in the Ninth Circuit. As I wrote in the earlier column, the U.S. Supreme Court (which is the source of federal privilege law, per F.R.E. 501) recognized a broad psychotherapist-patient privilege for communications between clients and licensed psychiatrists, psychologists, and licensed clinical social workers. *Jaffee v. Redmond,* 518 U.S. 1, 15-17, 116 S. Ct. 1923, 1931-32, 135 L. Ed. 2d 337 (1996). Montana's new version of the statutory privilege includes all

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5 I had almost forgotten the existence of this directory; I look up most things on my Maps application or on the Internet. (I am actively unfond of Siri, even after I changed her annoying voice to a much more attractive Australian male).

6 I had thought no one in the world still retained a landline, urban me. However, this past weekend, I helped with lambing-related chores on a friend's ranch outside Cascade, where the cell service stopped approximately at the paved road, 18 miles north of the ranch. Once I got back to the highway late Sunday, my pocket erupted with chirps, buzzes and rings.

7 Montana Lawyer, October 2014, Vol. 40, Issue 4.

8 The privilege belongs to the client/patient, not the provider. It is up to the client to assert the privilege. If the client voluntarily discloses what she said to her L.C.S.W., the privilege will be waived and the opponent may access the remainder of that conversation, and perhaps all of the conversations between them. When in doubt, "Object! Privilege. M.C.A. 26-1-807."

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three of these categories. Thus, Montanans using the mental health services of any of these three types of providers can make full revelations without fear of later having those disclosures repeated in court, either state or federal.[9]

The *Jaffee* opinion did not discuss the treatment of licensed professional counselors, neither explicitly including nor excluding them from the privilege. However, the majority's explanation for including licensed clinical social workers in the psychotherapy privilege seems to apply equally to licensed professional counselors:

All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists[10] and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer. Today, social workers provide a significant amount of mental health treatment. See, *e.g.,* U.S. Dept. of Health and Human Services, Center for Mental Health Services, Mental Health, United States, 1994, pp. 85-87, 107-114; Brief for National Association of Social Workers et al. as *Amici Curiae* 5-7 (citing authorities). Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, *id.,* at 6-7 (citing authorities), but whose counseling sessions serve the same public goals. Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers. We therefore agree with the Court of Appeals "[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose." *Jaffee v. Redmond,* 518 U.S. 1, 15-17, 116 S. Ct. 1923, 1931-32, 135 L. Ed. 2d 337 (1996).

The same considerations appear to apply to licensed professional counselors, and thus my educated guess is that eventually federal common law will evolve to include LPCs in the federal psychotherapy privilege. Indeed, *Jaffee* expressly left definition of the contours of this privilege to development on a case-by-case basis. Id, at 1932.

The Supreme Court has not yet decided any post-*Jaffee* case involving licensed professional counselors or other categories of mental health providers not listed in *Jaffee*, but a quick look at decisions from lower federal courts shows that the issue is percolating there. E.g., "The court uses the term 'psychotherapist' generically to include a psychologist, psychiatrist, counselor or other mental health therapist." *LeFave v. Symbios, Inc.,* No. CIV.A. 99-Z-1217, 2000 WL 1644154, at *3 (D. Colo. Apr. 14, 2000).

A prime example started in our own District of Montana. Robert Romo was convicted of threatening President George W. Bush. The letter he allegedly sent to the president was not introduced at trial; instead, a White House administrator testified that in the immediate aftermath of 9/11, all mail sent to the president for the next several months was diverted to a warehouse (to prevent delivery of anthrax) and that thousands of items (presumably including Romo's missive) remained there, unexamined. The trial evidence also included testimony from a licensed professional counselor to whom Romo "blurted out" a confession that he had made a threat against the president.

This case arises out of a confession Romo made during a meeting with Donald LaPlante, the program director at the Dawson County Adult Correction and Detention Facility where Romo was incarcerated. LaPlante is a licensed professional counselor whose job included providing inmates with psychological counseling and a host of other duties, ranging from arranging social events to providing classes and acting as a case manager. Before the meeting that sparked the chain of events leading to Romo's conviction, LaPlante had provided Romo with mental health treatment during voluntary counseling sessions.

In October 2002, Romo requested a meeting with LaPlante. Although Romo did not have a counseling session scheduled and LaPlante did not know why Romo wanted to see him, the two met in a private visitation room at the detention facility. Romo immediately confessed that he had written a threatening letter to the president. Before Romo went any further, LaPlante warned that he would have to report the letter to law enforcement officials. Despite the warning, Romo went on to tell LaPlante exactly what he had written: that someone should put a bullet in the president's head and he would be the person to do it. Romo also told LaPlante that he had mailed the letter to the White House.

After the meeting, LaPlante called the Secret Service and reported to Agent David Thomas that Romo had sent a threatening letter to the president. LaPlante's call prompted Agent Thomas to interview Romo. Agent Thomas gave Romo his Miranda warnings. Romo repeated to Agent Thomas what he told LaPlante, that he had written and mailed a letter to the president stating that someone should put a bullet in the president's head and he was willing to do it. Romo elaborated that he would try to punch, hit, or shoot the president if the president came to the jail. *United States v. Romo*, 413 F.3d 1044, 1045-46 (9th Cir. 2005).

Judge Haddon overruled the defense motion in limine to preclude the counselor's testimony. Romo appealed his conviction, arguing, inter alia, that his communication to licensed professional counselor LaPlante was privileged under *Jaffee.*

The Ninth Circuit held, 2-1, that Judge Haddon was correct and that the communication was not privileged. The *Romo* majority based its holding on the purpose of the communication by Romo to LaPlante:

Under *Jaffee,* to invoke the benefit of the privilege, Romo bears the burden of showing that 1) LaPlante is a licensed psychotherapist, 2) his communications to LaPlante were confidential, and 3) the communications were made during the course of diagnosis or treatment. As the contact between Romo and the therapist was not for diagnosis or treatment, this appeal can be

9 In my review of the tribes' evidence provisions (Montana Lawyer, February 2015 and March 2015), I did not notice any specific psychotherapist privilege in any tribal system. However, to the extent a tribe invokes state or federal law when its tribal law is silent, I would expect the same protection in tribal court as well.

10 Remember that there is no doctor-patient privilege in federal court, so that the only protection for disclosures to a psychiatrist M.D. is through this psychotherapist privilege. Where the doctor-patient privilege is recognized, a psychiatrist's sessions should fit under that umbrella. [Ford, *not* Supreme Court, footnote]

resolved on the basis of the third element. *United States v. Romo*, 413 F.3d 1044, 1047 (9th Cir. 2005).

Judge Betty Fletcher (sadly and dearly departed) concurred in the result, but "disagree[d] with the majority's conclusion that Romo's communications did not occur in the course of diagnosis or treatment…. When a patient contacts his therapist, with whom he has an ongoing patient-therapist relationship, to discuss a problem the patient is having and the patient and therapist subsequently meet and discuss the problem the resulting conference is a counseling session. This is exactly the course of events that occurred between Romo and his therapist LaPlante. To conclude otherwise disregards the reality of the psychiatrist-patient relationship and the nature of psychiatric treatment." 413 F.3d at 1052-1053. (9th Cir. 2005).

Judge Fletcher concurred because she concluded that the counselor's testimony mirrored that of the Secret Service Agent, and thus the error was harmless.

The startling thing about *Romo* is the underlying assumption, without citation, in both the Ninth Circuit's majority and concurring opinions that the licensed professional counselor, if diagnosing or treating, should be extended privilege on the same basis as psychiatrists, psychologists and licensed clinical social workers. Judge McKeown, writing for the majority, did not specifically address the distinction; Judge Fletcher specified her "agreement" that the psychotherapist privilege applied to licensed professional counselor LaPlante:

> The Supreme Court affirmed a patient-psychotherapist privilege under Rule 501 of the Federal Rules of Evidence in *Jaffee v. Redmond,* 518 U.S. 1, 15, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996). The requirements of the privilege are: (1) the communications must be confidential; (2) the therapist must be a licensed psychotherapist; and (3) the communications must occur in the course of diagnosis or treatment. *Id.* **I agree with the majority that the first two factors are not in doubt. LaPlante is a licensed psychotherapist** and Romo's communications to LaPlante were confidential. I disagree with the majority's conclusion that Romo's communications did not occur in the course of diagnosis or treatment. (Emphasis added) 413 F.3d at 1052.

Thus, all three members of the Ninth Circuit panel assumed that *Jaffee* extends to licensed professional counselors. The Supreme Court denied cert[11] to Romo, so it stands as the federal law in our District and Circuit. If, later, the U.S. Supreme Court does take a case on this issue, this time it can accurately include Montana in its list of states that expressly privilege communications made to a licensed professional counselor.[12]

Conclusion

For the first time ever, most mental health providers in Montana can confidently tell their clients that the communications between them are privileged in both Montana and federal courts, in addition to being subject to the providers' professional duties of confidentiality. I previously wrote:

> The Legislature should clarify the status of the mental health privilege, and if it concludes that social workers are entitled to a privilege, expand M.C.A. 26-1-807 to include licensed clinical social workers as well as psychologists and psychiatrists. In the meantime, Montanans who wish to keep their disclosures to a mental health practitioner privileged should go to psychologists, and not to either psychiatrists or social workers.

This warning is no longer necessary. By removing the disparate treatment between the systems, the 2015 amendment to M.C.A. 26-1-807 should increase the confidence of clients in the mental health care system, and thus increase the overall health of Montanans.

Still, there is a caveat. In Montana, where privilege is strictly limited to the relationships specified by statute, it behooves a client at the outset of a counseling relationship to be sure that the provider falls within one of the categories privileged under the amended statute: psychiatrist (medical doctor), psychologist (Ph.D.), licensed clinical social worker (LCSW), or licensed professional counselor. When I scanned the Missoula phone directory in my quick quantitative survey, I found several listings which did not indicate the exact qualification, such as "Courage to Chsange," "Choices for Change," "Therapy Village," and one law firm (?). If I were a client, prior to beginning treatment I would ask for the exact form of licensure of the treating person in one of these places, to be sure that my communications with that person qualified for privilege.

Remember Lucy in "Peanuts"? Look what I found on Amazon: "**The Doctor is In: The Peanuts Psychiatric Help Kit (Peanuts (Running Press)).**"[13] For only $422.65 (I checked this price twice! but it is a lot cheaper than years of schooling, and a lot easier than taking an exam), this is what you get:

> Now anyone can turn to that wellspring of psychiatric wisdom that the Peanuts gang turns to when things go wrong: Lucy Van Pelt. She tells it like it is and collects every nickel she can for it. With this kit Peanuts fans and would-be therapists can set their own price and start collecting on their words of wisdom. We could all use a little advice sometimes, and no one offers help to distressed souls like Lucy. Feeling nervous? "Learn to relax… five cents, please!" Feeling depressed? "Snap out of it! Five cents, please." Scared? "You're no different from anyone else…Five cents, please!" *The Doctor Is In* offers a replica of Lucy's own coin collection can and a 64-page book of classic Peanuts comic strips filled with Lucy-style wisdom to bring solace to the most troubled minds.

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11 547 U.S. 1048 (2006).

12 In my earlier article on the Psychotherapy Privilege, I spent some ink on the inaccurate statement by Justice Stevens that Montana was among the states that included licensed clinical social workers in its privilege law. Now, he is not wrong, thanks to the 2015 Montana Legislature and specifically Rep. Person.

13 http://www.amazon.com/The-Doctor-In-Peanuts-Psychiatric/dp/0762435747

A look at Montana's new right to counsel for indigent birth parents

By Jeff Wilson

This past December the Montana Supreme Court issued *In re A.W.S. and K.R.S.,* and held that Montana's constitutional right to equal protection requires that indigent parents facing termination of their parental rights in private adoption proceedings must be provided counsel.[1] The opinion is important because a constitutional right to counsel is a guarantee of counsel. For any judge to involuntarily terminate an individual's parental rights without ensuring that individual is represented, or explicitly waived their right to an attorney, is to invite a reversal.

This is the first time the Court has found a constitutional violation on equal protection grounds since *Snetsinger v. Montana University System* in 2004.[2] The Court has not granted a right to counsel since 1993, when it did so for persons facing termination of their parental rights in state proceedings.[3]

In re A.W.S. and K.R.S. reflects a right to counsel found in 26 other states and may signal a national trend. Family law practitioners representing adoptive parents will likely face stronger opposition when attempting to terminate a birth parent's rights in future adoption proceedings. The opinion also raises many questions as to its implementation.

Case Overview

The case originates from a stepmother's attempt to adopt her husband's two children, requiring termination of the birth mother's parental rights. In 2007, the mother and father dissolved their common-law marriage and in 2008, the father and stepmother married.[4] The two children resided with the father and stepmother, and until 2009, the mother had regular, unsupervised parenting time.[5] She was then limited to supervised visitation.[6] The mother's last visit was in August 2010.[7] She attempted to set up supervised visitation and claimed the father and stepmother thwarted her attempts.[8] The stepmother filed the petitions for adoption of both children in November, 2013.[9]

The mother did not file a response to the adoption or termination petitions, but appeared without counsel at the show cause hearing in January 2014, to oppose the termination of her parental rights.[10] The mother did not object to any evidence that the stepmother offered, nor did she present any of her own.[11] But, in response to questioning by the stepmother's counsel as to why she failed to follow through after attempting to set up supervised visitation, the mother stated she did not have the money to get an attorney and face the court proceedings.[12]

Two days after the hearing, the District Court terminated the mother's parental rights based on a finding of unfitness and that it was in the children's best interests to be adopted by the stepmother.[13] With the assistance of pro bono counsel, the mother appealed. On appeal, the Supreme Court considered whether Mother was entitled to counsel during the private-termination proceeding after initially finding that the mother had preserved the right to counsel issue when she had explained her inability to employ an attorney to the District Court.[14]

The Court began with the principle that similarly situated individuals must receive similar treatment under the U.S. and Montana constitutions.[15] The Court found the two classes involved were, first, indigent parents that face losing their parental rights by the state in abuse and neglect proceedings (DN cases) under Montana Code Annotated, Title 41; and second, indigent parents facing the same fate under Title 42, which allows certain private parties to petition for involuntary termination of a parent's rights.[16]

Under either statutory scheme, parental rights may be terminated if it is determined the parent is "unfit" because they "willfully abandoned" the child, as was found in the present case.[17] The difference is that Title 41 entitles the indigent parent to counsel, while Title 42 does not. The Court found that in either case, a parent may lose a "fundamental constitutional right on a judicial determination of unfitness," making them similarly situated individuals that do *not* receive similar treatment under the law.[18]

Because the right to parent is fundamental, strict scrutiny was applied to determine if the disparity in the statutory schemes was narrowly tailored to serve a compelling

1 *In re A.W.S. and K.R.S.*, 2014 MT 322, ¶ 26.
2 *Snetsinger v. Mont. Univ. Sys.*, 2004 MT 390, 325 Mont. 148, 104 P.3d 445 (holding that a policy against dependent health insurance coverage for unmarried same-sex couples violated equal protection under the Montana Constitution).
3 *In re A.S.A.,* 258 Mont. 194, 852 P.2d 127 (1993) (holding a constitutional due process right to counsel to persons facing termination of their parental rights in state proceedings).
4 *In re A.W.S. and K.R.S.,* ¶ 3.
5 Id. at ¶ 4.
6 Id.
7 Id.
8 Id.
9 Id. at ¶ 5.
10 Id.
11 Id. at ¶¶ 5, 7.
12 Id. at ¶ 6.
13 Id. at ¶ 8.
14 Id. at ¶ 21.
15 Id. at ¶ 11 (citing *Snetsinger*, ¶ 15).
16 Id. at ¶¶ 12-14.
17 Id. at ¶ 14.
18 Id. at ¶ 15.

government interest.[19] Normally, the burden of proof falls on the state, which was not a party in the case.[20] But, equal protection was necessary because it is the state that is empowered with the ability to terminate a parent's rights and plays the deciding role in the termination process.[21]

In evaluating whether the statutory differences were necessary to serve a compelling governmental interest, the Court recognized the state's pecuniary interest in avoiding the expense of appointed counsel and the cost of lengthened proceedings that occur when counsel is involved.[22] Though, it found this pecuniary interest to be legitimate, it was not significant enough to overcome an individual's fundamental right to parent.[23] Nor was the disparity in the statutory schemes found to be narrowly tailored.[24] Denying counsel to indigent parents under either scheme would create further constitutional questions regarding the fairness of the procedures to both the parent and the child (and overturn precedent).[25] Therefore, the Court held that the Montana Constitution requires indigent parents facing termination of their parental rights in private adoption proceedings be provided counsel.[26] The case was remanded to the District Court with directions to appoint counsel to the mother if financially eligible, and left the manner in which counsel is appointed to the District Court's discretion.[27]

Around the Country

The requirement of appointed counsel to indigent parents facing termination of their rights in private adoptions varies widely across the country. Twenty-six states and Washington, D.C., adhere to such a requirement on various grounds.[28] Sixteen states hold no such requirement, and eight fall somewhere in between.[29] Of those eight, some provide counsel depending on the statutory scheme used in the termination proceeding, and some provide counsel at the discretion of the court.[30] For example, in Michigan the court must measure various factors such as the strength of the adversaries and the presence or absence of legal, factual, procedural, or evidentiary complexities.[31] Oklahoma requires the parent to appear at the hearing and to desire representation before counsel is appointed.[32] In Virginia there is a guarantee of counsel except in cases where the parent has not visited or contacted the child in the six months prior to the adoption petition.[33] Six months without visiting one's child suggests abandonment, but this is problematic. There could be a possibility that the parent was prevented from seeing the child by the custodial parent. Then, because the parent lacks counsel, the parent is prevented from an effective presentation of evidence of the custodial parent's interference.

Several of the states that provide a guarantee of counsel do so under equal protection grounds like Montana.[34] Many others grant the right under due process.[35] The remaining states maintain the right to counsel by statute.[36] At least two, Tennessee and Washington, maintain the right to counsel through the appeal process.[37]

Implementation of *In re A.W.S. and K.R.S.*

In re A.W.S. and K.R.S. left the appointment of counsel to the judge's discretion, which raises many questions as to who will be appointed and how they might be compensated, or, whether attorneys will accept these cases pro bono. In a footnote, the Supreme Court suggested two appointment options after determining financial eligibility: 1) appointment of counsel from the Office of the Public Defender, similar to the appointment of counsel in DN cases, as provided in Montana Code Annotated § 47-1-111, or 2) appointment of private counsel, noting that §§ 42-7-101(1)(i), 102(2) allow payment of birth parent's legal fees by the prospective adoptive parent.[38] An examination of these two options and a look at what other states are doing provides some answers as to how the opinion should, or is likely to be, implemented.

OPD as appointed counsel

One option is to appoint state-funded public defenders. Of the 26 states mentioned above, only North Dakota and Connecticut explicitly provide that the right to counsel will be provided through the state.[39] One can only assume that when the right is mandatory it must ultimately fall on the public defenders of that state if other options fail. After all, it was in response to a guarantee of counsel to indigent criminal defendants in *Gideon* that gave rise to the widespread development of public defender offices across the country.[40]

An argument that favors appointment of state counsel is this: Just as birth parents facing termination of their parental rights in private adoptions are similarly situated to birth parents facing the same fate in DN cases, adoptive parents in private adoptions are similarly situated to adoptive parents in DN cases too. When a birth parent contests the termination proceedings in a DN case, counsel is not paid for by the adoptive parents, it is paid by the state. In turn, adoptive parents in private adoptions should not be required to pay for birth parents' counsel either.

Additionally, because the state is the entity empowered to

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19 Id. at ¶¶ 16-17.
20 Id. at ¶ 17.
21 Id. at ¶ 18.
22 Id. at ¶¶ 18, 22.
23 Id. at ¶¶ 22, 23.
24 Id. at ¶ 23.
25 Id. at ¶ 25.
26 Id. at ¶ 26.
27 Id.
28 National Coalition for A Civil Right to Counsel, http://www.civilrighttocounsel.org (accessed Jan. 3, 2015).
29 Id.
30 Id.
31 Id.; *In the Matter of Sanchez*, 375 N.W.2d 353, 358-59 (Mich. 1985).
32 Okla. Stat. tit. 10, § 7505-4.1(D) (2013).
33 Va. Code §§ 63.2-1203(C), 1202(H) (2013).
34 National Coalition for A Civil Right to Counsel, http://www.civilrighttocounsel.org (accessed Jan. 3, 2015).
35 Id.
36 National Coalition for A Civil Right to Counsel, http://www.civilrighttocounsel.org (accessed Jan. 3, 2015).
37 Tenn. Code Ann. §§ 37-1-126(2)(B)(ii), (3); Tenn. R. Juv. P. 36(b); Wash. Rev. Code §§ 13.34.090.2, 26.33.110(3)(b) (2013).
38 In re A.W.S. and K.R.S., ¶ 26 n. 3.
39 N.D. Cent. Code § 14-15-19.1 (2013) ("… if indigent, the court shall order … a state's attorney [to] serve as free legal counsel to the parent."); Conn. Gen. Stat. § 45a-717(a)-(b) (2013) (paid through special funds of the Judicial Department).
40 See Gideon v. Wainright, 372 U.S. 335 (1963).

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terminate a parent's rights, a fundamental liberty Montana has found to be a compelling interest, then it is the state that should pay for a birth parent's attorney to ensure that the process is fair and correct.[41] Because Montana has a compelling interest in the stability and permanency of adoptive children, any possible termination of a parent's rights must be performed fairly and properly.[42] In line with this reasoning, the appointment of counsel would make the fact-finding process more accurate and *further* the state's interest in a fair and accurate termination proceeding.[43] By acting as payor for appointed counsel, the state furthers its interest even more.

The Montana Office of the Public Defender may be reluctant, but forced, to add this new clientele to an already excessive and demanding caseload. It has been widely reported that public defenders already handle a burdensome amount of clients. There could be a shortage of public defenders with expertise in parental terminations. Public defenders that represent parents in DN cases would be a likely choice. Contracting to qualified private counsel is another option.

Adoptive parent as payor of birth parent counsel

The second option offered in *In re A.W.S. and K.R.S.*, is for the court to appoint counsel whose fees are paid by the adoptive parent. In suggesting this, the Supreme Court cited a statute that says adoptive parent may pay the reasonable legal fees incurred on behalf of the placing parent.[44] But, the statute cited by the Court is inapplicable to an involuntary termination of parental rights and applies only to a voluntary termination of a consenting birth parent because; under the plain language of the statute a "placing parent" is a parent that "voluntarily" surrenders their parental rights.[45] Still, other subsections of the statute could apply to an involuntary termination.[46]

In New Hampshire and Minnesota, an adoptive parent is required by statute to pay for the birth parent's attorney, [47] though it is uncertain if Minnesota requires the adoptive parent to pay when the termination is involuntary.[48] A California statute provides that an adoptive parent may be required to pay up to $500 for a birth parent's counsel, or more if the adoptive parent agrees.[49] In Missouri, the adoptive parent must pay unless they are unable to do so financially, in which case an attorney may be appointed without assurances they will be compensated.[50]

An adoptive parent would likely be reluctant to pay for the counsel of the birth parent. In an involuntary termination proceeding the two are adversarial parties. An adoptive parent could emphasize the state's role in termination proceedings, as discussed earlier, to argue that, as the adoptive parents, they should not have to pay.

Another argument has an ethical basis. The notion that an attorney advocates for one party while being paid to do so by the opposing party poses a conflict of interest. A lawyer is not to accept compensation for representing a client from anyone other than the client unless the client gives written informed consent, and there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship.[51]

In family law, it is somewhat unusual for a party to pay the counsel of the adversary. In dissolution and amendment to parenting plan proceedings, a court can order one party to pay the other party's reasonable fees.[52] But these situations differ from an adoption proceeding. In the dissolution context, the purpose is to ensure that both parties have timely and equitable access to marital financial resources.[53] These are resources the divorcing couple shared that one party has taken control of. The adoptive parent and birth parent in an involuntary termination of parental rights proceeding would not share financial resources.

In proceedings to amend a parenting plan, a party pays the fees of the adversary only after the court finds that the party had acted vexatious and the suit constituted harassment.[54] This court order of fees is punitive and different than ordering an adoptive parent to pay the birth parent's legal fees because of indigency. In either the dissolution or parenting plan context, the paying party has no link to the adversary's fees until after they are incurred, which prevents interference with the client-lawyer relationship during the proceeding.

If interference did not exist, the possibility of the appearance of interference might exist. A birth parent could consent to the arrangement. If later, the court terminated the birth parent's rights, the birth parent might claim the adoptive parent interfered with his or her representation.

As payor the adoptive parent would have no control or means to scrutinize the use or reasonability of the fees assessed. If at some point the adoptive parent were unable to pay the bill of the birth parent's counsel, the birth parent risks losing counsel through no fault of their own. Neither party has reason to ensure such an arrangement works well for the other. If the birth parent is not financing his or her own representation, neither the birth parent, nor counsel, has any incentive to limit the cost. Counsel could offer a myriad of services that the birth parent would agree to, which they might not if they were responsible for the bill.

One possible solution is that the adoptive parent could put funds for the birth parent's counsel in an escrow account to prevent communication between the adoptive parent and birth parent counsel.[55] The court could impose limitations or

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41 See *In re A.W.S. and K.R.S.,* ¶ 16.

42 Mont. Code Ann. § 42-1-108(2)(b) (The state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children).

43 *In re Jay.* 150 Cal. App. 3d 251, 264-65 (1983) (emphasis in original).

44 Mont. Code Ann. § 42-7-101(1)(i).

45 Id. at § 42-1-103(15) («placing parent» means a parent who is voluntarily making a child available for adoption (emphasis added)).

46 Id. at § 42-7-101(1)(a), (b), and (h).

47 N.H. Rev. Stat. § 170-B:13(a) (2014); Minn. Stat. § 259.47, subd. 5 (2014).

48 Minn. Stat. § 259.47, subd. 5 (2014) (in "direct adoptive placements").

49 Cal. Fam. Code § 8800(d)(1) (2012).

50 Mo. Rev. Stat. § 453.030(12), (13) (2014).

51 Mont. Rules of Professional Conduct § 1.8(f).

52 Montana Code Annotated §§ 40-4-110, 219(5).

53 Id. at § 40-4-110(2).

54 Id. at § 40-4-219(5).

55 Interview with Charlotte Beatty, staff attorney, Fourth Judicial District of Montana. (Jan. 7, 2015).

New health insurance deduction added in Montana Child Support Guidelines

By Ann Steffens

The implementation of the Affordable Care Act now requires individuals to have qualifying health care coverage each month of the year unless that individual qualifies for a coverage exemption or unless they choose to make a shared responsibility payment when filing their income tax returns. The rules governing the Montana Child Support Guidelines allow deductions from income for any expense "required by law." See ARM 37.62.110(1). Therefore, it is now appropriate to allow a parent to deduct the costs of their individual coverage from income when calculating child support. The question becomes how to determine those costs.

To adapt the provisions of the ACA to CSED's calculation of child support under the Montana guidelines, the first step is to identify those individuals whose health insurance premiums will be included in a child support calculation.

Step 1: Individual premiums will be entered into the worksheet for:

a. Each parent, but not the parent's new partner/spouse;

b. All children of the calculation; and

c. Other children of a parent in the calculation, whether or not ordered.

Because health insurance policies may cover individuals in a parent's household who are not eligible to be included in a child support calculation (adult children, for example), it is important to scrutinize the list of individuals with coverage to ensure the identity of each person whose premiums should be included.

The second step is to determine the dollar amount of insurance premiums to enter for each of the above individuals. Ideally, the information will come from the premium rate sheet for the insurance policy provided by the parent. The rate sheet will include the cost for the insured/employee only, insured/employee plus spouse, insured/employee plus children, etc. The rate sheet is normally provided by the employer to the employee during the annual open enrollment period for the insurance or may be obtained by the parent from the insurance company. The information may also be available directly from the employer.

Step 2: Where the rate information is available, the majority of the premium will be due to the main insured with additional amounts for a spouse and for children. In that case, enter the amount due for each person as shown on the rate sheet. The amount due for a spouse, for example, is the amount added to the main insured's amount. The amount due for the children is the amount added to the premium for the main insured and/or the spouse. Divide the children's amount by the number of children covered for a per-child amount. If no premium breakdown is available, simply divide the total premium by the number of persons covered for a per-person amount.

For a parent's premium, whether the main insured or a spouse, enter the amount on line 2k, worksheet A where it will be deducted from the parent's income. For children of the calculation, enter on line 12, as always. For other children, enter on line 2d or 2k. **NOTE:** Any penalty owed by a parent for failure to obtain or retain insurance is not an allowed deduction from income.

These guidelines should help you determine the appropriate deduction when you tackle your next guidelines calculation.

New IRS Tax Forms for the ACA

The following tax forms are available for your reference. They all have instructions, too, and you can print those out if or as you need them. Use the search box on the IRS Home page (www.irs.gov) and enter "Form 8962 Instructions" or whatever you seek. That appears to be the easiest way to find information if you know the form or publication number.

a. Form 1095-A Health Insurance Marketplace Statement[1] — This form provides information from the marketplace to the IRS and the recipient of the marketplace insurance policy, including monthly premium amount and monthly advance payment of the Premium Tax Credit (subsidy). This form is sent on the same schedule as a Form W-2; it is due to the insured by Jan. 31 for the previous year. You will notice the form does not include information regarding the cost for the primary insured, the spouse, or the children so unless the parent can obtain information on the breakdown of the premium, it appears the Marketplace cases may fall into the category of No Premium Breakdown.

b. Form 8962 Premium Tax Credit — This form calculates the tax credit which is the subsidy for the premiums of lower income households. An individual may estimate his/her income for the coming year and choose to have an estimated subsidy sent directly to the insurance company each month to reduce the out-of-pocket cost to the individual; or, pay the full premiums throughout the year and claim the tax credit when the tax return is filed. Either way, at the end of the year, the Premium Tax Credit form is used to determine the subsidy based on actual income. If income for the year is lower than estimated, an additional subsidy may be due the taxpayer; if income is

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1 Eventually, there will be a Form 1095-B (health coverage from government programs such as Medicare, Medicaid, CHIP, and Tricare) and Form 1095-C (Employer provided health coverage).

Elder abuse qualifies as a major public health problem in the US

By Iris Marcus, JD

Older Montanans are identified in THE JUSTICE GAP IN MONTANA: As Vast as Big Sky Country[1] study as a vulnerable population, that when faced with a legal issue might need full representation by an attorney.[2] The need for full representation increases if the individual has cognitive difficulties, is the target of consumer fraud, financial exploitation by a relative or caregiver, or is the victim of elder abuse. The spectrum and urgency of legal needs older Montanans might encounter is detailed in "Assessment of the Legal Needs of Elders in Montana and the Capacity of Montana's Resources to Meet those Needs"[3] This assessment, paired with the *Gaps and Barriers* study, provides a rich, thorough and well-documented picture of the challenges faced by older Montanans.

One urgent area of need, discussed in the *Montana Assessment* as well as in several recent national studies, is elder abuse. The National Association of Area Agencies on Aging and the Centers for Disease Control and Prevention consider elder abuse so pervasive it qualifies as a major public health problem.

Elder abuse is especially pernicious because the elderly might be dependent for care or housing by the very person abusing them. This factor contributes to a widespread presumption that elder abuse is under-reported. As the Elder Justice Coalition observes, "One of the reasons that elder abuse is so persistent is due to the fact that it is a silent epidemic. Many people do not recognize the signs of elder abuse and oftentimes the victims are afraid to speak up." This fear is not surprising given that elder abuse and neglect are committed by their caregivers, including family members. The barriers to not speaking out are numerous: shame; fear that by doing so they will cause trouble for their family; possible retaliatory consequences; and lack of financial resources and possible physical fragility. If the elderly individual suffering from abuse/neglect is also cognitively impaired or physically disabled the possibility that they will be in a position to reach out for help is even further diminished.

In addition to the specific reasons that victims of elder abuse do not seek help, are more general reasons that apply to many, non-abused older Montanans. *Gaps and Barriers* discusses cultural and logistical reasons why older Montanans are reluctant to seek legal help. These reasons include, older Montanans not wanting to be a burden to family, friends or other caregivers; a deep-rooted sense of privacy that affects their willingness to disclose personal problems; feeling embarrassed to take anything for free, (including legal services), or not perceiving themselves as so low-income as to qualify for free legal services.[4] Three additional barriers that other populations experience are mentioned in the study: lack of access to and/or familiarity with technological resources; lack of transportation, (especially as many older people no longer drive); and a greater need to consult in a face-to-face setting to establish adequate trust with a potential provider.[5]

Raising awareness of elder abuse/neglect is an essential component to increasing access to justice for older Montanans. Some of the signs of elder abuse and/or neglect are: changes in behavior/personality; unexplained injuries or weight loss; unsanitary living conditions; and being left for long periods without care. The elderly are also vulnerable to being exploited

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About the Gaps and Barriers series

This is the fourth installment in a series of articles giving an in-depth look at "The Justice Gap in Montana: As Vast as Big Sky Country," a study authorized by the Montana Access to Justice Commission. Past articles in the series looked at veterans and victims of domestic violence as populations in particular need of consideration. Future installments will examine other populations the study identified as needing particular consideration: the mentally ill or mentally disabled, Native Americans, and people with limited English proficiency or who are hearing impaired.

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/

1 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.*

2 *Gaps and Barriers*, p 29.

3 An Assessment of the Legal Needs of Elders in Montana and the Capacity of Montana's Resources to Meet Those Needs, Anne Debevoise Ostby, project coordinator, August 2014. Made possible through a grant from the U.S. Administration for Community Living/Administration on Aging, awarded to Montana AAA Legal Services, Inc. Hereafter *Montana Assessment*.

4 *Gaps and Barriers*, pgs 28 and 34.

5 *Gaps and Barriers*, pgs 25 and 23.

New organization established to help vets get access to programs, services available

By Steve Garrison

A 2012 survey commissioned by the State Bar of Montana revealed that Montana's veterans population is the second highest per capita of the 50 states, with approximately 100,000 veterans (about 13 percent of our adult population).

While this demonstrates both the patriotism and willingness to serve of Montanans, the survey also disclosed that our veterans have many legal problems, many of a financial nature, and some of them were directly attributable to their military service. To illustrate the ages of our veterans, the survey found that the highest percentage of Montana veterans served in the Vietnam War (37 percent), followed by the Gulf War (24 percent), and the Korean War (13 percent)." **That means that fully 50 percent of our veterans are in their 60s, or older.**

Many programs, agencies and organizations are designed to assist veterans but, in many cases, they are somewhat duplicative and, unfortunately, well-kept secrets to the veterans. The Veterans Administration is the primary agency designed to help them, but based on its unfortunate history (at least in many parts of the U.S.), many veterans are either leery of contacting the VA or downright refuse to.

For that reason, many of the other programs are essential. However, historically, little coordination occurred between the various programs, agencies and organizations, and many did not know what services the other ones offered. As a result, for instance, a veteran visiting an agency for help with finances might not be able to easily learn that another program could help with his upcoming housing problem.

Joining Community Forces (or JCF) has started to address this problem. JCF has established operations in Helena, Missoula, Kalispell, Billings and Red Lodge with the mission of:

- gathering all service providers together;
- coordinating work in the community;
- identifying agency services and gaps; and
- providing training and resources to weave the many services into a net through which no veteran should be able to slip.

JCF has established seven "key service areas": Legal, Financial Wellness, Behavioral/Physical Health, Family/Youth, Faith, Career/Adult Education and Crisis Response. In response to legal service area needs, the JCF has been instrumental in initiating a Veterans Law Section in the State Bar. (Please see article in the April *Montana Lawyer* for more information. The article is also posted at montanabar.org.)

Upcoming Events:

Symposium and Resource Fair: Friday, Aug. 7, and Saturday, Aug. 8, at Carroll College, Helena.

Aug. 7 Symposium will include a free, 2-hour (tentative) CLE presentation on legal/financial burdens faced by our veterans.

Aug. 8 Resource Fair will bring providers together and offer employment opportunities, housing agencies and organizations, family and friend support services, and food for veterans in need. Plans are underway to provide on-site legal services to veterans and their families.

If you would like to assist any of these works, would like information on the Symposium or Resource Fair, or would like to join the upcoming Veterans' Law Section of the State Bar, please contact Steve Garrison at turbo159@earthlink.net.

Veterans Law Section

If you are interested in joining a new Veterans Section of the State Bar of Montana, please contact Steve Garrison at turbo159@earthlink.net. For more information about the section, see an article in the April Montana Lawyer or online at www.montanabar.org.

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financially by caregivers and family members.

Elder abuse is only one of the legal issues addressed in the *Montana Assessment*. Indeed, legal assistance with estate and disability planning, as well as help securing government benefits are ranked higher in a list of legal needs.[6] These are critical legal issues that if addressed will improve the financial security and quality of life for older Montanans.

The legal challenges posed by elder abuse are, of course, so different from drafting a will as to not be made of the same material. Elder abuse has always existed. In the same way that child abuse and intimate partner abuse have always existed. But now, public recognition of the problem has increased as the impact of elder abuse is made more evident by the increasing number of cases that correspond to the growing population of older adults. A first step in securing the health and safety of any population is learning about the risk factors specific to that population. *Gaps and Barriers* and the *Montana Assessment* are excellent resources for raising awareness of these issues among the legal community and beyond.

Iris Marcus is an Americorps VISTA with Montana Justice Foundation.

6 *Montana Assessment*, p 14.

Court Orders

Avery placed on disability/inactive status

Summary of April 14 order (No. PR 15-0142)

The Montana Supreme Court ordered that attorney David C. Avery be placed on disability/inactive status in the State Bar of Montana and that his disciplinary matter is stayed while he is on disability/inactive status.

Avery was placed on interim suspension on March 17 for driving under the influence — fourth or subsequent offense — and failing to give notice of an accident by the quickest means.

Avery asked to be placed on disability/inactive status. The Commission on Practice recommended that his request be granted subject to requirements of the Montana Rules for Lawyer Disciplinary Enforcement.

It was also ordered that any future request by Avery for transfer to active status will be subject to the Montana Rules for Disciplinary Enforcement. Avery will also be required to prove by clear and convincing evidence the extent, nature and scope of his claimed mental or physical conditions that he contends contribute to his inability to assist in his defense of disciplinary proceedings and that those conditions have been resolved.

Townsend, Wheat, Ulbricht appointed to Judicial Education Committee

Summary of April 28 order (No. AF 06-0209)

The terms of the Honorable Patricia Cotter, the Honorable John Brown and the Honorable Karen Townsend on the Judicial Education Committee expired Dec. 31, 2014.

Judge Townsend indicated her willingness to serve another term on the committee and was reappointed. Justice Cotter and Judge Brown, having served two terms on the committee, were ineligible for reappointment.

The Honorable Michael Wheat was appointed as the Supreme Court member of the committee for a three-year term starting May 1. The Honorable Heidi Ulbricht was appointed as a District Court member of the committee for a three-year term starting May 1.

Supreme Court Schedule

Oral argument scheduled for May 20 in Marble's request for new trial in rape case

Oral argument in the case Cody Marble v. State of Montana has been set for Wednesday, May 20,

Marble is appealing the denial of his request for a new trial on his 2002 conviction of sexual intercourse without consent. The Fourth Judicial District Court dismissed Marble's petition for postconviction relief after determining that the victim's inconsistent statements following Marble's conviction do not affirmatively and unquestionably establish Marble's innocence, thus failing to meet the standard necessary to justify a new trial under this Court's opinion in Beach II. The question on appeal is whether the District Court applied the correct test in its review of Marble's request for a new trial.

The Honorable Michael B. Hayworth, District Judge, 16th Judicial District, will sit as a member of the Court in place of Chief Justice Mike McGrath, who has recused himself.

Argument will begin at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana. Oral argument times shall be 40 minutes for the Appellant and 30 minutes for the Appellee.

Correction

Veterans article contained inaccuracy

An article on the representation needs of veterans in the April issue of the Montana Lawyer contained an inaccuracy about the Montana Attorneys for Montana Veterans (MAMV). The program, including its initial and subsequent trainings, were a partnership between the University of Montana School of Law and the Montana Supreme Court Pro Bono Program rather than the State Bar. The program remains a partnership between the initial two entities with the support of the State Bar.

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higher, some of the subsidy may have to be repaid. Limitations on repayment of advance subsidies are a feature of the ACA.

c. Form 8965 Health Coverage Exemptions — This form includes the two types of exemptions available for individuals: 1) the Marketplace-Granted Coverage Exemptions for Individuals; and 2) the Coverage Exemptions for Your Household Claimed on Your Return or Coverage Exemptions for Individuals Claimed on Your Return. The details of the exemptions can be found in the instructions for Form 8965. Following are some examples of the exemptions: Members of Indian tribes; incarceration; income below the filing threshold for tax return; coverage considered unaffordable; and, members of certain religious sects.

Ann Steffens is Child Support Guidelines Liaison with the Montana Department of Public Health and Human Services' Child Support Enforcement Division.

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reporting requirements on the birth parent's counsel to control the accumulation of costs and conduct a hearing on the reasonableness of the fees before ordering an adoptive parent to pay.

Another argument against ordering the adoptive parent to pay the birth parent's fees is that the cost of legal fees for one or both birth parents could result in an excessive and unfair financial burden to the adoptive parent. The statute cited in *In re A.W.S. and K.R.S.*, allows for adoptive parent to pay for legal costs entailed for providing legal counsel for one birth parent, unless the birth parents elect joint representation.[56] But, the case holding is that parents facing involuntary termination of their parental rights are entitled to counsel, regardless of the statutory suggestions offered. This means an adoptive parent could be on the hook for *two* attorneys when both parents face termination.

The potential costs of representing just one birth parent could be financially burdensome. Contesting a termination petition requires consultation with the client, investigating the parent's involvement and history with the child, drafting a response to the termination petition, legal research regarding the applicable law, interviewing potential witnesses, at least two court appearances, and more. This could result in thousands in fees. If a parent's rights were terminated and he or she chose to appeal, that amount could double. Faced with the possibility of these potential costs, an adoptive parent might choose not to pursue an adoption to the detriment of the child's best interests.

Pro bono counsel

The possibility remains that under a court's inherent authority it appoints counsel who accepts the case pro bono. [57] It is difficult to speculate if this is a viable solution. Montana Legal Services Association is underfunded and overburdened with clients in need. Private attorneys that are unfamiliar with the law in parental terminations may be reluctant to accept such a case given the importance of the right at stake. Judge James P. Reynolds, from the First Judicial District, has said he will use the legal services referral listing until other options appear.[58]

Conclusion

How the decision is implemented and its effect on Montana practitioners will not be known until some time has passed. Perhaps attorneys will come forward to assist the birth parents pro bono, or the Legislature will respond by providing financial support to guarantee counsel or enact a law to the same effect as other states have done. Since the decision, the Office of the Public Defender was appointed to the mother in *In re A.W.S. and K.R.S.* The Office moved the court to be withdrawn, which was denied. At least one other case has been filed since, in Missoula County, and the judge ordered the Office of the Public Defender to provide counsel to both birth parents. The Office has opposed this appointment as well. Moving forward, private adoption proceedings need to be tracked closely to determine what is happening and how Montana can make good on the ruling that birth parents facing involuntary termination of their parental rights are entitled to counsel.

Jeff Wilson is a second-year law student at the University of Montana School of Law and a legal intern at Montana Legal Justice PLLC. Special thanks to Charlotte Beatty, Robert Ferris-Olsen, John Pollock and Julie Brown.

56 Mont. Code Ann. § 42-7-102(2).

57 State ex. rel. Courturier v. Todd, 363 Mont. 416, 285 P.3d 1052 (2011).

58 Eric Killelea, Recent high court ruling extends right to counsel, Independent Record (Jan. 17, 2015).

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

Legal technology seminars to be presented in Billings, Helena in May

Paul Unger — a national speaker, writer and leader in the legal technology industry — will be presenting at two State Bar of Montana CLEs in May.

The CLEs — Legal Technology for Legal Professionals — will be Wednesday, May 13, in Helena at the Best Western Great Northern Hotel and Friday, May 15 in Billings at the Big Horn Resort.

The presentations are each approved for 6.0 Montana CLE credits, including 1.0 ethics.

Unger is an attorney and founding principal of Affinity Consulting Group, a nationwide consulting company providing legal technology consulting, continuing legal education and training.

See the ad on page 4 for more information.

Case Evaluation, Settlement and Mediation

On Friday, May 8, the Bar is presenting Case Evaluation, Settlement and Mediation in Helena at the Best Western Great Northern.

Attorneys who represent plaintiffs and defendants in civil cases will share tips for evaluating cases, and attendees and will have the chance to learn from one another and presenters in a small group case-evaluation exercise.

Faculty include Justice Patricia Cotter of the Montana Supreme Court; Hon. Carolyn Ostby, Magistrate Judge, Billings; Hon. James Reynolds, Helena; and Hon. Jeffrey Sherlock, Helena.

Upcoming State Bar of Montana Live CLE Events

Wednesday, May 8: Case Evaluation, Settlement and Mediation, Helena

Wednesday, May 13: Legal Technology for Legal Professionals CLE presented by Paul Unger, Helena

Friday, May 15: Legal Technology for Legal Professionals CLE presented by Paul Unger, Billings

Tuesday, May 26: Indian Wills, Missoula

Friday, June 5: New Lawyers' Workshop/Roadshow, Bozeman

Tuesday, June 16: Internet for Lawyers, Billings

Thursday, June 18: Internet for Lawyers, Helena

Friday, June 26: Parental Alienation, Bozeman (live event and webcast)

Wednesday-Saturday, Sept. 9-11: Annual Meeting, Missoula

Thursday-Friday, Oct. 1-2: Women's Law Section CLE, Chico Hot Springs

Friday, Oct. 9: Construction Law Section CLE, Bozeman

Friday, Oct. 9: Dispute Resolution Committee

Friday, Oct. 16: New Lawyers' Workshop/Roadshow, Kalispell

Friday, Oct. 23: Family Law Section, Missoula

Friday, Oct. 30: eDiscovery Through Trial – A Practical Approach, Missoula (Rescheduled)

ROADSHOW
Bozeman

When: Friday, June 5 | Where: Holiday Inn 2-5 p.m.

The Road Show qualifies for 3 ethics credits:

- Confidentiality & Disclosure
- Candor with the Trubunal
- Technology, Inadvertant Disclosures & Purloined Documents

Please RSVP Tawna Meldrum at (406) 447-2206 or tawna@montanabar.org

Coming Oct. 16: New Lawyers' Workshop/Roadshow in Kalispell

State Bar of Montana | 2015

New Lawyers' WORKSHOP

{Featuring keynote speaker Montana Supreme Court Justice James J. Shea}

What is it?

The New Lawyers' Workshop brings together newly admitted lawyers with experienced Montana practitioners and judges in small groups to discuss the practical aspects of the practice of law. Space is limited and by invitation only. Please mail in the registration form below or register online at www.montanabar.org no later than Friday, May 29. ***There will be no "at-the-door" registrations.***

When is it?

Friday, June 5 — Bozeman Holiday Inn — 7:45 a.m. to 1:30 p.m.

Why Attend?

5.0 CLE credits. | Learn from experienced practitioners | Valuable networking opportunities. | Attend the social event sponsored by the New Lawyers' Section. | Receive a free, full registration to the State Bar's Annual Meeting in September where you can earn even more CLE credits (courtesy of Attorney's Liability Protection Society).

To register, please mail this form by **May 29** to:

State Bar of Montana
PO Box 577
Helena, MT 59624

You can also register at www.montanabar.org

Name_____ **Year Admitted**_____

Address, City, State, Zip_____

Name as you would like it to appear on badge_____

Which small group would you prefer? (select one):

☐ Family ☐ Government ☐ Prosecution
☐ Defense ☐ Litigator ☐ Non-Profit
☐ Job Seeker
☐ Other (please describe_____)

Type of Practice:

☐ Solo ☐ 1-3 Firm ☐ 3-10 Firm ☐ 11+ Firm
☐ In-House Counsel ☐ Law Clerk ☐ Government
☐ Other (please describe_____)

If you have practiced in another jurisdiction, please indicate where and for how long:_____

_____

Do you also plan on attending: ☐ Roadshow ☐ Reception

Protection, from page 9

during this process is for you and your client to contact your local domestic violence advocacy program to see what other services may be available to best help protect your client. If your client is fleeing from the abuse, she may be able to seek safe housing at a local domestic violence shelter.

An attorney working with a victim of domestic violence should be aware that safety planning is another important tool to help keep your client safe. Safety plans often include a recommended list of clothing, personal items, identification, money, a prepaid cellphone, and important contacts that a victim will need on hand if she is fleeing from her abuser. For more information about safety planning, contact your local domestic violence program.

Myth #5: An order of protection is only good in the state in which it was issued

Under 18 U.S.C. 2265(a), orders of protection are given full faith and credit across all jurisdictions as long as they meet the federal statutory requirements.17 The court issuing the order of protection must have had jurisdiction over the parties and matter, and protected the respondent's due process rights by providing a notice and opportunity to be heard. In order to more effectively enforce orders of protection throughout the state and country, MDVFRC recommended the implementation of the Hope Card Program. The Victim Services Division of the Montana Attorney General's office now coordinates the Hope Card program, which issues cards to victims who are granted permanent orders of protection.18 Hope Cards are wallet-sized and contain all relevant information about the order of protection and identifying characteristics of the respondent. This allows the victim to conveniently carry her order of protection on her at all times, and easily prove the validity of the order throughout all jurisdictions.

Myth #6: There are no repercussions for violating an order of protection

While orders of protections are not a guarantee of safety to all victims, there may be serious repercussions when they are violated. Although orders of protection are civil matters, violating these orders can lead to criminal charges.[19] When working with a client who has an order of protection, it is important to remind her to report all suspected violations to local law enforcement. Your client may also want to keep a record of all violations in order to better protect herself. Multiple offenses and the seriousness of the offense both affect the severity of consequences to the offender.

Orders of protection are not effective unless the violations are taken seriously and the offender is held accountable for his actions. When violations are minimized by the justice system, the safety of victims can be gravely compromised. Victims of violence will be reluctant to even file for an order of protection if they feel their cries for help will be ignored. Attorneys are in a unique position to advocate for the safety of their client and improve the overall effectiveness of the justice system.

Conclusion

This article sought to dispel common myths around orders of protection and provide tips to attorneys willing to stand up and speak for those whose voices may not otherwise be heard. If this is an area that interests you, please know that there are many resources available to help you advocate for your client. For a list of crime victim advocates in your area, check out the Montana Department of Justice website at: https://dojmt.gov/victims/crime-victim-advocates/. For more tips on representing a client at an order of protection hearing, go to www.montanalawhelp.org.

Montana Coalition Against Domestic & Sexual Violence offers a wide variety of resources and programs for those wanting to learn more about this very important topic. More information is available on their website at: http://mcadsv.com/.

Pro bono attorneys are always needed in this area of law, as well as other civil legal issues. If you are interested in helping someone in need, call the Montana Legal Services statewide Pro Bono Coordinator at 406-543-8343, extension 207. If you know of a low-income client who could benefit from Montana Legal Services, please see: www.mtlsa.org/ .

Diana E. Garrett is a supervising attorney with Montana Legal Services Association. Shannon Fuller is a staff attorney with Montana Legal Services Association. Both practice primarily in the areas of domestic violence and family law.

17 18 U.S.C. 2265(b).

18 *Review Commission Works to Reduce Domestic Violence Incidents in State*, http://www.sidneyherald.com/news/review-commission-works-to-reduce-domestic-violence-incidents-in-state/article_532dd71a-71e0-11e4-a679-5f050877ddec.html (accessed Apr. 20, 2015).

19 Mont. Code Ann. § 45-5-626.

Joseph R. Marra

GREAT FALLS —Joseph R. Marra died of natural causes on April 14, 2015.

Joseph was born in Havre on Jan. 25, 1924, to Frank and Mary Marra, who also had two other children, Anthony J. and Norine Marra, who predeceased him. Joseph Marra graduated from Havre High School in 1941 and attended Northern Montana College for one year. He enlisted in the Navy at 18 in 1942, from which he was honorably discharged in 1946. He then attended the University of Illinois and graduated from the University of Montana law school in 1951. He practiced law in Great Falls from 1951 until he retired.

During that time, the Montana Supreme Court appointed him to serve on the Civil Rules Commission in 1970 where he served until shortly before his retirement. The court appointed him chairman of the first Reapportionment Commission in 1973, and its representative on the Judicial Nominating Commission where he served for 11 years. He was a member of the American Bar Association Legislative Committee. He was president of the Cascade County Bar Association and received the first Edward C. Alexander award for professionalism and integrity.

Joseph married Norma Grassechi of Black Eagle on June 6, 1949, who predeceased him. They had four sons, Frank of Boise, Idaho; Tom (Antonia) of Great Falls; John (Ann Marie) of Honolulu; and Paul (Lonny) of Hollywood, Calif., all of whom survive. Also surviving are four grandchildren and two great-grandchildren.

He married June L. Wilder in 1999, and she died Nov. 24, 2014. He played with the Great Falls Symphony for many years and would prefer that donations in his name be made to the Great Falls Symphony, 11 3rd St. N., Great Falls, MT 59401.

Condolences for the family may be posted online at www.schniderfuneralhome.com.

Clifford Edward Schleusner

Cliff was born the oldest of 11 children on his parents' homestead 30 miles north of Saco (12 miles south of the Canadian border), on Feb. 15, 1918. He graduated from WhiteWater High School in 1935 and Northern Montana College-Havre in 1941. He taught school in Box Elder for one year, then enlisted and served as a decorated member of the Army Air Force until 1946. He was in the 31st Squadron, 5th Bomb Group, Samar Island, Philippines, on VJ Day, Sept. 2, 1945. After the war, he attended law school in Montana, graduating in 1951.


Schleusner

Cliff's legal career spanned 63 years. He worked for the U.S. Attorney's office, the Yellowstone County Attorney's office and ran a private practice, sharing office space with George Radovich from 1980 until retirement on Dec. 31, 2014.

Cliff was a true Montana outdoorsman: hunting, camping, exploring, fishing, prospecting and downhill skiing along with many other activities. Cliff was a founding member of Red Lodge Mountain and the Beartooth Ski Patrol and skied into his 80s, enjoying the mountains all his life. Cliff was a skilled musician, playing many instruments including his specialty, the harmonica. He played fiddle in a local bluegrass band and attended fiddle camps all over the state, even in his later years. Cliff was a life master of bridge, a chess master, a wonderfully skillful pool player, and he was one of the most knowledgeable Montana historians. Cliff was a dedicated member of numerous service and fraternal organizations, including the Masonic Ashlar Lodge #29, the Masonic Scottish Rite, VFW Post #6774, and Kiwanis, to name only a few.

One of the proudest moments of Cliff's life was giving a kidney to his brother Kenneth in 1966. Kenneth survived until 2012 when he died of natural causes not associated with any kidney problems. On Feb. 23, 2015, Cliff passed the same way he lived his life — with independence, dignity and grace, conveying his wishes to his doctors until the very end. At age 97, his death was due to complications from a fall at his home.

Cliff has two surviving siblings: Idelia Vaupel of Florida and Hattie Engstrand of Washington. He was an honorary member of the Radovich family, spending many happy years participating in family holidays, celebrations and ski trips to Big Sky.

He is preceded in death by his parents, his brothers, Kenneth and Wilbur, and sisters Margaret, Clara and Sally. Three babies died in infancy.

Memorials may be made to Cliff's second home, the VFW Post No. 6774, 637 Anchor Ave., Billings, MT 59105.

Evidence, from page 15

So, beware: If your provider, or your witness, has one of these kits rather than a framed license from the State of Montana as a psychologist, psychiatrist, professional counselor or licensed clinical social worker, any disclosure made still can be compelled at trial, no matter how helpful the session was. If the provider has an actual license in one of these categories, no matter how informal the office, you should win your motion in limine to exclude his or her testimony at deposition or trial in both state and federal cases. Good work, Andrew Person!

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

McLean, from page 10

their activities and interactions with citizens. With more than 1.1 million enforcement-involved cases in the justice system, he believes that the recent negative events in the news represent a miniscule percentage of the overall interactions. However, he believes that video recordings will help law enforcement officers more than hurt them.

He and Sandy are looking forward to spending time in the Florida Keys in February, and may make that trip an annual event. While he enjoys reading a book just as much at Georgetown Lake as he does on a beach in Florida, he knows that Sandy enjoys the warm sunshine and sandy beaches, and he doesn't pass up the opportunity to go fishing, no matter the location. For their 50th wedding anniversary, he and Sandy and all of their children and grandchildren are planning a trip to Ireland. He will visit the house of his grandfather Tim Tracy [spelled "Treacy" while in Ireland], outside of Waterford. He is proud of his Irish heritage, and as a founding member of the Ancient Order of Hibernians has been instrumental in making St. Paddy's Day in Missoula a family celebration.

McLean has served for 26 years as a District Court Judge and is the senior District Court Judge of the Fourth Judicial District. His tenure began with a controversial case and comes to a close with another that gained international notoriety. Soon after he was appointed, he sentenced Joe Junior Cowan, a man who suffered from paranoia and delusions and who viciously assaulted Maggie Dougherty, a Forest Service ranger. The case raised questions about whether a person suffering from a mental illness could be criminally responsible for actions taken while delusional. More recently, he presided at a trial that received national and international news coverage, the case of Marcus Kaarma, who was found guilty of homicide for shooting a German teenager he found in his garage. But, no matter the case before him or situation, McLean has followed in the footsteps of his father, standing up for what he believes is right. From humble beginnings, he has applied common sense to well-established principles of justice, and worked with integrity to protect victims, children, and Montanans' constitutional rights.

As he simply says, "It has been a good run."

Leslie Halligan is a standing master in the Fourth Judicial District, covering Missoula and Mineral counties.

Technology, from page 11

Once the limitations of a particular system are known, then it will require a practitioner to carefully draft the request to ensure that it seeks information that is accessible. Of course, the answering party will also need a working knowledge of the applicable system in order to offer complete production or, in the alternative, to object on accessibility.

Given a discovery deadline of 5-6 months, it is easy to recognize how this new language will impose a significant burden of diligence and competence in order to work through these issues in time to satisfy the demands of a scheduling order.

Rule 34, M.R.Civ.P., also impacts the efforts to obtain ESI. First, Rule 34(a)(1)(A), allows a party to request "any designated documents or electronically-stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." While we have no guiding case law, one can see the interplay between the question of whether information is "reasonably accessible," and whether that information can be translated into a "reasonably usable form."

We suggest that these disputes, if they arise, will turn primarily on the burden associated with production. Many understand that information can sometimes be saved from even a crashed hard drive. But, the question becomes, at what cost? Assume that 10-year-old information is available from data backup tapes. What if the format of the tape backups is no longer in general use? Who should pay the significant expense in locating appropriate search software and applying it to the old data, especially when this expense can easily run into thousands upon thousands of dollars? We believe that these 'balancing issues' will become ever more prevalent as we continue our march forward into technological progress.

The final significant change to the Rules of Civil Procedure can be found in the text of Rule 37: "Failure to Provide Electronically-Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically-stored information lost as a result of the routine, good-faith operation of an electronic information system." This is the 'other side' of the question. What if the information is requested, what if it is reasonably accessible, but what if it no longer exists?

There is no present rule in Montana requiring a person or entity to maintain email backups for a particular length of time. If you archive your emails after a year, and delete them after two, are you engaged in the "routine, good-faith operation of an electronic information system," or are you spoliating evidence? Like the question of what is reasonably accessible and the question of what is a reasonably usable form, the question of what is routine and good-faith will turn on the facts of a particular case. (This also elevates the importance of a litigation hold letter, whereby a party is instructed not to delete anything pending the outcome of the litigation.)

Obviously, a brief article in the Montana Lawyer will not be able to answer the questions of what is reasonably accessible or what is good-faith destruction of evidence, especially when we do not have a developed body of case law on these questions. It is our hope, though, that a Montana practitioner now at least has enough information to be aware (and wary) of the issues raised by the changes to the way ESI will be addressed in Montana state courts.

Gregg Smith and Chris Gray are members of the State Bar of Montana's Technology Committee.

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

ATTORNEYS

CITY ATTORNEY: The City of Whitefish seeks an experienced full-time City Attorney with a lively work ethic. Salary: $80,000 - $115,000. Preferred application deadline: 5 p.m Wednesday, May 20, 2015. Position open until filled. Send cover letter, resume, City application, and writing sample to City Attorney, City of Whitefish, P.O. Box 158, Whitefish, MT 59937. See the full announcement and application instructions at www.cityof-whitefish.org/jobs.

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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.

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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!

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MONTANA LAWYER
State Bar of Montana

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