MONTANA LAWYER
State Bar of Montana
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MONTANA LAWYER

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Essays give food for thought on staying relevant in digital age

"(Fred) Ury's message is a wakeup call that a technology-transformed economy is leaving many in the Bar behind. But he remains a positive cheerleader for the prospect that it is not too late for the Bar to lead the profession to adapt and remain relevant.

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

The ABA is at the forefront of addressing the dramatic changes in the practice of law and is publishing resources that provide a wealth of thought and action-provoking information. One such resource, *The Relevant Lawyer, Reimagining the Future of the Legal Profession* (ABA Standing Committee on Professionalism 2015), is a collection of 20 essays by experts in their respective areas of the law, addressing a vast array of issues facing the legal profession (transformation of the delivery of legal services and business models, expanding access to justice, the growing irrelevance of geographic boundary lines, and reexamining regulation of the practice and legal education) as a result of the rapid and disruptive changes in technology. The authors offer insights and some recommendations for addressing the current, and future, state of the practice of law. Some will be controversial. But it is critical that lawyers participate in shaping the responses to the changes we face in our profession and not limit our role to that of simply opposing changes, particularly regarding the regulation of the practice. This should be true even if we need to accept completely new ways of defining regulation and consider new practice models. The past demonstrates that intransigence has not been effective in serving the public interest or maintaining high professional standards.

The *Relevant Lawyer* offers much to consider whether you practice in a large firm, small or solo, non-profit or government; and is essential for Bar leaders, whether elected representatives or one of the hundreds of volunteer lawyers working on committees or sections to develop legislation and regulation, access to justice initiatives or assists with the numerous Bar programs that deliver services.

Fred Ury, a prominent Connecticut trial lawyer, Chair of the ABA Standing Committee on Professionalism, member of the ABA Commission on the Future of Legal Services, and the project leader for *Relevant Lawyer* visited Montana this past May to address the Trustees of the Montana Bar. Ury presented and participated in our discussions about technology and the future of the practice of law, including our consideration of the ABA Commission on Ethics 20/20 proposed amendments to the ethics rules addressing technology. Ury's message is a wakeup call that a globalized, technology-transformed economy is leaving many in the Bar behind. But he remains a positive cheerleader for the prospect that it is not too late for the Bar leaders to lead the profession to adapt and remain relevant. In his essay in *The Relevant Lawyer, Saving Atticus Finch: The Lawyer and The Legal Services Revolution*, Ury asserts that Bars must address the reality of the Internet-based economy and the fact that legal services have become largely unaffordable by average consumers. He recommends several points of discussion to transform the legal profession: 1) Change the focus of regulation from regulating individual attorneys to regulating entities; 2) permit multijurisdictional practice between attorneys and other professionals; 3) phase in non-lawyer ownership of firms, similar to that in the UK; 4) License and regulate paralegals and legal technicians; 5) Create a two year Masters in Law Degree to allow a specialized practice to provide limited services; and amend law school accreditation to allow experimentation with programs to meet changing needs. Ury is not asserting that these reforms must be adopted immediately or in a prescribed form, but that the discussion start; that the Bar address the realities resulting from the disruptive changes in technology. Maintaining the profession and the self-regulated practice of law, and the resulting benefits to society, depend on it.

The Bar must lead in addressing the future of the practice of law, in order to maintain the high standards of the last self-regulated profession; not to protect our turf, as some may claim, but to ensure the profession remains relevant and viable in promoting the rule of the law and in particular improving our system of justice, access to justice and challenging of the abuse of power when necessary. Only a profession can do this.

Randall Colbert elected president of MDTL

Randall Colbert, a partner in Garlington, Lohn & Robinson PLLP in Missoula, was recently elected president of the Montana Defense Trial Lawyers.

Colbert is a Montana native who was raised in Anaconda. He has practiced at Garlington, Lohn & Robinson since graduating from the University of Montana School of Law in 2003. He was recognized by Chambers USA as one of the leading lawyers in business (commercial litigation 2009-2010), as well as one of the Best Lawyers in America. He is admitted to practice before all Montana courts and the United States District Courts for the District of Montana.


Colbert

Other recently elected MDTL board members include John Russell, Billings; Nicholas Pagnotta, Missoula; Lee Bruner, Helena; Jordan Crosby, Great Falls, Sean Goicoechea, Kalispell; Jill Laslovich, Helena; and Mark Thieszen, Butte. Paul Haffeman of Great Falls, serves as the immediate past president.

Swanson joins Paul Warren Law in Billings

Paul Warren Law PLLC has announced that Elinor Swanson has joined the Billings personal injury law firm as an associate attorney.

Swanson graduated with honors from Lewis & Clark Law School, where she received the Dean's Scholarship for Excellence and was an editor for the Lewis & Clark Law Review. She has externed for U.S. District Court Judge Paul Papak, the Multnomah County Attorney's Office and the Lewis & Clark Legal Clinic.


Swanson

Warren and Swanson can be reached at 406-294-2300 or paul@paulwarrenlaw.com.

Williams Law Firm opens Bozeman office

Williams Law Firm, P.C. has opened an office in Bozeman. Partner Nicholas J. Pagnotta will manage the Bozeman office. The firm will continue to handle complex civil litigation and trial work throughout Montana.

Williams Law Firm has also announced that Alexander T. Tsomaya has joined the firm as an associate attorney in the Bozeman office. Tsomaya grew up in eastern Montana. He attended Northland College in Ashland, Wisconsin, where he played baseball for four years. He received his B.S. in Business Administration in 2011 and received his J.D. from the University of Montana School of Law, graduating with honors, in 2014. While in law school, he interned for the Office of the Federal Defender and clerked for Williams Law Firm. After law school, he worked in civil litigation in Bismarck, North Dakota. Alex is admitted to the bars of Montana and North Dakota, and he is a member of the Defense Research Institute. His practice primarily focuses on litigation related matters.

Both Nick and Alex can be reached through the Williams Law Firm Missoula office, P.O. Box 9440, Missoula, MT 59807, 406-721-4350.

Attorney joins Ugrin, Alexander, Zadick & Higgins

Jim Zadick is a new associate attorney with Ugrin, Alexander, Zadick & Higgins.

Zadick earned his law degree from William & Mary Law School, where he served as an articles editor of the William & Mary Environmental Law and Policy Review.

He clerked for Justice Michael E. Wheat of the Montana Supreme Court and worked as a policy adviser and legal counsel for Sen. Max Baucus and Sen. John Walsh in Washington, D.C.

Matrium Law Group welcomes Goodkind

Matrium Law Group has announced that Julie D. Goodkind has joined the firm as Of Counsel.

Julie graduated from the University of Montana School of Law in 2008. She brings experience to Matrium Law Group from five years at a diverse civil litigation firm in Missoula, preceded by four years at a Missoula firm focusing on catastrophic personal injury and medical malpractice.


Goodkind

Julie and her family enjoy living in Missoula and spending time exploring the outdoors. Julie currently serves on the Board of Directors for Missoula Community School and volunteers at Missoula's Self-Help Law Center. Julie's practice at Matrium Law Group includes family law, estate planning, estate administration and probate.

Julie can be contacted at: Matrium Law Group, 317 E. Spruce St., Missoula, MT 59802; website: www.matriumlaw.com; phone: (406) 396-4994; email: julie@matriumlaw.com.

Addy wins national city attorney honor

Bigfork pastor Kelly Addy, a former longtime Billings deputy city attorney, received the Brad D. Bailey Award from the International Municipal Lawyers Association (IMLA) during their 2015 Annual Meeting in Las Vegas on Oct. 6.

The award is given to one deputy city attorney in the nation each year for excellence in the practice of law, outstanding service to the public, the highest of ethical standards, and for maintaining a life that balances a passion for professional excellence and the joy of family and friends.


Addy

In presenting the award, IMLA President G. Foster Mills noted that Addy had served as the Billings civil deputy attorney for almost 14 years before he retired in May of this year to become the pastor of Community United Methodist Church in Bigfork.

Mills also cited Addy for the "countless hours he has spent helping people" through his work as an Army lawyer, for teaching business law at two different universities, as a Boy Scout leader, a local pastor serving the United Methodist Church, chairman of the Montana Board of Personnel Appeals, as a Montana State Legislator, and as a member of the Montana

Supreme Court Commission on Courts of Limited Jurisdiction.

During his career Addy has served in positions in local, state and federal government and he is one of a few Montanans who have served in all three branches of Montana's state government.

Peter G. Scott opens new firm in Bozeman

Peter G. Scott, Law Offices, PLLC opened its doors in Bozeman on Oct. 1.

Scott has practiced in Montana since 2007 and in Bozeman for the past three years. He is also licensed in Idaho, Washington, and Oregon. After a stint in the US Navy, Scott received his degree in geology then worked in Bozeman as a hydrogeologist before attending law school at Lewis and Clark in Portland, Oregon. Scott clerked at the Oregon Supreme Court for Chief Justice Paul DeMuniz before joining Preston Gates and Ellis, LLP as an associate in 2001.

Scott

Since 2007 Scott has been a partner with Gough Shanahan Johnson & Waterman PLLP. Scott's practice will continue to focus on administrative, civil, and government law with an emphasis on utilities, environmental permitting, water, and land use. Scott can be reached at 406.585.3295 or peter@scott-law.com.

Leisher joins Paoli Law Firm in Missoula

Paoli Law Firm in Missoula has announced that Paul Leisher has joined the firm as a new associate.

Leisher graduated with honors from the University of Montana School of Law in 2014, where he served as an Editor-in-Chief of the Montana Law Review, served three years on the Student Bar Association, completed a clinical internship with Judge Donald Molloy of the Federal District Court, and founded the UM Criminal Law Student Group. He spent the previous year clerking for Justice Jim Shea of the Montana Supreme Court and serving as a pro bono attorney with the Montana Innocence Project.

Leisher

Leisher will be representing clients in civil plaintiff and criminal defense matters, as well as continuing his volunteer work with the Innocence Project.

MLSA welcomes two new attorneys

Montana Legal Services recently welcomed new attorneys Jean Bearcrane and Alan Zackheim.

Bearcrane joins the Domestic Violence Law Practice Group and provides services to domestic violence survivors on the Crow and Northern Cheyenne reservations, as well as in state courts.

Bearcrane, a Crow tribal member, graduated from Marquette University Law School in 1984 and became a member of the Wisconsin Bar, then returned to Billings and became a member of the Montana Bar in 1985. As well as having staffed the Browning MLSA office a number of years ago, she has been staff attorney for a number of the Montana tribes, serving as general counsel, special counsel, juvenile prosecutor, and attorney-prosecutor for domestic violence and sex assault crimes. Her legal career also includes teaching full time for four years at MSU-Billings (formerly Eastern Montana College). Her special interest and love are her six grandchildren and her many nieces and nephews.

Zackheim joins the Foreclosure Law Practice Group and provides services related to foreclosure and housing cases.

Zackheim received his undergraduate degree in Social Anthropology from Harvard College in 2006 and graduated from the University of Montana School of Law in 2013. He clerked for Montana Supreme Court Justice Michael E Wheat before joining MLSA.

Amy Rubin

Rubin appointed Missoula standing master

Amy Rubin was recently appointed standing master for the 4th Judicial District Court.

She will work primarily with family law cases, as well as dependency and neglect of children cases for Judge Karen Townsend and Judge Leslie Halligan.

Prior to this appointment, Rubin was a partner in Rubin & Ries, a private Missoula law firm, and worked with a series of nonprofit agencies providing legal representation under Violence Against Women Act grants through the U.S. Department of Justice. She has received the Crime Victim Advocate of the Year award, as well as the Missoula Family Violence Council Pro Bono Attorney of the Year award.

Rubin received her undergraduate degree from Colorado College and is a 1989 graduate of the University of Montana School of Law. In her spare time she enjoys horses, and playing ice hockey with her family. She is active in a number of community organizations. She can be contacted at arubin@mt.gov.

Northwestern School of Law gets new name after donation

The University of Montana School is not the only law school to announce a name change this year.

The Northwestern University School of Law announced last month that it is now the Northwestern Pritzker School of Law after a $100 million donation from alumnus J.B. Pritzker and his wife, M.K. Pritzker.

According to the ABA Journal, the school announced the name change on Oct. 22 during an event held at the school.

Officials said that the donation would be used to support and expand the school's social justice, entrepreneurial and clinical programs, as well as beef up financial aid opportunities to students.

Pritzker, who earned his J.D. in 1993, is also a life member of the Northwestern Law Board, and is a member of the University's Board of Trustees. His wife, M.K., is a director of the Pritzker Family Foundation and serves as a trustee of the Northwestern Memorial Foundation.

The law school at the University of Montana officially changed its name in September to the Alexander Blewett III School of Law after a $10 million gift from the Blewett family. The gift, which was the largest in the history of the university, nearly doubled the school's endowment.

The Blewetts' gift will create an endowed chair in consumer law and protection, with endowed programs in the subject. It will also create a matching scholarship fund of $1.5 million. The goal of the scholarship fund is to double the gift with matching donations.

At the September naming ceremony, Blewett cited his commitment to public education as the chief reason he and his wife, Andrea, made the donation, and he criticized lawmakers for not properly funding public education.

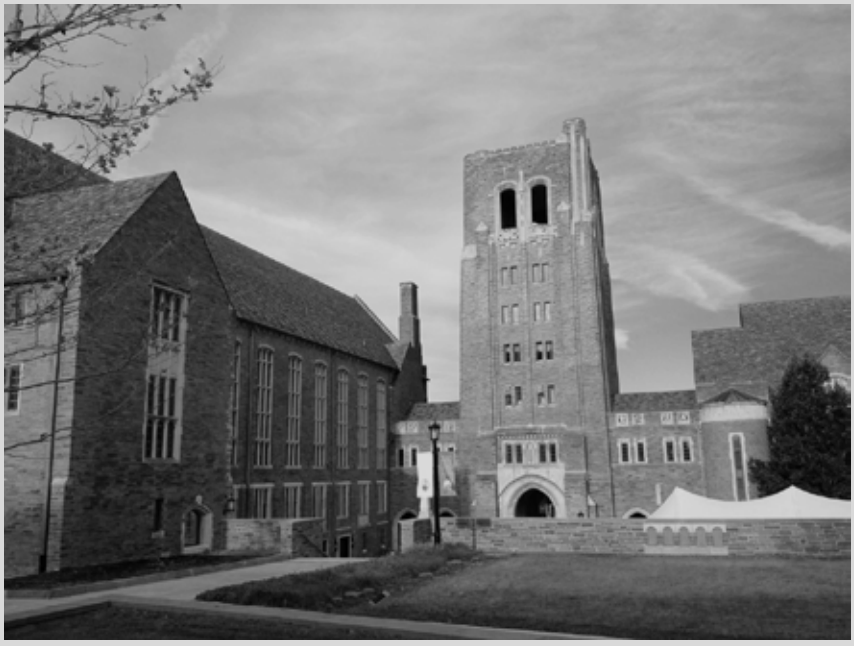

Photo courtesy of Greg Murphy

Shown is Myron Taylor Hall, which houses the law school at Cornell University.

Murphy to chair ABA section, serving as Cornell Law School Practitioner-in-Residence

At the August 2015 meeting of the ABA Section of Legal Education and Admissions to the Bar in Chicago, Montana lawyer Greg Murphy of Billings was elected Chair-Elect of the Section.

According to the Bylaws of the Section, he will become chair in August 2016, succeeding the Honorable Rebecca Berch, Justice of the Arizona Supreme Court. The Council is the final accrediting authority for American law schools, and is "separate and independent" from the ABA with respect to its accreditation responsibilities.

Murphy formerly chaired the Section's Law School Accreditation Committee. He is believed to be the only Montana lawyer to be appointed chair of the Accreditation Committee and elected to chair the council. He is also currently serving as co-chair of the Uniform Bar Examination Committee of the National Conference of Bar Examiners. In the past he chaired both the conference and its Multistate Bar Examination Committee, and served on the Multistate Performance Test drafting committee. He is a former longtime member and chair of the Montana Board of Bar Examiners.

Cornell University Law School recruited Murphy to be its Distinguished Practitioner-in-Residence for the fall term 2015. In August, Murphy and his wife Kate moved to Ithaca, New York. They will return to Montana in January, and he will renew his mediation practice.

Changes to IOLTA certification and trust account reporting aim to simplify process

As Montana settles into fall and the holiday season approaches, it's time once again to begin thinking about attorneys' annual Interest on Lawyers Trust Account (IOLTA) certification. This year, the Montana Justice Foundation is sponsoring a new online reporting service for lawyer trust accounts in an effort to make the mandatory certification and reporting as simple as possible for attorneys and their administrative staff.

Rule 1.18 of the Rules of Professional Conduct requires attorneys to annually certify to their IOLTA status and report their firm's trust account information to the Montana Justice Foundation, which is the Montana Supreme Court-appointed administrator and beneficiary of the Montana IOLTA program.

In recent years, the State Bar of Montana has made this process available online. Attorneys have been able to access an online form to both certify their trust account status and provide their firm's trust account information, if applicable. Additionally, the online process has allowed attorneys to complete a pro bono reporting form in conjunction with their annual certification. While the online process increased the efficiency and accuracy of reporting, attorneys and law firms were required to complete certification and reporting forms from scratch each year, even if their IOLTA status and/or trust account information remained the same.

The new reporting service will simplify that process by requiring attorneys/firms to complete the trust account reporting form *only* when changes have been made to their trust account. Likewise, if an individual attorney's IOLTA status remains the same from one year to the next, the attorney or designated firm administrator only needs to log into the system to recertify that their information remains correct.

This year's process will set the baseline for the system going forward. **Beginning December 1**, attorneys will be able to access the new IOLTA certification portal on the State Bar's website, where they will create a user account that will be used to update the attorney certification each year. Individual attorneys will once again be required to use their Montana Supreme Court-issued State Bar number for the IOLTA certification.

During this year's certification process, attorneys who hold IOLTA-eligible funds will be asked to provide the contact information for the person in their firm responsible for IOLTA. That person will be contacted during the coming year to set up a Firm Administrator account in the new system that will be used to complete mandatory reporting of the firm's IOLTA account information.

Finally, the pro bono reporting form will continue to be available on the State Bar website alongside the trust accounts reporting.

The State Bar will mail out a postcard in November with detailed instructions and pertinent deadlines for registration and reporting to all Montana licensed attorneys required to certify. The deadline for certification is **January 8, 2016**.

Contact Kate Kuykendall at the Montana Justice Foundation at 406-523-3920 with any questions.

Group Benefits Trust discontinuing health plan

The State Bar's Group Benefits Trust is discontinuing the health insurance and other plans in the Trust effective Dec. 31, 2015, due to changes in the health insurance marketplace and recent claims costs.

No health, dental, or vision benefits will be available after Dec. 31. Since claims will continue, the Trust has made arrangements with Blue Cross Blue Shield to continue processing claims into 2016, and Trust reserves are more than adequate to fund these "run out" claims, Trustees say.

Other than health insurance, there are four benefits currently offered in Trust plans: life insurance, long term care insurance and vision. Dental and vision will not continue, but life and long-term care are being transitioned for members.

Firms currently participating in the Trust will receive a letter explaining the decision. Included with the letter is information on obtaining alternative health coverage. In addition, Leavitt Great West has been asked to call each participating firm.

The Trust was founded 16 years ago, giving solo lawyers and small firms that had been unable to purchase health insurance through the traditional marketplace an opportunity to purchase coverage at a significantly better price.

However, the introduction of the Affordable Care Act and other regulatory changes have dramatically changed the health insurance landscape, leading to considerable shrinking of the size of the Trust. Current Trust enrollment is 668 employees, short of the ideal enrollment of 1,000.

After considering all the available alternatives, it was determined that the Trust would need to substantially increase premium rates for 2016 in order to remain financially viable. Trustees determined that discontinuing the health insurance and other plans was the only prudent option.

Eddy appointed 11th Judicial District judge

Gov. Steve Bullock appointed Amy Poehling Eddy of Kalispell as district judge in the 11th Judicial District on Oct. 22.

Eddy, 40, replaces District Judge Ted O. Lympus, who announced his retirement earlier this year effective Aug. 31.

Eddy is a solo practitioner in Kalispell and a graduate of California Polytechnic Institute and the University of Montana School of Law. She will be subject to primary and general election in 2016. The candidate elected in 2016 will serve until 2019.

Eddy is an Idaho native and has lived in Montana since law school, graduating in 2001. She has been a solo practitioner since 2014. Prior to that, she had been a partner in a Kalispell law firm since 2007.

Six attorneys applied for the judge seat. Eddy was one of three people whose names the Judicial Nomination Commission forwarded to the governor following a public comment period and interviews conducted by the commission. The other two were Richard DeJana, 65, a solo practitioner in Kalispell, and Flathead County Justice of the Peace Daniel R. Wilson, 51.

The Judicial Nomination Commission received 64 comments in support of Eddy's application during the comment period. Commenters included former U.S. Magistrate Leif B. Erickson; retired Supreme Court Justice Terry Trieweiler; Montana Workers' Compensation Court Judge David M. Sandler; 20th Judicial District Judge James A. Manley; 8th Judicial District Judge Gregory G. Pinski; Professor Larry Howell of the Alexander Blewett III School of Law; Greg Munro, the former interim dean of the law school; and Alexander Blewett III.

Amy Poehling Eddy

Eight to interview for 1st Judicial District judge

The Judicial Nomination Commission will interview eight candidates for district court judge for the 1st Judicial District in Helena on Monday, Nov. 9.

The eight who will be interviewed are:

■ Christopher Abbott, 34, assistant public defender in Region Four, Helena. Abbott has been a public defender since 2007, including three years in the Major Crimes Unit. Prior to that he was a law clerk for the Honorable James R. Browning of the 9th Circuit Court of Appeals. There were 47 comments in support of his application, including the Honorable Harry Pregerson of the 9th Circuit.

■ Melissa Broch, 57, Lewis and Clark County deputy county attorney. She received 18 comments in support, including former District Judge Dorothy McCarter and Lewis and Clark County Justice of the Peace Mike Swingley.

■ Marc Buyske, 64, senior counsel at Doney Crowley in Helena and former state district judge in the 9th Judicial District. There were 23 comments in support of Buyske, including retired Montana Supreme Court Justices James C. Nelson and John Warner; 9th Judicial District Judge Robert G. Olson; and Past State Bar of Montana President Joe Sullivan.

■ DeeAnn Cooney, 59, owner of Cooney Law Firm, primarily defending counties in civil litigation. She received 18 comments in support, including from Helena mayor Jim Smith and Lewis and Clark County Commissioner Mike Murray.

■ Daniel Guzynski, 44, assistant attorney general, Prosecution Services Bureau. Previously he was a deputy county attorney in Flathead County and Cascade County. He received 25 comments in support, including from 8th Judicial District Judge Dirk Sandefur and 22nd Judicial District Judge Blair Jones.

■ Barbara Harris, 57, a law clerk for First Judicial District Court Judge Kathy Seeley, special prosecutor for the Supreme Court Commissioner on Character and Fitness and special master in the First Judicial District Court. She received 35 comments in support, including eight current and former judges: Judge Seeley, retired Judge Ed McLean of Missoula, retired judge Douglas G. Harkin of Missoula, Judge Karen S. Townsend of Missoula, Judge James A. Haynes of Hamilton, and Missoula Municipal Court Judge Kathleen Jenks.

■ Donald Jones, 55, partner/owner at Hohenlohe, Jones PLLP in Helena, practicing mostly in employment law and civil rights/discrimination. He received 39 comments in support, including from Justice of the Peace Swingley, former Montana Auditor John Morrison and Montana School Boards Association President Lance Melton.

■ Michael McMahon, 50, managing attorney at McMahon, Wall and Hubley in Helena. His practice emphasis is representing attorneys in legal malpractice and disciplinary matters. He received six comments in support including one from Mick Taleff, chairman of the Supreme Court's Commission on Practice, which McMahon frequently appears before in his practice.

After interviewing the candidates, the commission will forward the names of three to five nominees to Gov. Steve Bullock, who will choose one for appointment to the seat to be vacated by the Honorable Jeffrey Sherlock, who is retiring effective Jan. 1. The person appointed is subject to election at the primary and general elections in 2016. The candidate elected in 2016 will serve until January 2019.

Comment sought on local federal court rule changes

The Local Rules Committee of the United States District Court for the District of Montana is now accepting public comment on proposed amendments to the Local Rules of Procedure. The deadline for comment is **Tuesday, Nov. 24, at noon Mountain time**.

Here is a brief summary of the principal proposed amendments:

■ L.R. 1.3(d) incorporates Standing Order DLC-24 (D. Mont. June 24, 2015), regarding cameras and personal electronic devices.

■ The scope of L.R. 7 is clarified. Corresponding amendments to L.R. 7.5 impose word limits on motions for leave to file amicus briefs and prohibit filing of a brief in support of such a motion.

■ L.R. 11 is clarified to provide that any document submitted for conventional filing -- including but not limited to a complaint -- must bear a hand signature.

■ L.R. 56 is amended to require a party seeking summary judgment to e-mail the word-processing version of its Statement of Undisputed Facts to the non-moving party immediately on filing the motion for summary judgment.

■ L.R. 83.1(d) is amended to require a pro hac vice applicant to certify compliance with Montana Rule Professional Conduct 8.5.

■ New L.R. 83.8(c) and (d) implements a process for pro se litigants to file documents by electronic mail directed to the Clerk and to effect service via CM-ECF. The proposed rule also clarifies pro se litigants' and represented parties' time to respond to filings.

■ L.R. CR 32.1 is amended to create a clearer record with respect to presentence reports and sentencing judges' changes to them.

■ New L.R. CR 41.1 requires the parties to discuss the return of non-contraband property to a defendant at the close of the case for the purpose of avoiding motions under Fed. R. Crim. P. 41(g).

Comments can be sent by email to LocalRules@mtd.uscourts.gov.

If adopted by the judges of the District Court after the public comment period closes, amendments to the Local Rules will go into effect on **Tuesday, Dec. 1**. This date is subject to change.

The full text of the proposed amendments is at www.mtd.uscourts.gov/rulesorders.html. If you have any questions, please feel free to e-mail me at Melissa_Hartigan@mtd.uscourts.gov or 406-829-7138.

Upcoming Supreme Court Oral Arguments

Case: State v. Colburn
When: Wednesday, Dec. 2, 9:30 a.m.
Where: Courtroom of the Supreme Court, Helena

Montana's "rape shield law" bars admission at trial of evidence on the sexual conduct of victims except "evidence of the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease that is at issue in the prosecution." James Colburn appeals his conviction of incest, sexual intercourse without consent, and sexual assault of two 11-year-old girls. Oral argument on whether the District Court erred in ruling that the rape shield law prohibited Colburn from introducing evidence that one of the victims had been sexually abused by her biological father. Colburn argues such evidence could explain the victim's advanced sexual knowledge, and that the rape shield law must yield where its application deprives a defendant of his right to present a defense.

Case: Tyrrell v. BNSF and Nelson v. BNSF
When: Dec. 9, 9:30 a.m.
Where: Courtroom of the Supreme Court, Helena

Montana district courts have not been uniform on the question of whether they have jurisdiction to decide Federal Employers' Liability Act claims filed by out-of-state plaintiffs against BNSF Railway. The question has two parts: Do Montana statutes authorize state courts to exercise personal jurisdiction over BNSF in such situations, and does the Due Process Clause of the U.S. Constitution allow our state courts to exercise personal jurisdiction over BNSF in such situations?

Montana Supreme Court case summaries for September 2015

Estate of Schreiber

Estate of Schreiber, 2015 MT 282 (Sept. 29, 2015) (Cotter, J.; Rice, J., concurring) (5-0, affirmed and reversed)

Issue: (1) Whether the district court erred in concluding the devise of the lots and the certificates of deposit had not been adeemed and the named beneficiaries were entitled to a distribution equal to the value of the lots and the CDs; and (2) whether the district court erred in rejecting the PR's final accounting.

Short Answer: (1) The devise of the lots was not adeemed but the devise of the CDs was; and (2) no. *Affirmed in part, reversed in part, and remanded for entry of an amended order*

Facts: August Schreiber died testate in September 2013. His grandson, John Watkins, was named PR. The will devised three lots and five CDs, with half going to Schreiber's granddaughter, Jaime Harlicker, and half going to the children of Schreiber's grandson, Donald Watkins. The PR was the residual beneficiary of the will.

Between the time Schreiber executed the will and died, he sold the lots for $20,000 each, and cashed the CDs for an unknown amount, roughly estimated to be between $50,000-$60,000. In his capacity as PR, John Watkins traced the proceeds using the first-in-first-out accounting method, and concluded Schreiber had spent $301,393 between the time he sold the last CD to the time he died, and thereby consumed all proceeds of the sales before he died.

Procedural Posture and Holding: The PR filed a final accounting and petition for distribution calling for Jaime Harlicker and Donald Watkins' children to receive nothing, and the residuary beneficiary (the PR) to receive the net distributable estate of $111,110. The district court denied the accounting and distribution, finding the PR breached his fiduciary duty by interpreting the will to benefit himself at the expense of other beneficiaries. The PR appeals, and the Supreme Court affirms in part, reverses in part, and remands for entry of an amended order.

Reasoning: (1) Ademption is the destruction or extinction of a testamentary gift as a result of the asset no longer being part of the estate. At common law, a specific devise of property was adeemed if the property was not part of the estate at the decedent's death. The UPC creates a mild presumption against ademption by extinction of some specific devises. Based on the language of the will, which provides that any proceeds from the lots' sale are devised, the district court correctly concluded Schreiber did not intend admeption of his specific devise of the lots. The PR bore the burden on showing Schreiber intended ademption, and did not meet his burden.

However, the language devising the CDs differs, and leads the Court to conclude Schreiber did intend them to be adeemed. The district court erred in ordering the value of the CDs to be distributed to the named beneficiaries.

(2) The Court affirms the district court's rejection of the final accounting and remands with instructions to order the PR to file an amended accounting distributing the value of the lots but not the value of the CDs, and clarifying the fate of certain property Schreiber held in joint tenancy with the PR. Property held in joint tenancy passes immediately to the joint tenant and should not have been included in the distributable estate.

Justice Rice's Concurrence: Justice Rice concurs with the Court's holdings but for different reasons. Based on the language of the will specifically devising the proceeds of the sale of the lots, the proceeds are the specific devise.

Editor's note: *The Montana Lawyer is happy to welcome back selected Supreme Court case summaries from attorney Beth Brennan. Ssummaries of all Montana Supreme Court cases are available at the author's website,* ***http://brennanlawandmediation.com/mt-supreme-court-summaries***

State v. Thompson

State v. Thompson, 2015 MT 279 (Sept. 18, 2015) (McKinnon, J.; Wheat, J., dissenting) (4-1, affirmed)

Issue: Whether the justice court had good cause to conduct Thompson's trial after the six-month deadline provided by statute.

Short Answer: Yes. *Affirmed*

Facts: The state charged Thompson with DUI on Oct. 11, 2011, and that same day he pleaded not guilty in justice court. He appeared with counsel at the omnibus hearing Dec. 27, 2011, and requested a jury trial. The justice court set trial for March 22, 2012, with a pretrial conference March 16, 2012. The notice stated the defendant was required to personally attend the pretrial conference, and if he failed to do so he would be deemed to have waived his right to a jury trial, and jus trial date would be vacated and reset for a bench trial at the next available time.

Thompson's counsel appeared at the pretrial conference but Thompson did not. The justice court vacated the trial date and reset the case for a bench trial April 30, 2012.

Thompson moved to dismiss on May 1, 2012, arguing his trial would be held beyond the six-month deadline imposed by § 46-13-401(2), MCA. The justice court denied the motion

on the basis of Thompson's absence at the pretrial conference, which it found established good cause for the delay.

Procedural Posture and Holding: Thompson pled guilty to DUI and was sentenced to six months, with all but 24 hours suspended. He reserved his right to appeal the denial of his motion to dismiss, and appealed to the district court, which affirmed. Thompson appeals, and the Supreme Court affirms.

Reasoning: The statute provides that the court shall dismiss a misdemeanor charge if it has not brought to trial within six months, and was not postponed on the defendant's motion. § 46-13-401(2), MCA. Good cause depends on the totality of the facts and circumstances. The facts here are indistinguishable from State v. Luke, 2014 MT 22, leading Thompson to request that the Court overrule it. The Court declines to do so.

Justice Wheat's Dissent: Justice Wheat dissents, as he did in State v. Luke, on the basis that a defendant's passive mistakes or omissions do not constitute good cause. Thompson's failure to appear is a technicality that did not delay process, and was not a postponement "upon the defendant's motion." § 46-13-401(2), MCA. Justice Wheat does not believe it is proper to take away a defendant's right to a jury trial based upon his failure to personally appear when his counsel is present and can make final trial preparations.

In re Poplar Elem. V. Froid Elem.

State v. Thompson, 2015 MT 279 (Sept. 18, 2015) (McKinnon, J.; Wheat, J., dissenting) (4-1, affirmed)

Issue: Whether the justice court had good cause to conduct Thompson's trial after the six-month deadline provided by statute.

Short Answer: Yes. *Affirmed*

Facts: The state charged Thompson with DUI on Oct. 11, 2011, and that same day he pleaded not guilty in justice court. He appeared with counsel at the omnibus hearing Dec. 27, 2011, and requested a jury trial. The justice court set trial for March 22, 2012, with a pretrial conference March 16, 2012. The notice stated the defendant was required to personally attend the pretrial conference, and if he failed to do so he would be deemed to have waived his right to a jury trial, and jus trial date would be vacated and reset for a bench trial at the next available time.

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O'Connor v. George

O'Connor v. George, 2015 MT 274 (Sept. 15, 2015) (Cotter, J.; Baker, J., dissenting) (4-1, reversed)

Issue: Whether the district court manifestly abused its discretion in denying O'Connor's motion for a new trial based on defense counsel's failure to disclose that some of George's photographic evidence depicted damage from another accident.

Short Answer: Yes.*Reversed and remanded for new trial*

Facts: In September 2011, O'Connor was rear-ended by George while stopped at a railroad crossing in Helena. Both vehicles sustained minor damage; the property damage claim was resolved. O'Connor claimed she was injured in the accident. George admitted liability but disputed the extent of O'Connor's injuries.

O'Connor sued George in May 2013. State Farm, George's insurer, investigated and provided O'Connor with its investigative materials. O'Connor was deposed in April 2014 and was shown the accident photos for the first time, which showed damage to the front of George's vehicle. O'Connor testified George was going 30-40 mph when she hit O'Connor.

O'Connor moved in limine to exclude photos of the damage to George's car, anticipating George would argue that the pictures show relatively little damage and that O'Connor's claim of injury was exaggerated. The district court denied the motion, although agreed to offer a cautionary instruction.

At trial, the parties stipulated to the exhibits. George, the first witness, testified that several of the photos were of damage to her car a year after the collision with O'Connor. When O'Connor testified to George's car having scratches and cracks around the grille after the accident, defense counsel showed her photos of George's damaged car and asked if they showed the damage. He did not mention that the photos were of the accident that occurred one year after the O'Connor accident.

George testified in her case in chief that State Farm had conflated the two accidents and she had tried to resolve this error without success. She said she did not know that photos from the later accident had been given to O'Connor. When she saw the photos the day before trial she told her attorney they were the wrong ones. He did not tell O'Connor and did not withdraw the photos as exhibits.

O'Connor moved for a mistrial on the basis of surprise, and George argued O'Connor would have discovered the mistake had she conducted discovery on the photographs. George's counsel insisted he was obligated to submit all photos, and that

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withdrawing the ones from the later accident never occurred to him. The district court denied the motion for a mistrial, and gave a cautionary instruction to the jury regarding inferences from photos about injuries O'Connor suffered.

Procedural Posture and Holding: The jury returned a verdict for O'Connor, awarding $3,665 in damages – far less than the $17,236 in medical expenses for which O'Connor sought recovery, and less than the amount George's counsel had suggested would be reasonable in his closing. O'Connor moved for a new trial and renewed her motion for a mistrial. The district court denied the motions, calling it a very close question due to defense counsel's actions. O'Connor appeals and the Supreme Court reverses and remands for a new trial.

Reasoning: O'Connor contends that the manipulation of the evidence constituted an irregularity in the proceedings that prejudiced her right to a fair trial. The Court agrees. The district court failed to take into account the impact the incorrect photos had on O'Connor's credibility. Defense counsel used the wrong photos to impugn O'Connor's credibility, and undermined the fairness of this trial to such a degree that a new trial is the only remedy.

Justice Baker's Dissent: Justice Baker agrees with the majority's assessment of defense counsel's conduct in this case, but would afford more deference to the district court's determination that the misconduct did not prejudice O'Connor's case. She would affirm.

State v. Northcutt

State v. Northcutt, 2015 MT 267 (Sept. 8, 2015) (Baker, J.; McKinnon, J., concurring) (7-0, affirmed)

Issue: Whether the district court violated Northcutt's right to be present and right to a public trial by asking the jury about the status of its deliberations without the defendant and the public present.

Short Answer: No. *Affirmed*

Facts: The state charged Northcutt with three counts of assaulting a peace officer and one count of aggravated animal cruelty. On the third day of trial, the jury began deliberating around 4:30 p.m. At around 5:30 p.m., the jury sent a note to the court asking to see one of the demonstrative exhibits, which the court and the parties agreed to supply. The jury sent a second note around 7:30 p.m. asking for a copy of the trial transcript, and the court sent a note back saying it could not oblige that request. At about 8:30 p.m., the jury reached a verdict finding Northcutt guilty of three counts of assault on a peace officer and not guilty of aggravated animal cruelty.

At some point between the first note and the verdict, the district court judge approached the jury room and inquired of the jury whether they would reach a verdict that night. The jurors nodded in affirmation. Northcutt was not present, nor were his counsel, the prosecutor and the court reporter.

Procedural Posture and Holding: Northcutt timely moved for a new trial based on the judge's contact with the jury. He submitted affidavits from two jurors, one of whom stated the interaction felt like an instruction to complete out deliberations that evening. The state submitted affidavits from two bailiffs. The district court denied Northcutt's motion, and he appeals. The Supreme Court affirms.

Reasoning: A reversible violation of a criminal defendant's right to be present during criminal proceedings occurs when the defendant is excluded from a critical stage of his prosecution, and is prejudiced as a result. Additionally, a criminal defendant has the right to a public trial. The Court reversed a jury verdict after a district judge, without the defendant or his counsel present, entered the jury room during deliberations and no record existed of what transpired, holding that "absent a contemporaneous, personal, knowing, voluntary, intelligent and on-the-record waiver by the defendant, if a judge enters the jury room while the jury is present . . . reversal will be automatic." Tapson. Here, four witnesses testified as to what occurred, and all were in substantial agreement. Therefore, reversal is not automatic, but depends on the facts in the record and the rights Northcutt asserts.

The district court erred in holding the jurors' affidavits were inadmissible. M.R. Evid. 606(b)(2).

The Court reaffirms that "the jury room door must remain closed to judges." Matt, ¶ 16. The interaction between Judge Tucker and the jury was improper, and Northcutt's right to be present was violated. However, the judge's interaction with the jury was very brief and the error is not reversible.

The scope, duration and contact of the closure of Northcutt's trial to the public lead the Court to conclude the closure did not impair the fairness of Northcutt's trial.

Justice McKinnon's Concurrence (joined by Justice Rice): Justice McKinnon does not agree "that an ex parte communication between a judge and a jury about what the jury would like for dinner and whether they wished to deliberate into the evening constitutes a critical stage of the proceeding." ¶ 24. Justice McKinnon asserts that absence from a critical stage of the proceeding is intolerable and reversible error." ¶ 25. However, she believes the Court must consider not only the stage of the proceedings but what actually occurred, and "[t]o the extent our analysis fails to apply such a framework to a right to presence claim, I disagree." Id. To the extent the communication between the judge and the jury is administrative, it is not a critical stage of the proceeding, and Northcutt had no right to be present.

Justice McKinnon would not evaluate Northcutt's right to a public trial claim except to indicate that the right does not extend to allowing members of the public to be present outside the jury room during deliberations.

Marriage of Clark

Marriage of Clark, 2015 MT 263 (Sept. 8, 2015) (Baker, J.) (5-0, affirmed and reversed)

Issue: (1) Whether the district court abused its discretion in ordering Gordon to make an equalization payment within 120 days or be forced to sell or transfer the ranch; (2) whether the district court abused its discretion in failing to consider tax liabilities associated with selling the ranch; and (3) whether the district court erred in its valuation of the ranch.

Short Answer: (1) No; (2) yes; and (3) no. *Affirmed (1 and 3) and reversed (2) and remanded*

Facts: Gordon and Nancy married in 1996 and separated in

2012. No children were born to the marriage. Nancy entered the marriage with property on the Stillwater River (the river house) and Gordon entered the marriage with ranch property. The parties put both properties under joint title upon their marriage.

After the parties separated, Nancy moved for temporary maintenance and the district court ordered Gordon to pay $2,800 a month until the final decree unless the river house sold first. Gordon made payments from Nov. 2012-Feb. 2013 and then stopped. He also stopped making mortgage payments on the ranch in early 2012, sending the property into foreclosure. The parties sold part of the ranch and used the proceeds to bring the mortgage current in 2012, but Gordon again stopped making payments and the ranch went into foreclosure a second time.

The river house sold in early 2013, and the district court allowed Nancy to withdraw her temporary maintenance from those proceeds. At the time of the final decree, the district court estimated $289,681.23 remained from the river house sale proceeds.

The parties presented conflicting evidence about the ranch's value. Neither party presented evidence about the tax implications of selling the ranch.

Procedural Posture and Holding: The court valued the ranch at $2.45 million, and the marital estate at $2.6 million. It awarded the ranch and its debt to Gordon. It awarded $955,298 to Nancy, about 37% of the marital estate, and required Gordon to make an equalization payment of $650,000 to Nancy within 120 days of the order, or sell the ranch and make the payment from the proceeds. If Gordon did not cooperate with the ranch sale, the court ordered the property to transfer solely to Nancy's name so that she could handle the sale. Gordon made post-trial motions, which the district court denied without explanation. Gordon appeals, and the Supreme Court affirms in part and reverses in part.

Reasoning: (1) Whether the structure of an equalization payment is error depends upon the specific facts of a case. Nancy argues the 120-day limit was justified due to Gordon's lack of cooperation throughout the dissolution. The Court agrees the equalization order was not an abuse of discretion.

(2) When equitably apportioning a marital estate, the district court must take into account "liabilities" of the estate. § 40-4-202(1), MCA. The failure to consider the tax consequences of a taxable event precipitating concrete and immediate tax liability is an abuse of discretion. Here, the surrounding circumstances and the court's order implicate a significant taxable event. The 120-day deadline was imposed sua sponte by the district court, and Gordon filed a post-trial motion raising his argument about taxes for the first time. "In the unusual and particular circumstances of this case, we hold Gordon did not waive his right to raise the tax argument on appeal." ¶ 21. The district court's failure to consider the tax liabilities of selling the ranch was an abuse of discretion.

(3) The district court's valuation of the ranch is supported by substantial evidence in the record.

Montana Interventional and Diagnostic Radiology Specialists v. St. Peter's Hospital

Montana Interventional and Diagnostic Radiology Specialists, PLLC v. St. Peter's Hospital, 2015 MT 258 (Sept. 1, 2015) (Cotter, J.) (5-0, reversed)

Issue: Whether the district court erred in granting the hospital's motion for judgment on the pleadings based on the primary complaint being barred by the statute of limitations.

Short Answer: Yes. Reversed and remanded

Facts: MIDRS and St. Peter's worked together for many years, with MIDRS physicians providing radiological services through the hospital. Before 2006, St. Peter's had an "open" radiology department, meaning the hospital medical staff granted privileges to qualified non-employee radiologists to interpret images taken at the hospital.

In 2005, MIDRS announced its intent to open a separate imaging facility in Helena, which would compete with St. Peter's. In February 2006, the parties entered into a three-year contract under which MIDRS would provide exclusive services to the hospital and refrain from opening a new facility while the contract was in effect. In October 2008, MIDRS submitted a proposal to extend the expiring contract. St. Peter's did not submit the proposal to its medical staff, instead choosing to enter into exclusive contracts with other providers during 2009-2010.

After the MIDRS contract expired, the hospital revoked the MIDRS doctors' credentials due to their alleged failure to abide by the Mammography Quality Standards Act guidelines. MIDRS radiologists were not allowed to practice at the hospital after February 2009.

MIDRS doctors applied again for staff privileges in 2011, as the exclusive contract between the hospital and another radiology group was expiring, but were told the hospital had closed its radiology department and would be staffed only by hospital personnel.

MIDRS filed a complaint against the hospital in August 2012, seeking declaratory and injunctive relief, and damages for unreasonable restraint of trade in violation of the UTPA, and intentional interference with prospective advantage. On Aug. 6, 2012, MIDRS opened the Helena Imaging Center, a standalone facility offering a full range of radiological services.

The hospital answered, asserting affirmative defenses and counterclaiming for breach of contract. MIDRS answered the counterclaim, and counterclaimed for breach of contract, breach of the implied covenant of good faith, and seeking declaratory judgment.

St. Peter's moved for judgment on the pleadings on June 20, 2013, arguing MIDRS failed to file its claim under the UTPA within the two-year statute of limitations, and its claim for intentional interference within the three-year statute of limitations. It contended all elements of MIDRS' claims accrued in February 2009 when the exclusive contract between St. Peter's and MIDRS expired. MIDRS responded that its claims were premised on the July 2011 closure of the radiology department.

Procedural Posture Holding: Following a hearing, the

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Doctors as employees

What attorneys should know when advising hospitals and/or physicians on terms of contracts

By Megan McCrae

Health care reform and reimbursement concerns have resulted in hospitals increasingly employing physicians. Attorneys who advise physicians and/or hospitals on physician employment agreements should be familiar with many unique health care related issues. This article focuses on some, but certainly not all, of these issues.

The Stark Law

Compensation that hospitals pay to physicians is regulated by the federal law prohibiting physician self-referrals (commonly known as the "Stark Law") and the federal Anti-Kickback Statute. Before drafting or reviewing a physician employment agreement, it is imperative to become familiar with these laws. Physician compensation and recruitment activities have come under serious scrutiny by the federal government in recent years. In 2014, a hospital agreed to pay the government $85 million for improperly compensating six employed medical oncologists,[1] and in July, 2015, a federal appeals court upheld a $237 million verdict against a hospital for improperly compensating nineteen part-time employed physicians.[2] These cases illustrate the increased focus by the federal government on what it considers to be excessive compensation provided to physician employees of hospitals and the need to be proficient in physician employment matters.

The Stark Law prohibits a **physician** from making a **referral** for a **designated health service** to an **entity** in which he or she (or an immediate family member[3]) has a **financial relationship,** unless the arrangement is covered

1 *United States v. Halifax Hosp. Med. Ctr.*, No. 6:09-CV-1002-ORL-31, 2013 WL 6017329 (M.D. Fla. Nov. 13, 2013).

2 *U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364 (4th Cir. 2015).

3 An immediate family member includes a husband or wife; birth or adoptive parent, child, or sibling; stepparent, stepchild, stepbrother, or stepsister; father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; grandparent or grandchild; and spouse of a grandparent or grandchild.

by an exception.[4]

The definition of a "physician" includes physicians (medical doctors and doctors of osteopathic medicine), chiropractors. podiatrists, optometrists, and dentists.

A "referral" includes a request by a physician for, or ordering of, or certifying or recertifying of the need for, any "designated health service" payable under Medicare.

"Designated health services" ("DHS") include, among other things, inpatient and outpatient hospital services, but do not include services personally performed by a physician.

An "entity" includes a physician's sole practice, group practice, or any corporation, LLC, foundation, nonprofit corporation or unincorporated association that furnishes DHS.

A "financial relationship" is broadly defined as a direct or indirect ownership or investment interest in an entity that furnishes DHS, or a direct or indirect compensation arrangement with an entity that furnishes DHS. In terms of physician-hospital employment arrangements, employment agreements are considered compensation arrangements under the Stark Law.

The Stark Law is not an intent-based statute, meaning liability attaches regardless of whether or not a physician or hospital intended to violate the law.

The applicable Stark exception for physicians employed by hospitals is the employment exception, which provides that the amount of remuneration a hospital pays to an employed physician must be (i) consistent with fair market value; (ii) not determined in a manner that takes into account the volume or value of any referrals; and (iii) is commercially reasonable. The employment exception does not preclude a hospital from paying physicians a productivity bonus so long as the bonus is based on services personally performed by the physician.

(i) Fair Market Value

The Stark Law defines fair market value as the value in an arm's length transaction, consistent with general market value. General market value means the price an asset would bring as a result of bona fide bargaining between well-informed parties to the contract who are not otherwise in a position to generate business for the other party. The safest approach for determining fair market value is to seek an independent valuation consultant to perform a compensation review. Physician compensation surveys such as MGMA, AGMA, and Sullivan Cotter are also frequently used to assess fair market value.

(ii) Volume or Value of Referrals

Under the Stark Law physicians can only be compensated for those services that they "personally perform", which excludes compensation for ancillary services such as imaging and laboratory services, as well as profit derived from a hospital's facility fees. When a hospital bills for a physician's professional services the hospital also bills a corresponding facility fee, which the federal government considers a referral. A good example of this is the *Halifax* case.[5] In *Halifax*, six medical oncologists employed by Halifax Hospital entered into employment agreements with the hospital under which they were paid a salary and a bonus. The bonuses were paid out of an incentive compensation pool that was funded by 15 percent of the operating margin of the hospital's oncology program, which included both expenses and revenues associated with facility fees, the administration of chemotherapy and other services the medical oncologists did not personally perform. The incentive compensation pool was divided among the medical oncologists based on each physician's personally performed services. However, the government argued — and the court agreed — that because the incentive compensation pool was equal to 15 percent of the operating margin of the oncology program, revenue from the oncologists' referrals (i.e. chemotherapy administration and facility fees) would flow into the pool, and additional referrals would be expected to increase the pool's size, which in turn would increase the size of each medical oncologist's incentive bonus, in violation of the Stark Law. The violation cost the hospital $85 million.

(iii) Commercial Reasonableness

Commercial reasonableness is determined based on whether a prudent employer would enter into an employment arrangement on the same terms and conditions even if it received no referrals from the employee. Commercial reasonableness often depends on the particular circumstances of the employer. For example, a critical access hospital in northern Montana may need to pay a physician more than a hospital located in an urban area to induce the physician to relocate his or her practice to the hospital's service area. Other reasons such as adding or expanding a service line, expanding the service area, or bringing unique skills to a community may support commercial reasonableness apart from referrals.

Anti-Kickback Statute

The AKS is a civil and criminal statute that prohibits paying, offering, soliciting, or receiving remuneration, directly or indirectly, to induce referrals or services of federal health care program business, unless a safe harbor applies.6 The AKS safe harbor for employment arrangements is broader than the Stark Law's employment exception and provides that "remuneration" does not include any compensation paid by an employer to an employee, who has a bona fide employment relationship with the employer. Unlike the Stark Law, if an arrangement does not satisfy a particular safe harbor it is not presumed to be a violation of the statute because a party must knowingly and willfully engage in the prohibited conduct.

Compensation

Hospitals usually compensate physicians using a guaranteed salary, production-based payment methodology, or a combination of the two. Production-based payments are typically calculated by assigning a dollar amount to each worked Relative Value Unit ("wRVU") the physician produces. The dollar number for a given wRVU is generally calculated by a fair market consultant retained by the hospital. Hospitals often prefer to pay physicians on a wRVU basis because it easily fixes fair market value, incentivizes physicians to increase their productivity and allows physicians who are more entrepreneurial to increase their income if they are willing to forgo a guaranteed

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4 42 U.S.C. § 1395nn.

5 *United States v. Halifax Hosp. Med. Ctr.,* 2013 WL 6017329 (M.D. Fla. Nov. 13, 2013).

6 42 U.S.C. § 1320a-7b.

Physicians, from previous page

base salary.

In addition to a base compensation, hospitals may offer production-based or quality bonuses. For example, if a physician receives a guaranteed salary, the hospital may offer the physician an incentive bonus if the physician's production exceeds a certain number of wRVUs on a quarterly or annual basis, or may offer a quality bonus if certain quality and/or citizenship metrics are achieved, such as medical staff meeting attendance, timely charting, or other patient-centered criteria.[7]

In terms of benefits, it is fairly standard for a hospital to pay for a physician's membership in professional organizations, medical and DEA licensure, continuing education, and to provide such other benefits, including retirement benefits, as other similarly situated hospital-employed physicians receive.

Malpractice Insurance

During the term of the employment contract, the physician must have either occurrence-based or claims-made malpractice insurance coverage. Occurrence-based policies cover malpractice that occurs during the policy term, regardless of when the claim is made. Claims-made policies only cover malpractice claims that are made during the policy period.

The employment contract should describe which party is responsible for paying the cost of malpractice insurance. In an employment arrangement, the employer will usually cover the cost of the physician's malpractice coverage. In Montana, policies typically have limits of $1 million per claim and $3 million in the aggregate per policy year, but this may vary depending on the physician's specialty.

The employment contract should also address which party is responsible for paying the cost of an extended reporting endorsement or "tail coverage", or "prior acts" coverage when the physician joins or departs hospital employment. Tail coverage is necessary after a physician terminates his or her claims made coverage with an insurance carrier. Tail coverage is not necessary if the physician had occurrence based coverage during the term of the employment contract. Tail coverage is usually a one-time payment which can cost anywhere from 60 percent to 300 percent of the physician's annual premium under the expiring claims made policy, and extends the protection of the claims made policy to cover claims made in the future for acts that occurred during the expired policy's term. Prior acts coverage is coverage offered by a new insurance carrier with a retroactive date on or prior to the date the physician becomes employed by the hospital or the date the physician departs from hospital employment.

Term and Termination

A standard term of employment for physicians is two to three years. A valuation consultant usually won't opine on a term longer than three years; provided, however, the term may be longer than three years if there is a fair market value analysis done no later than the end of year two or three.

In Montana, most physician employment agreements may only be terminated during the physician's probationary period, or for cause. Under Montana's Wrongful Discharge from Employment Act ("WDEA"), if a written employment contract contains a without cause (for any reason or no reason) termination provision, the contract may become subject to the WDEA because it is not considered "a written contract of employment for a specific term".[8] Common events of termination for cause in physician employment agreements include the following:

- The physician's license to practice medicine is suspended, revoked or canceled;
- The physician fails to remain eligible for professional liability coverage, or professional liability coverage is inordinately expensive;
- The physician is convicted of or enters a plea of guilty or nolo contendere to any felony or misdemeanor charge related to the delivery of health care services;
- The physician's death or disability;
- The physician fails to secure or maintain medical staff membership and hospital privileges at the employing hospital or any other hospital requested by the employing hospital;
- The physician has his or her federal or state registration to prescribe controlled substances suspended, revoked or materially restricted; and
- The physician is suspended, excluded, debarred, or sanctioned by any federal- or state- sponsored health care program. Before entering into the employment contract, the hospital must search the Office of Inspector General's List of Excluded Individuals/Entities to ensure the physician has not been excluded from a federal health care program. An excluded individual or entity who submits a claim for reimbursement to a federal health care program, or causes such a claim to be submitted, may be subject to a Civil Monetary Penalty of up to $10,000 for each item or service furnished during the period that the person or entity was excluded.[9]

Call Coverage

Call coverage obligations are a significant concern for many physicians and should be addressed in the employment contract. If you're representing a physician, consider including a provision that the physician will take call on an equal basis with other similarly situated employed physicians. If the physician is compensated for taking call, the compensation may be a flat fee for each shift the physician is on call or a wRVU payment for any services provided while the physician is on call.

Specific Duties

The employment contract should outline the professional and administrative duties the physician will be expected to perform, such as the timeframe for completing medical records,

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7 As an example, a quality metric may be a requirement that all patients be screened for tobacco use at least once within 24 months AND receive tobacco cessation counseling intervention if identified as a tobacco user.

8 *See Arnold v. Yellowstone Mountain Club, LLC*, 2004 MT 284, 323 Mont. 295, 100 P.3d 137.

9 42 U.S.C. § 1320a-7a.

Library users have a lot to be thankful for

By Lisa Mecklenberg Jackson

When Thanksgiving rolls around each November, do you take the time to make a list of things you are thankful for? I attempt to do this each year in my personal life and it seems like a great concept to carry over into my work life. Because I know you are all very busy, and because we at the State Law Library are very thankful for you, our fine state legal practitioners, allow me to make a list for you of things you can be thankful for at the State Law Library.

Video streaming. Watch one of the law library's live CLEs in real time or, if you can't make it to Helena for an oral argument of the Montana Supreme Court, you can still watch and listen via the court's live Webstream at http://stream.vision.net/MT-gov/. See the Court's oral argument schedule at http://courts.mt.gov/oral_cal for the argument schedule and then click on the Webstream link at the designated time for the oral argument to begin. Try it out on Wednesday, Nov. 4 at 9:30 a.m. when the court holds its next oral argument. Montana Cannabis Industry Association, March Matthews, Shelly Yeager, Jesse Rumble, John Stowers, M.D., Point Hatfield, and Charlie Hamp, Plaintiffs, Appellees and Cross-Appellants, v. State of Montana, Defendant, Appellant and Cross-Appellee. In this action, the Montana Cannabis Industry Association (MCIA) challenges the 2011 Montana Medical Marijuana Act. The State of Montana appeals the First Judicial District Court's rulings that three provisions of the Act are unconstitutional: the prohibition of commercial sales of marijuana, the provision subjecting physicians who certify more than 25 patients per year to review by the Board of Medical Examiners, and the ban on advertising by medical marijuana providers. MCIA cross-appeals the court's decisions that the Act's ban on access to medical marijuana by probationers and its authorization of unannounced inspections of providers' premises pass constitutional muster.

No rotten links. Thankfully, links to cited material in Montana Supreme Court Opinions will no longer become "rotten." How often have you gone to click on Internet materials, perhaps mentioned in a footnote, and you get the dreaded "404 not found" message? That will be a thing of the past for our high court opinions. All Montana Supreme Court Law Clerks are now using perma.cc, a service that allows users to create citation links that will never break by permanently archiving the materials. When a user creates a Perma.cc link, Perma.cc archives a copy of the referenced content, and generates a link to an unalterable hosted instance of the site. Regardless of what may happen to the original source, if the link is later published by a journal using the Perma.cc service, the archived version will always be available through the Perma.cc link. If there are any district court judges or law clerks out there who would like to get set up with perma.cc for your own court opinions, just contact me at the State Law Library.

High-speed scanner. Have you been in to try out our new high-speed digital scanner yet? Scan to your email, phone, or flash drive for free. Makes copying those multi-page legislative histories not quite so painful. Everyone who has tried it is very thankful for it!

Legislative histories. Speaking of those, you are going to be super thankful if you discover the legislative history you have to put together has already been compiled! We have hundreds of legislative histories already put together—saving you hours of time. E-mail mtlawlibrary@mt.gov to see if the history you need has already been done.

Cheaper LEXIS. The State Law Library recently went through an RFP process for statewide legal research services. The RFP was awarded to LEXIS. If you are part of a state, county, or city government, have not yet joined the statewide contract, and would like to access LEXIS at cheaper rates than you can attain as a single entity, please contact me. I'd be happy to discuss the statewide contract with you. We'd be very thankful to have you on board! (Note: State Bar of Montana members get access to Fastcase legal research as a free member benefit.)

Here's one more pretty nifty thing to be thankful for. I hope you know you can search the law library catalog from your desk for materials of interest to you. Now, once you find something to your liking, you can put a **hold on the materials** simply by clicking a "hold" button. This generates a report to staff to pull the volume and we'll either have it waiting for you to pick up in Helena or we'll send it your way. If you don't yet have a law **library card**, you'll need to get one to put items on hold. It's free, easy, and thankfully, quick!

And finally, perhaps you will be thankful for these **recent additions** to the State Law Library collection:

American Law 101: An Easy Primer on the U.S. Legal System. Jasper Kim, 2015.

The Environmental Law Sourcebook. The ABA, 2014.

Judging Statutes. Robert A. Katzmann, 2014.

Laughing at the Gods: Great Judges and How They Made the Common Law. Allan C. Hutchinson, 2012.

On Democracy's Doorstep. The Inside Story How the Supreme Court Brought "One Person, One Vote" to the United States." J. Douglas Smith, 2014.

Pocket Copyright Guide for Publishers, Laura N. Gasaway, 2014.

A Practitioner's Guide to Real Estate and Wind Energy Project Development. Kathleen K. Law, 2015.

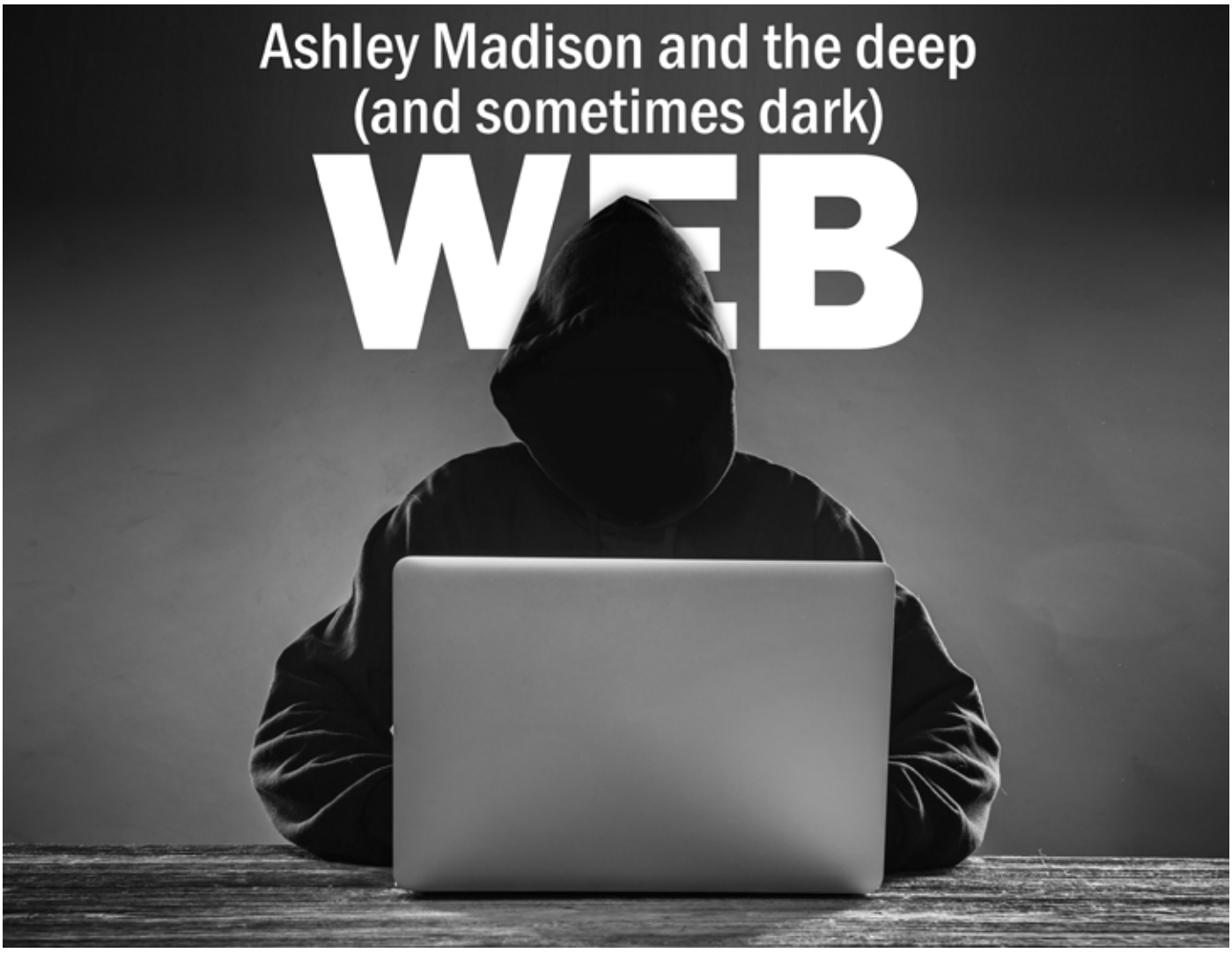
Reinventing the Practice of Law. Liz Herrera, ed., 2014.

*Storytelling for Lawyer*s. Philip N. Meyer, 2014.

Uncertain Justice: The Roberts Court and the Constitution. Laurence Tribe and Joshua Matz, 2014.

If you need any legal research assistance or materials, please do not hesitate to contact the State Law Library by calling 444-3660 or e-mailing mtlawlibrary@mt.gov. We are so thankful for you—and we love to help!

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



Dark corners of Internet a mix of legitimate, seamy

By Sharon D. Nelson, Esq. and John W. Simek
Sensei Enterprises Inc.

There are lawyers – mostly family and criminal defense lawyers – who know at least a little about the Deep Web and the Dark Web. But the average lawyer? Not so much. In fact, after the Ashley Madison breach, a lot of family law colleagues began asking us questions about the Deep Web and the Dark Web – where the full steamy contents of the Ashley Madison breach were published in many places. Most had no clue that there was any distinction between the Deep Web and the Dark Web.

So what is the Deep Web? Think of the web we search (via Google or other search engines) as an iceberg. Conventional browsers only index about 4 percent of the web – that's the top of the iceberg. Everything beneath the waters is the Deep Web – 96 percent of the Internet content. That content is deliberately kept away from conventional search engines, via encryption and masked IP addresses – and accessible only by special web browsers.

Much of the Deep Web is perfectly legitimate. Many privacy advocates are there, wishing to operate without being tracked. Journalists are often there, generally concerned about government prying. You can also find whistleblowing sites. Some of it is also dynamically generated web pages or forums which require registration. We're not sure how much of the Deep Web is also the Dark Web, though experts say it is a small percentage. The Dark Web contains the seamy places where drugs and guns are sold, human trafficking occurs, criminals offer their

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First impressions make a big difference in attorneys' relationships with clients

By Mark Bassingthwaite
ALPS Risk Manager

Like you, I've been a consumer for years and the older I get the more I've come to recognize the impact of first impressions. They really do matter. I can only speak for me but these days if I am accosted by an aggressive salesperson when first entering a store, I often leave and rarely return. If I'm shopping online and a website fails to load properly because it's outdated or it's simply hard to navigate, I'm gone. If a grocery store is unclean, I will walk out and shop elsewhere. Heck, everyone knows that you can judge the quality of the food an unfamiliar restaurant serves by the number and types of vehicles in the parking lot don't they? First impressions matter and I don't think I'm alone in believing this. If you agree, I would ask if you've taken steps to set the right impression at your own firm, because it's certainly going to be easier to establish an effective and trusting attorney-client relationship if a potential new client's first impression is a positive one.


Mark Bassingthwaite

Consider this. I have walked into more than a firm or two for the first time where I was placed in an unkempt reception area or an absolutely cluttered and dirty conference room featuring broken furniture. Some of these spaces looked more like old storage rooms than the client areas that they were. I have also been kept waiting for 30 to 60 minutes past my appointment time without explanation and on several occasions even forgotten about entirely. I have been the recipient of cold greetings by staff and treated by reception as if I was a bother. Such experiences can't help but result in setting an impression. That's normal. Now put yourself in my shoes. What might your response to any of the above experiences have been? If your own clients were to have a similar experience, what might their response be? I can share my initial response was to begin to question the business and even legal acumen of the attorneys who practiced in these firms. Certainly my initial opinions were open to being changed but it was now going to be an uphill climb.

First impressions are made at first contact, be it calling for an appointment, visiting your webpage, or walking through your front door. They are often set before you even have a chance to meet with a prospective client and it's all about presentation and experience. Is there a welcoming greeting? Is the space tidy and inviting? Is your website user friendly and functional on multiple platforms to include mobile devices? With all this in mind, I offer the following as ideas to help get you started in thinking about what you can do to try and make certain you're setting the right impression.

■ Train staff to greet every individual as soon as possible, certainly within a minute of their entering the office, and remember that even a sales representative who is turned away today may be a prospective client tomorrow. If your receptionist happens to be helping someone else, have them give a simple "Hello, I will be with you in a moment" in order to acknowledge the individual's presence.

■ Never allow confidential or personal conversations to be overheard by others, particularly in the reception area. If conversations from an employee break area, a conference room, or attorney offices can be heard in reception consider some type of sound proofing. Periodically remind staff and attorneys that confidential or personal matters should never be discussed within earshot of any visitors. In fact, give staff permission to briefly interrupt a client meeting to perhaps shut a door if voices can be overheard in reception or by visitors elsewhere in the office.

■ Do not allow visitors to view computer screens. The receptionist's computer screen will often have confidential information on it and thus should never be visible to anyone coming into the office.

■ Occasionally check the waiting area during the day. This is an especially good customer service technique. If anyone sitting there seems bored or frustrated and has been in the reception area less than 10 minutes, there's a problem. The space should be designed to make the wait as pleasant as possible. Remember they don't like having to wait for you any more than you would like having to wait for them if you were in their office. You might even go sit in your own reception area for 10 or 15 minutes just to see how it feels. For example, does the reading material provided fit the clientele? While Scientific American is probably a great choice for an intellectual property practice, it won't win any points from clients in a family law practice. If families use your waiting area, make sure there are materials suitable for children. All magazines and newspapers should be current as opposed to displaying outdated ones that have a home address label still attached.

■ Keep the reception area clean and orderly because an unkempt reception area is too easily seen as a reflection of the quality of service offered by the firm. Before the attorney-client relationship has even started, a potential new client may already begin to question whether the attorney has enough time to appropriately deal with their matter simply because it appears the attorney already doesn't have enough time to pick up the place.

■ In a similar vein, do not minimize the importance of

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Forums seek solutions to access to justice barriers

By Justin Franz
Flathead Beacon

The Access to Justice Forum series, an effort of the Montana Supreme Court Access to Justice Commission with the support of other access to justice entities, kicked off in Kalispell Oct. 21.

Montana needs to make its justice system more accessible to all people, especially those who live below the poverty line, according to a Montana State Supreme Court justice.

Justice James Jeremiah Shea and other state and local legal officials participated in the Access to Justice Forum at the Flathead Valley Community College. The listening session featured presentations from various stakeholders in the region and was the first of a series of community meetings across the state hosted by the Montana State Supreme Court's Access to Justice Commission.

"This is a complex issue that does not have a simple solution," Shea said. "We're a country of laws, but there are folks for whom the court room doors are closed for whatever reason, and we need to do what we can to provide that access."

Included on the listening panel were District Court Judge Heidi Ulbricht, Justice of the Peace Daniel Wilson, Flathead County Clerk of Court Peg Allison, state Sen. Bob Keenan, chief legal counsel for the office of the governor Andy Huff, and attorneys and past presidents of the State Bar of Montana Don Murray and Randy Snyder.

Alison Paul, executive director of the Montana Legal Services Association, which is a federally and privately funded program that provides free legal assistance in civil cases for low-income people, said in 2014 more than 7,000 people in Montana sought help from the association, including more than 450 in Flathead County. However, Paul said the association was only able to take on 62 new cases.

"We are under resourced because the federal government gives us money based on population, and since Montana has such a small population we get a smaller piece of the pie," Paul said. "We use our scarce resources to their maximum ability… But there just isn't enough."

Access to Justice Forum Series

- Great Falls, Wednesday, Nov. 28 — Great Falls College MSU. Contact: Matt Dale, mdal@mt.gov, 406-444-1907
- Billings, Wednesday, March 16, 2016 — site TBA. Contact: Patty Fain, pfain@mt.gov, 406-794-7824
- Missoula, Wednesday, April 13, 2016 — site TBA. Contact: Lisa Mecklenberg Jackson
- Bozeman, Wednesday, May 18, 2016 — site TBA. Contact: Jennifer Brandon, jbrandon@mt.gov, 406-582-2165
- Butte, Wednesday, Sept. 21, 2016 — site TBA. Contact: Michele Robinson, michele.robinson45@gmail.com
- Helena, Wednesday, Oct. 19, 2016 — site TBA. Contact Melanie Reynolds, 406-457-8910, mreynolds@lccountymt.gov

Hilary Shaw, executive director of the Abbie Shelter, said there are not enough resources for victims of abuse to navigate the legal system. She added that other advocates have noticed that people accused of partner or family member abuse are rarely prosecuted in this area.

"It is one of the most common calls – one in four women will be impacted by abuse in their life – and it's a huge problem but it is rarely prosecuted," Shaw said. "There should be accountability for offenders. We see the lack of prosecution as an extreme barrier to justice and safety."

Another population that rarely gets adequate legal representation is seniors, according Susan Kunda, director of the Flathead County Agency on Aging. She said some seniors are victimized and there are few people in the legal system who can stand up to help them.

The forums will be held in seven locations across the state over the next year. Shea said the information gathered at the listening sessions would be used to make recommendations to the 2017 Legislature in hopes of resolving some of the issues.

The next forum in the series is scheduled for Wednesday, Nov. 28 at Great Falls College MSU.

> *This is a complex issue that does not have a simple solution. We are a country of laws, but there are folks for whom the courtroom doors are closed for whatever reason, and we need to do what we can to provide the access.*
>
> Justice James Jeremiah Shea

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Court amends several rules within Rules for Lawyer Disciplinary Enforcement

Summary of Oct. 13 order (AF 06-0628)

The Montana Supreme Court on Oct. 13 issued an order substantially amending several rules within the Rules for Lawyer Disciplinary Enforcement.

The Office of Disciplinary Counsel petitioned the court for the rule changes in February. The court received three public comments during the comment period. The most substantial of the comments was from attorneys Michael F. McMahon and Timothy B. Strauch, both of whom frequently represent lawyers in disciplinary cases.

McMahon and Strauch raised concerns about some of the proposed rule changes on double jeopardy grounds. Specifically, they objected to a provision that would allow ODC to appeal a review panel's decision to deny ODC's request to file a formal complaint. They cited the court's decision in the recent David McLean disbarment case in which ODC objected and the court agreed that a respondent may not bypass the Commission on Practice rather than applying directly to the Supreme Court.

The court agreed with the objection and struck ODC's request for review, despite an ODC brief in response arguing that courts have uniformly concluded that sanctions imposed for attorney misconduct are not punishment for purposes of double jeopardy analysis. The court, however, let stand changes to Rule 16 — Review by the Supreme Court After Contested Case Hearing — over McMahon and Strauch's objections on double jeopardy grounds.

McMahon and Strauch also raised concerns about changes to Rule 19B on investigative subpoenas, arguing that the power ODC requested would be similar to the rights of a criminal prosecutor under Montana statute with none of the same constitutional protections afforded by the statute. The suggested that if ODC were given that right, the rule should contain language requiring the commission to find probable cause upon an affidavit by ODC.

The court approved of most of the other changes requested by ODC and ordered that amended versions of Rules 7, 11, 12, 14, 16, 18 (abrogated), 19, 22, 25, 27, 28, and 29 of the Rules for Lawyer Disciplinary Enforcement be adopted effective Jan. 1, 2016.

A copy of the order with the new rules attached is posted at montanabar.org under "Recent Supreme Court Orders."

To read the comments and see previous versions of the amended rules, visit https://supremecourtdocket.mt.gov/activecase.jsp and search for Case Number AF 06-0628.

Environmental law students get up-close look at Blackfoot Valley community-based conservation

Environmental law students at the Alexander Blewett III School of Law at the University of Motnana had the opportunity to see landscape-scale and community-based conservation in the Blackfoot Valley in October.

The Public Land and Resources Law class and Professor Vicky Dreitz's Habitat Conservation and Management class, from the College of Forestry and Conservation, met with Jim Stone from the Blackfoot Challenge and Greg Neudecker from the U.S. Fish and Wildlife Service.

The groups toured some of the projects that the Blackfoot Challenge has implemented with help from Partnerships for Fish and Wildlife, like restoration of trumpeter swans in the Valley and practical solutions like fencing the transfer station to keep grizzly bears out of trouble and citizens in the community safe.

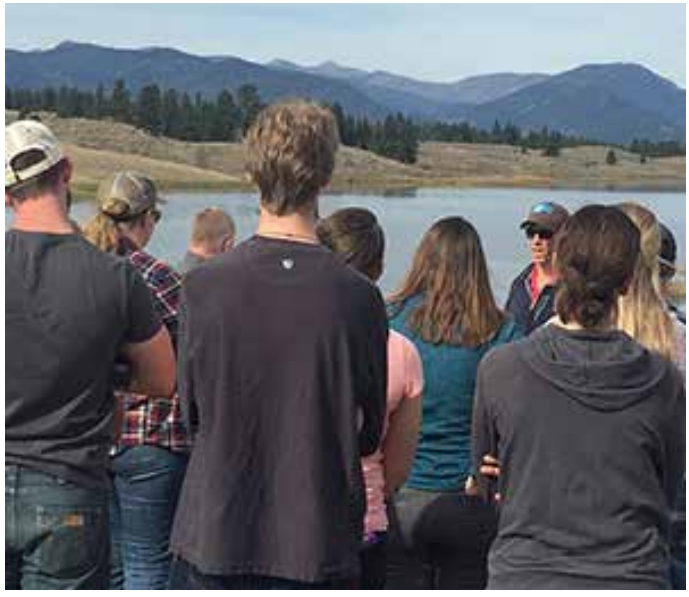

Photo courtesy of Alexander Blewett II School of Law

University of Montana environmental law and forestry students are shown touring a project implemented by Blackfoot Challenge.

Mills to present at Indian Law Conference at Michigan State University College of Law

Professor Monte Mills of the Alexander Blewett III School of Law will present on two panels at the upcoming 12th Annual Indian Law Conference at the Michigan State University College of Law.

Mills

The conference, entitled "Aandaakonige: From the Trilogy to TICA," will take place Nov. 5-6 and will mark the first conference gathering of the Tribal In-house Counsel Association, a national network of attorneys working for Indian tribes. The conference agenda includes a number of leading Indian law scholars and practitioners presenting on a variety of issues, including tort claims in Indian Country, the Indian Child Welfare Act (ICWA), and the 2012 re-authorization of the Violence Against Women Act (VAWA) that recognized expanded tribal criminal jurisdiction.

Mills' presentations will include a session on tribal self-determination and energy development legislation as part of a panel on tribal environmental regulatory structures and an overview of his experiences as director of an in-house tribal legal department as part of an ethics panel for tribal in-house counsel.

Law school offers environmental CLE Nov. 4

The Alexander Blewett II School of Law is offering a free Environmental CLE — Clinic Class on Nov. 4.

The program, titled, "The Public's Rights to Know & Participate," will run from 1:10 to 2:40 p.m. in Room 215 of the law school.

The program will feature an overview of Montana's right to know and participate, 2015 legislative updates, and an overview of federal records laws under the Freedom of Information Act.

Speakers are Mark Phares of the Montana Department of Natural Resources and Conservation, Professor Michelle Bryan, Alan Campbell of the U.S. Forest Service.

Legal Zoom to offer prepaid services in North Carolina after settlement with bar

Legal Zoom in October settled its $10.6 million suit against the North Carolina Bar over the bar's ban on the company's prepaid legal plans. Under the agreement, LegalZoom will be allowed to market its plans for two years or until pending legislation redefining the "practice of law" is enacted, whichever comes first.

LegalZoom had sued the North Carolina State Bar in state and federal courts over its ban on the plans, which the bar characterized as the unlicensed practice of law.

The agreement comes after a lawsuit against the bar filed in federal court in North Carolina in June, seeking $10.6 million in antitrust damages. LegalZoom's suit was based on a U.S. Supreme Court antitrust ruling earlier this year against the state's self-regulating body for dentists over teeth-whitening services offered by non-dentists.

The state bar has battled the company since 2008, after first clearing it to operate there in 2003.

Under the agreement, LegalZoom must vet its documents with North Carolina lawyers, and inform its customers that the blank templates aren't a substitute for in-person advice from an attorney. The bar also agrees to support proposed legislation that would clarify the definition of unauthorized practice of law. Both parties agreed to support legislation permitting interactive legal-help websites that abide by the basic terms of the settlement agreement.

In a statement, LegalZoom's vice president of legal and government affairs, Ken Friedman, said the company is "delighted that the North Carolina State Bar has confirmed LegalZoom's lawful status in North Carolina," and praised bar president Ron Gibson and former president Ron Baker for working to resolve the dispute.

The company is now looking to offer more services to consumers and small businesses, according to a feature in the ABA Journal last year, including routine legal advice using a mix of lawyers and non-lawyers.

LegalZoom already has expanded from online documents and provides prepaid legal service plans in 42 states, according to the company's news release. The company says it plans to launch more services in North Carolina and several other states this year.

Borgmann named ACLU Montana executive director

GREAT FALLS — Attorney Caitlinn Borgmann was named the executive director of the American Civil Liberty Union's Montana chapter in June.

Borgmann, a Missoula native, had been a professor at the City University of New York School of Law, where her scholarship focused on the roles of the courts and the legislatures in protecting constitutional rights.

Borgmann told the Great Falls Tribune that the issues the ACLU will focus on include criminal justice reform, voting rights, lesbian, gay, and bisexual and transgender equality.

She said the organization is also working on a project focusing on civil liberty issues Native Americans face in Montana. She said an advisory group of tribal government officials will raise issues such as criminal justice, health care and voting rights.

A Yale graduate, she received her J.D. from New York University, where she was executive editor of the New York University Law Review. She clerked for Judge Robert P. Patterson, Jr., of the Federal District Court for the Southern District of New York and spent four years as a litigator at Davis Polk & Wardwell.

Borgmann is only the second executive director of the ACLU of Montana, replacing Scott Crichton, who retired this year after 27 years in the position.

"I feel gratified, he left the organization in such amazing shape," she told the Tribune. "Scott himself is a very admired and well-loved person."

"I knew it was a good and strong organization, and I'm excited to be the next leader of it."

Borgmann said she decided as a middle school student to become a public interest lawyer after reading "Inherit the Wind" and "To Kill a Mockingbird."

Caitlin Borgmann

Guides offer help for those managing others'

The Consumer Financial Proection Bureau has created a series of four guides for people who are in charge of managing other people's financial matters.

The guides are tailored to meet the needs of people in four different fiduciary capacities: agents under a power of attorney, court-appointed guardians, trustees, and government fiduciaries (Social Security representative payees and VA fiduciaries).

Each guide contains information on the fiduciary's responsibilities and tips on how to spot financial exploitation and avoid scams. Also, each guide includes a 'Where to go for help' section with a listing of relevant agencies and service providers. For each guide we provide links to download the guide as a PDF, which is best for web viewing, or to order a printed copy through GSA.

Because people's powers and duties as a fiduciary vary from state to state, we also created six sets of state-specific Managing Someone Else's Money guides. These state guides provide information about the state's unique laws and practices, as well state-specific resources. To make it easy for legal and aging experts in other states to adapt the guides for their states, the bureau has developed a set of tips and templates for creating state-specific versions. The tips summarize what we learned by collaborating with lawyers and other professionals to produce several state-specific versions.

To download a free copy of one of the guides or order free printed copies, go to www.consumerfinance.gov/managing-someone-elses-money.

Summaries, from page 13

district court determined MIDRS' claims accrued in February 2009 and dismissed MIDRS' complaint. Because the counterclaims were not dismissed, MIDRS moved for certification under Rule 54(b), which the district court granted. MIDRS appeals, and the Supreme Court reverses.

Reasoning: Judgment on the pleadings is appropriate only where all allegations of material fact are admitted or not controverted in the pleadings, and only questions of law remain to be decided by the court. Under the appropriate standard of review, the court was required to assume that MIDRS's well-pleaded factual allegations were true and the hospital's contravening assertions were false.

The district court determined that MIDRS alleged the cause of its harm was the denial of staff privileges in 2009, and that the complaint was therefore untimely. MIDRS contends the district court contradicted this in its order on certification, acknowledging there that "[t]he primary complaint alleged facts arising out of the Hospital's closing of the radiology department in July 2011." ¶ 15. MIDRS maintains that the elements of its claims did not and could not accrue until 2011 when the hospital closed its radiology department. It was at this point, MIDRS argues, that the hospital began exercising monopoly power, creating the horizontal restraint on trade that forms the basis of MIDRS' antitrust and UTPA allegations.

Based on the standard of review, which takes MIDRS' well-pled factual allegations as true, the Court concludes the date of MIDRS' claims accrued cannot be determined from the pleadings alone, and that further development of the record is necessary.

Case summaries are courtesy of Beth Brennan, who practices in Missoula with Brenna Law & Mediation PLLC.

AG Fox announces Montana has joined suit against federal government to halt carbon rule

Attorney General Tim Fox announced on Oct. 23 that Montana, along with 23 other states, filed a lawsuit challenging the Obama administration's plan to restructure the way electricity is produced and consumed throughout the country.

Fox called the Section 111(d) Rule "unlawful" and said it would result in dramatically higher electricity bills and significantly less reliable service for families, businesses, hospitals and schools across America. Fox was joined by Sen. Steve Daines at this morning's announcement at the Attorney General's Office in Helena.


Fox

"Once again, the EPA has overstepped its rule-making authority granted by Congress, this time seeking to impose an unworkable, technically unfounded, and legally invalid national energy policy on the states," Attorney General Tim Fox said. "The new regulations don't bode well for states like Montana, which relies on abundant and inexpensive coal for stable, affordable electricity, or for the members and residents of the Crow Indian Reservation, who are also Montanans, and who rely on benefits from the mining of coal within their Reservation. The states have a right to develop, use, and market their natural resources for the benefits of their citizens and the communities they live in. Resource development and protecting our environment are not mutually exclusive. Our ability to do this is vital to Montana's future, and we felt it was imperative for us to join in the challenge of this rule."

The Rule purports to require states to reorganize their energy grids, in order to reduce carbon emissions from electric-generating plants by 32 percent below 2005 levels by 2030. The Rule could cost over $25 billion annually and these costs will ultimately be paid by consumers who could see their electric bills go up by 10 percent or more.

The Rule will also cause coal miners, union workers, and other hardworking people to lose their jobs, concentrating the pain from the unlawful rule on those who can least afford it.

In the documents filed with the U.S. Court of Appeals for the District of Columbia Circuit, The States make clear that EPA has no legal authority to promulgate or enforce the 111(d) Rule.

"States have argued to the EPA for more than a year that the Rule is illegal for multiple reasons," Fox added. "In particular, the EPA lacks authority to force States to fundamentally restructure their power portfolio to consume less coal-fired energy. The Rule is also illegal because it seeks to require States to regulate coal-fired power plants under Section 111(d) of the Clean Air Act, even though the EPA already regulates those same plants under Section 112 of the Act. This results in double regulation, which is flat out prohibited by the Clean Air Act."

The states challenging the rule are West Virginia, Texas, Alabama, Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, New Jersey, Ohio, South Carolina, South Dakota, Utah, Wisconsin, Wyoming, the Arizona Corporation Commission, and the North Carolina Department of Environmental Quality.

AG issues reminder about hotline for citizens to report suspected Medicaid fraud

Attorney General Tim Fox reminded Montanans the Montana Department of Justice maintains a hotline for citizens to report suspected Medicaid provider fraud.

Fox said the successful investigation and prosecution of two recent Medicaid fraud cases by the Montana Department of Justice's Medicaid Fraud Control Unit demonstrates the department's commitment to protecting the financial health of state resources and the quality of care available to Medicaid patients.

Fox encouraged anyone who suspects Medicaid provider fraud to call the Montana Department of Justice's hotline at 800-376-1115.

"Stealing from Medicaid is like stealing from each and every taxpayer," Fox said. "Examples of Medicaid provider fraud include billing for services not performed, dispensing generic drugs and billing for brand-name drugs instead, and falsifying timesheets or signatures in connection with the provision of personal care services."

In 1995, the Montana Legislature created the Medicaid Fraud Control Unit, which became operational the following year. In 2014, MFCUs nationwide reported almost $300 million in criminal recoveries. In Montana, the amount of restitution ordered on MFCU cases since 1996 totals $2,964,903.

Deep, from page 18

services for hire, hackers and cybercriminals operate and child porn is viewed, distributed and sold. And those are only some of the activities on the Dark Web.

Most people, if they know the Dark Web at all, know it because of the black market website called Silk Road – which was shut down twice by the FBI in 2013-2014. Silk Road's founder, Ross Ulbricht, was convicted of a number of crimes, including several attempted murders-for -hire.

Sometimes, the Dark Web is known as the Darknet. By whatever name you use, it is accessed via Tor (The Onion Router), Freenet or I2P (Invisible Internet Project), all of which use masked IP addresses to allow users and website owners to operate anonymously. In common parlance, when you use Tor, you are in Onionland.

It amazes most lawyers when we tell them that Tor was originally funded by the U.S. Department of Defense. While it is now a nonprofit run by volunteers, it is funded in part by the U.S. government and the National Science Foundation.

Why would the U.S. government support it? Because it is part of the State Department's Internet freedom agenda, allowing people in repressive countries to have access to data censured by their governments. Even Facebook has a version of its site on the Dark Web in order to make it easier to use in countries that restrict Facebook, such as China and Iran.

We spend some time there because of our work as criminal defense expert witnesses as part of our digital forensics work. And recently, we've helped family law colleagues ferret out some of the Ashley Madison evidence.

Make no mistake about it – the family law grapevine is rife with stories about snaring clients since the AM breach. And as many conventional sites began to remove Ashley Madison information upon request, or to report the information only in part, the lawyers surged to Tor to find more evidence in their cases.

Since we find questions about the Deep Web and the Dark Web popping up frequently in our recent presentations, we thought a small primer would be timely. Happy travels in Onionland – just be careful which streets you walk down!

The authors are the President and Vice President of Sensei Enterprises, Inc., a legal technology, information security and digital forensics firm based in Fairfax, VA. Phone: 703-359-0700; www.senseient.com

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Impressions, from page 19

appropriate attire. Staff and attorneys alike need to dress the part whenever meeting potential new clients. This isn't to suggest that casual Fridays and the like are inappropriate. Just be mindful that people will make initial judgments about someone they're meeting for the first time based upon overall appearance. I can share that I have actually walked into a law firm where I was given a nod by the receptionist who was dressed down, reading a romance novel, and chewing gum with her feet on the desk. Suffice it to say, my initial thought was I would never hire anyone in this firm because tolerance for the sloppy appearance suggests a tolerance for sloppy work. The message was they didn't care.

■ Client information and documents must be kept confidential at all times. If client file material needs to be in the reception area in order for the receptionist to do his work, make sure that wandering eyes can never land on those materials. Never leave client file material, mail, or anything else that might identify a client on the counter or privacy wall around the reception desk.

■ Try to prevent anyone from having to wait longer than ten minutes. Most people are willing to be reasonable and wait a short amount of time for the right lawyer; but don't expect them to wait as long for their lawyer as they might for their doctor. While medical emergencies do arise, lawyers can rarely claim a legal emergency. If prospective clients are waiting too long, consider altering your scheduling procedures. If a delay is unavoidable, have staff inform them of the delay as quickly as possible and discuss options. Some will wait and others will need to reschedule.

■ Be mindful of the difficulties the receptionist faces when assigned phone answering duties. Confidentiality can easily be breached in a law office when someone in the reception area overhears a phone conversation or a client name. The receptionist should have a way of notifying attorneys that someone has arrived or that a client is on the phone without being forced to breach client confidentiality. Statements like "You're two o'clock appointment is here" or "you have a call on line one" as opposed to "John Smith is here and he wants to talk with you about getting a divorce" should be acceptable when necessary. Viable alternatives might include the use of privacy glass, email notifications of a waiting call, or the moving of phone answering responsibilities away from the reception area.

■ If your space permits, have visitor areas and work areas separated by a wall or partition. One never knows what impression potential new clients may have when they observe people working. Some may feel they are seeing energetic and busy staff members and take that as a positive sign while others may feel the staff is overworked or unprofessional and conclude the opposite. A wall with a tasteful picture or two is worth the investment. In fact, some firms place all conference room areas near reception and away from work areas for this very reason.

■ Finally, don't overlook your Web presence. A poorly designed website, a website that doesn't display properly on a mobile device, or a website that isn't kept current can send a message about your competency and priorities as well. After all, who wants their lawyer to be someone who appears to think halfway is good enough or perhaps got started on something and then neglected to follow through?

As I shared above, all of this is about presentation and experience. At first contact if your presentation is poor and/or the experience of any potential client is bad, then you're going to start off on the wrong foot if they even decide to get started with you at all.

ALPS Risk Manager Mark Bassingthwaighte, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminars to assist you with your practice at alps.inreachce.com. Contact him at: mbass@alpsnet.com.

Physicians, from page 16

mid-level supervision, satisfying meaningful use standards, participating in peer review, attending medical staff meetings, and medical director duties. The physician should receive additional compensation for acting as medical director, and may receive additional compensation for mid-level supervision.

Non-Compete and Non-Solicitation

Non-compete and non-solicitation provisions are fairly common in physician employment agreements. The non-compete will usually cover the term of employment, and may extend beyond the term of employment so long as it is limited in scope and time. Physicians are often hesitant to agree to a non-compete beyond the term of employment because the non-compete will likely require them to leave the area. If you're representing the physician, try to address the hospital's concerns through a non-solicitation provision.

Non-solicitation provisions typically prohibit the physician from soliciting employees, patients, and/or referring providers for a period of one to two years post-termination of the employment contract. It's important to note that the hospital cannot prohibit patients from following the departing physician and providing the physician with those patients' medical records post-termination for treatment purposes or as otherwise required by law. A common source of contention upon termination of the employment contract is which party will send patients notification of the physician's departure, so consider addressing that issue in the employment contract.

Corporate Practice of Medicine

Montana law requires that physicians practicing medicine as employees of a hospital have a written agreement with the hospital containing language that (i) the relationship created by the employment contract may not affect the physician's exercise of independent professional medical judgment, and (ii) the hospital cannot require the physician to refer any patient to a particular provider or supplier or take any other action that the physician determines not to be in the patient's best interest[10]. Notwithstanding this prohibition, patients treated by the physician during the term of the employment contract will be considered patients of the hospital and as a result the physician will only be entitled to those patients' records upon termination for treatment purposes (i.e. the patient follows the physician to his or her new practice) or as required by law.

Other Terms

Other terms requiring consideration are exclusivity provisions, recruitment payments, medical direction responsibilities, service line management or administrative functions, and whether there is justification or efficacy in contracting with the physician or his or her group practice under a professional services agreement as opposed to direct employment, which are analyses outside the scope of this article.

Megan McCrae is an attorney with Crowley Fleck in the Billings office, practicing transactional health care law, and is a member of the State Bar of Montana's Health Care Law Section.

10 ARM 24.156.625.

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

ATTORNEYS

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