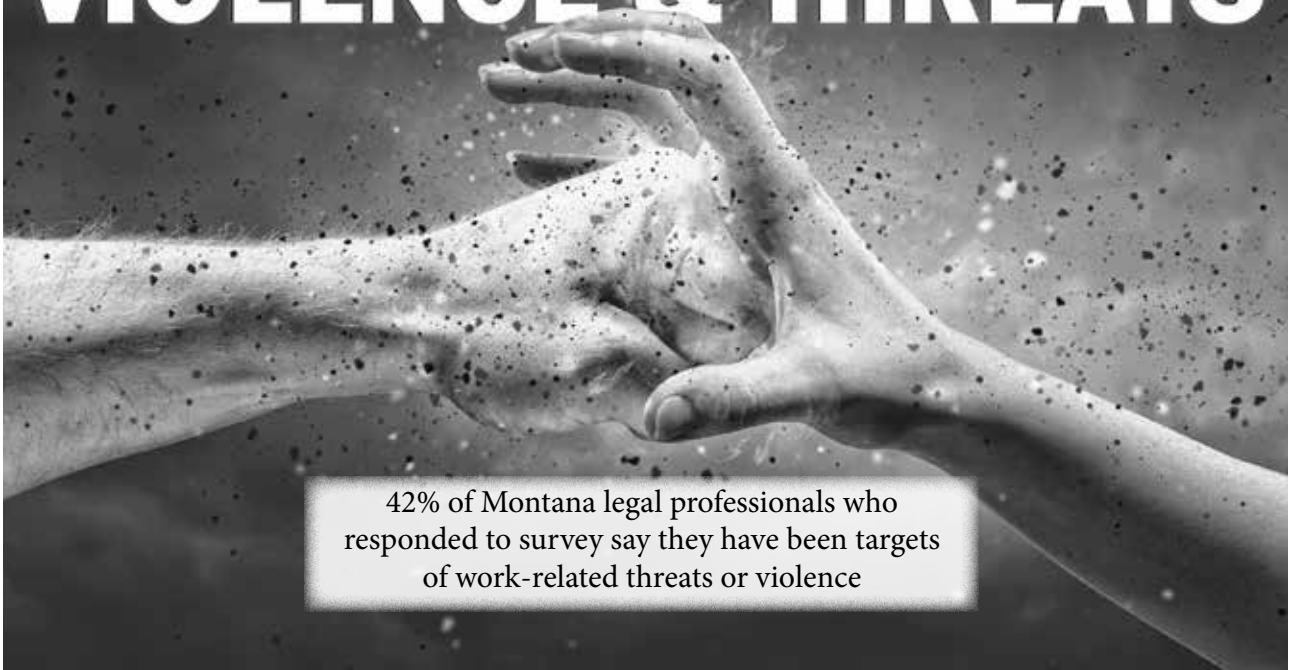


# MONTANA LAWYER

State Bar  
— of —  
Montana

February 2016 | Vol. 41, No. 4

## VIOLENCE & THREATS



42% of Montana legal professionals who responded to survey say they have been targets of work-related threats or violence

### Also in this edition:



> ABA TECHSHOW 2016 — State Bar of Montana members eligible for heavily discounted registration — See page 20 for details

> Montana Supreme Court orders committee to study decline in bar exam passage rates — page 11

> Former longtime Lake, Silver Bow county attorneys pass away — page 27

> Matt Thiel reflects on Magna Carta's 800th anniversary — page 3

> Supreme Court set oral arguments in Bozeman and Missoula — page 12

The official magazine of the State Bar of Montana published every month except January and July by the State Bar of Montana, 7 W. Sixth Ave., Suite 2B, P.O. Box 577, Helena MT 59624. 406-442-7660; Fax 406-442-7763.  
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### From the cover

As part of an ongoing series of surveys around the country Utah attorney Stephen D. Kelson asked Montana legal professionals if they have been the target of violence and threats, number of threats received, the nature of the threats and more. The survey, conducted in the fall of 2015, found that threats and violence are more common than some may think.

# Magna Carta's spirit still strong after 800 years

This past June, I, along with three other Montana attorneys and ABA members (Bob Carlson, Peggy Probasco and Cindy Thiel) traveled to London to participate in The 2015 London Sessions. This ABA program featured substantive programs and social events designed to commemorate the 800th anniversary of Magna Carta and to the rededication of the ABA memorial at Runnymede. The program was excellent and allowed for study of Magna Carta and its continuing influences as well as visits to some of the important historical sites associated with Magna Carta, to include the Inns of Court, Knights Church and Westminster. We were also privileged to attend a reception at the U.S. Ambassador's residence and a reception at the Royal Courts of Justice. These events provided remarkable opportunities to interact with fellow members and leaders of the American and UK Bars.

The seminal event was the UK commemoration of Magna Carta on June 15, 2015, featuring Prime Minister David Cameron and the Archbishop of Canterbury, and attended by members of the royal family, including Queen Elizabeth and Prince William. This event was followed by the rededication of the ABA memorial at which Attorney General Loretta Lynch spoke. The event was also remarkable for its location, the sight of the meeting and sealing of Magna Carta on June 15, 1215, at Runnymede, England. This meadow by the River Thames was the meeting place (approximately halfway between London and Windsor Castle) where King John negotiated terms with his barons to avoid civil war and placed his royal seal on the articles of the barons, to become known as Magna Carta, or the Great Charter. King John did not actually sign the document, as is often repeated by contemporary American speakers on the subject.

Even though Magna Carta was invalidated by Pope Innocent III at the request



**TOP:** Bob Carlson, ABA Board of Governors, Current State Bar President Matt Thiel, and Peggy Probasco, State Bar Past President, attend the opening of the London Sessions at Westminster Central (Methodist) Hall.



**LEFT:** Thiel at the ABA Memorial at Runnymede, England.

of King John within weeks of its sealing, it remains one of the earliest known records of the principles of due process, access to justice and supremacy of the law and the most cited record of those principles around the world. ("To no one will we sell, to no one deny or delay right or justice." Clause 40, Magna Carta 15 June 1215.)

More than one scholar at the sessions noted that Magna Carta is, in many ways, more important to Americans, than to the British, and particularly so in its symbolism. This is evidenced by the fact that the monument at Runnymede was erected by the ABA in 1957. Notably, the only other monument at Runnymede is for President Kennedy. The simple stone monument reads: "This Acre of English

ground was given to the United States of America by the people of Britain in memory of John F. Kennedy President of the United States 1961-63. Died by an assassin's hand 22 November 1963. Let every nation know whether it wishes us well or ill that we shall pay any price bear any burden meet any hardship support any friend or oppose any foe in order to assure the survival and success of liberty." A fitting memorial to America's legacy to Magna Carta.

**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.**



### Law Office of Katharine Leque opens in Bozeman

Katharine E. Leque has announced that she has opened the Law Office of Katharine E. Leque PLLC in Bozeman.

Leque, originally from Juneau, Alaska, graduated with honors from Montana State University in 2009.



Leque

She attended the University of Montana School of Law where she earned her Juris Doctorate in May 2012.

While in law school, Leque served as executive editor of the Montana Law Review.

She also interned at Phillips Haffey P.C. and prosecuted misdemeanor crimes for the Missoula City Attorney's Office.

After graduating law school and passing the Montana bar exam, Leque practiced at the law firms of Phillips Haffey P.C. and Berg, Lilly & Tollefsen, P.C. as an associate attorney.

She can be contacted via 25 Apex Drive, Suite B, in Bozeman; 406-404-1106; and [katharine@lequelaw.com](mailto:katharine@lequelaw.com).

### Van Horssen opens solo practice in Helena

Gregory A. Van Horssen has left the law firm of Keller, Reynolds, Drake, Johnson & Gillespie, PC. to pursue a solo practice. Van Horssen's practice will continue to focus on Administrative/Regulatory Law and Government Relations. His new contact information is as follows:

Gregory A. Van Horssen, Esq., Van Horssen Law & Government, PLLC, Capital One Center, 208 N. Montana Ave., Suite 102, Helena, MT 59601; 406-422-4007; [gvhorssen@vanhorssenlaw.com](mailto:gvhorssen@vanhorssenlaw.com).

### Hupp joins Worden Thane law office in Missoula

Worden Thane PC of Missoula has announced that attorney Dana Hupp has joined the firm. Her primary practice areas will be commercial litigation and insurance defense.

Hupp graduated with her Juris

Doctorate and an environmental law and natural resources certificate in 2000 from Lewis and Clark Law School in Portland, Oregon. Before joining Worden Thane, Hupp clerked for the Honorable Kenneth Neill of the 8th Judicial District (Cascade County) and worked in the Solicitor's Office for the federal Department of the Interior.

Hupp has extensive knowledge in the evolving practice of electronic discovery, in addition to experience in commercial litigation, insurance defense, and environmental and natural resource law.

You can reach Hupp at 406-721-3400.

### Monson elected partner at Holland & Hart

Holland & Hart LLP has announced that 15 attorneys were elected into the firm's partnership, including Michael Monson of the Billings office, effective Jan. 1. The new partners represent several practice areas and work from eight of



Monson

the firm's 15 offices across the Mountain West and in Washington, D.C.

Monson is a member of the Real Estate, Construction, Finance, and Bankruptcy group in the Billings office. He helps clients to identify, understand, and solve their corporate, real estate, and tax and estate planning issues. Drawing on his experience as a certified public accountant, Monson provides high net worth individuals and small, family-owned businesses with advice to achieve their tax, estate planning, and trust administration goals.

Others who were elected into partnership at Holland & Hart are:

■ From the Boise, Idaho, office – Dean Bennett, Alison Johnson, Eric Vehlow and Brian Wonderlich;

■ From the Denver office – Leslie Boyle and Rebecca Schroer;

■ From the Salt Lake City office – Mark Burghardt and Derek Kearl;

■ From the Boulder, Colorado, office – Charles Cotter and Larry Tronco;

■ From the Jackson Hole, Wyoming, office – Trey Overdyke;

■ From the Cheyenne, Wyoming, office – Jenifer Scoggin and Joanna Vilos;

■ From the Las Vegas office – Joe Went.

Holland & Hart is a full service, national law firm that today has more than 500 lawyers in 15 offices across the Mountain West and in Washington, D.C. For more information, visit [www.hollandhart.com](http://www.hollandhart.com).

### Conner joins Great Falls firm as associate attorney

Conner & Marr, PLLP, is pleased to announce that James Robert "JR" Conner has joined the firm as a new associate. JR grew up in Great Falls and graduated from C.M. Russell High in 2003. He received his Bachelor of Arts in Political



Conner

Science from Montana State University in 2012 and earned his Juris Doctorate from The University of Montana School of Law in 2015. He is admitted to practice in Montana State and Federal Courts.

He will join his father, Dennis P. Conner, and partner, Keith D. Marr, in specializing in civil litigation issues. Their plaintiff's practice focuses on automobile defects including rollovers, child seats, tires, seat belts, airbags, and fires; catastrophic injury or wrongful death; aviation accidents; civil trials; dangerous products; unfair insurance practices; and railroad injuries.

You can reach JR Conner at Conner & Marr, PLLP, P.O. Box 3028, Great Falls, MT 59403-3028; [jr@connermarr.com](mailto:jr@connermarr.com); or 406-727-3550.

### Hughes joins Matrium Law Group as Of Counsel

Matrium Law Group PLLC has announced that Jill A. Hughes has joined the firm as Of Counsel.



Hughes

Hughes received a B.A. in English after attending the University of Chicago and University of Montana. She earned her Juris Doctorate from the Alexander Blewett

III School of Law at the University of Montana, where she served as an editor of the Public Lands and Natural Resources Law Review. She also interned in business transactions, estates, taxation and conservation easements.

Before law school, Hughes owned a small business in the Bitterroot Valley. She is admitted to the Montana District Courts, Montana Supreme Court, and the U.S. District Court, Montana Division. She is a member of the Ravalli County Bar Association, the Montana State Bar Modest Means program and the Western Montana Estate Planning Council. Her practice includes family law, estate planning, probate, elder law, and special needs trusts.

You can contact Hughes at: Matrium Law Group PLLC, 317 E. Spruce St., Missoula, MT 59802; 406-370-9252; or [jill@matriumlaw.com](mailto:jill@matriumlaw.com). For more information, visit Matrium Law Group's website at [www.matriumlaw.com](http://www.matriumlaw.com).

### Johnson opens private practice in Montana City

Mathew Johnson has returned to private practice in the greater Helena area after over 12 years as the elected Jefferson County Attorney.

Johnson grew up in the Helena area, attended the University of Montana and earned his BA in political science and MS in natural resources. He continued on to the University of Montana School of Law and earned his Juris Doctorate in May 1999. Prior to being elected county attorney, Johnson had a law practice in Montana City. Johnson also has served in the Montana Army National Guard as a JAG for five years.

In his free time, he enjoys catching up with his family, which includes five children and three grandchildren, and he also enjoys camping, fishing, and jogging with his wife, Kelly.



Johnson

He has opened the Law Office of Mathew Johnson PC in Montana City and will practice in the areas of Criminal Defense, Family Law, and Estates, Probates, and Wills. He can be reached at [mathew@mtlegalcounsel.com](mailto:mathew@mtlegalcounsel.com) or 406-603-0075.

Visit [www.mtlegalcounsel.com](http://www.mtlegalcounsel.com) for more information.

### MLSA adds 3 attorneys to staff

Montana Legal Services Association has announced the addition of three attorneys to its staff.

Celia Blewett graduated from University of Washington School of Law in 2013. Prior to joining MLSA, Blewett was an associate at Foster Pepper PLLC in Seattle, primarily focused on investment management and real estate. While at Foster Pepper, she staffed a monthly legal aid clinic in a homeless shelter, and during



Blewett

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## Member and Montana News

law school she worked in several low-income legal-aid clinics and volunteered as a tax preparer for the United Way of King County. Before law school she worked as a program coordinator at Washington Low Income Housing Alliance, a low income housing advocacy organization based in Seattle.

Margaret Hirschak received her Juris Doctorate from Arizona State University's Sandra Day O'Connor College of Law in 2012. Hirschak was introduced to free civil legal aid during law school when she worked as a student attorney in the Indian Legal Clinic. Her interest in legal aid grew after graduation while working for the Salt River-Pima Maricopa Indian Community's Legal Services Office.

Prior to joining MLSA, Hirschak worked for the Crow Tribe of Indians Executive Branch Office of Legal Counsel. She has been admitted to practice in Montana and the Crow Tribal Court



Hirschak

since 2014, and is also a member of the State Bar of Arizona

Paul Thibeault graduated from Bowdoin College and UC-Hastings College of the Law. He has extensive experience in Native American, migrant and basic legal services, primarily with Pine Tree Legal Assistance in Maine and Anishinabe Legal Services in Minnesota. He also has substantial experience as a tribal and state public defender and in general private practice. He has been working in Indian Country for 25 years and has worked in eight tribal courts. He has served as a member of the Maine Indian Tribal-State Commission, the Passamaquoddy Restorative Justice Commission and the steering committee of the National Association of Indian Legal Services (NAILS).

### Great Falls attorneys awarded Preeminent rating

Attorneys Roland Durocher and Jeff Winter have been awarded the



Durocher



Winter

Martindale-Hubbell AV Preeminent rating.

Receiving the highest possible rating, Durocher and Winter were measured on both legal ability and ethical standards.

The rating is achieved through reviews and recommendations from peers in the legal field.

They join law partner Channing Hartelius in earning the highest possible rating.

Durocher is a 1994 graduate of the University of Montana School of Law.

Winter received his Juris Doctorate from University of Minnesota in 1996 and earned a Master of Laws in Taxation in 1997 from University of Florida Graduate Tax Program.

Partners at Hartelius, Durocher and Winter, they specialize in personal injury, wrongful death, and malpractice.

## Worden Thane P.C. Welcomes Dana Hupp to the Team

We are happy to announce the addition of Dana Hupp to the law firm of Worden Thane P.C. Dana graduated with her J.D. and an environmental and natural resource certificate in 2000. Prior to entering private practice, Dana clerked for Montana District Court Judge Kenneth Neill and the Solicitor's Office for the Department of Interior. We look forward to incorporating within the firm Dana's experience in the areas of commercial litigation, insurance defense, environmental and natural resource law, and her extensive knowledge in the evolving practice of electronic discovery.



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# 13 State Bar of Montana members file candidacies for Montana Legislature seats

Candidate filing for political offices in Montana opened on Jan. 14, with a flurry of candidates filing in the opening week, including a number of attorneys.

As of press time, 13 members of the State Bar of Montana had filed to run for legislative races. That list includes seven incumbents and an eighth, Republican Steve Fitzpatrick of Great Falls, who is running for a Senate seat after serving in the House in 2015.

In Helena's House District 83, two lawyers will be squaring off in the Democratic primary to replace term-limited Rep. Chuck Hunter. Kim Abbott, co-director of the Montana Human

Rights Network, and Quinlan O'Connor, an attorney for the Montana Department of Labor and Industry, both filed for the seat.

Joel G. Krautter, Sidney city attorney, a Republican, is challenging incumbent Scott Staffanson, a fellow Republican, in HD35.

Shane Morigeau, Democrat in Missoula's HD95, is also a first-time candidate. Morigeau is opposed in the primary by Curtis Bridges.

The following Montana attorneys are also among those who filed for legislative seats include, with incumbents designated by an asterisk:

Tom France, D-Missoula, SD47; Austin Knudsen,\* R-Culbertson, HD34; Jeff Essman,\* R-Billings, HD54; Kim Abbott, D-Helena, HD83; Quinlan O'Connor, D-Helena, HD83; Nate McConnell,\* D-Missoula, HD89; Ellie Hill Smith,\* D-Missoula, HD90; Kim Dudik,\* D-Missoula, HD94; Shane Morigeau, D-Missoula, HD95; Andrew Person,\* D-Missoula, HD96; Andrea Olsen,\* D-Missoula, HD100.

Candidates may file with the Montana Secretary of State's office until 5 p.m. on March 14.



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## Most district court judge candidates running unopposed

Twelve people have filed for 11 district judge seats that are up for election this year.

Only one judicial race was contested as of Jan. 22. Matthew J. Cuffe, an attorney at Worden Thane in Missoula, and William L. Managhan, from the office of the Public Defender in Kalispell, are running for the seat currently held by the Honorable James Wheelis in Lincoln County, who says he is not running for re-election. Kalispell attorney Dan Wilson was the only candidate to file for the 11th Judicial District seat currently held by the Honorable David Ortley.

Others who have filed for judicial seats, all of whom are sitting judges, are listed below.

The Honorable DeeAnn Cooney, 1st Judicial District (Lewis and Clark and Broadwater Counties); the Honorable James P. Reynolds, 1st Judicial District (Lewis and Clark and Broadwater Counties); The Honorable Leslie Halligan, 4th Judicial District (Missoula and Mineral Counties); the Honorable Karen Townsend, 4th Judicial District (Missoula and Mineral Counties); the Honorable John A. Kutzman, 8th Judicial District (Cascade County); the Honorable Amy Eddy, 11th Judicial District (Flathead County); the Honorable Michael G. Moses, 13th Judicial District (Yellowstone County); the Honorable Mary Jane McCalla Knisely, 13th Judicial District (Yellowstone County); the Honorable Jeffrey H. Langton, 21st Judicial District (Ravalli County)

# Federal courts sponsor high-school civics contest

A civics contest organized by federal courts in the western United States offers Montana high school students a chance to win cash prizes while learning about their constitutional rights.

"50 Years After the Miranda Decision: How Federal Courts Defined the Rights of the Accused" is an essay and video competition open to sophomores, juniors and seniors in public, private and parochial schools or to home-schooled students of equivalent status. Individual

students can compete in the essay contest, while individuals and teams of up to three students can enter the video contest. Entries may be submitted online through April 15, 2016. Complete information is available at [www.ca9.uscourts.gov/civicscontest](http://www.ca9.uscourts.gov/civicscontest).

The contest is sponsored by the U.S. District Court for the District of Montana and the Courts and Community Committee of the Judicial Council of the Ninth Circuit, the governing body for federal courts in nine western states and two Pacific Island jurisdictions.

The district court is holding a local contest with prizes of \$2,000, \$1,000 and \$500 for the top three finishers in both

the writing and video competitions. Local winners go on to compete in the Ninth Circuit contest, which also offers prizes of \$2,000, \$1,000 and \$500 to the top three finishers in each category. Local winners will be selected in May and circuit winners announced in June.

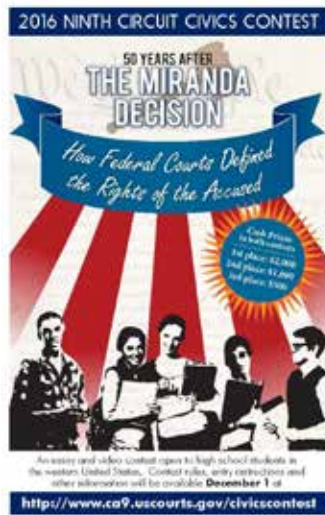
The contest celebrates the 50th anniversary of the U.S. Supreme Court decision in *Miranda v. Arizona* in which the court ruled that a person taken into

police custody must be informed — prior to questioning of his or her Fifth Amendment right against self-incrimination. Students will consider how "Miranda Rights" came to be defined and how they are safeguarded by the federal courts.

"An informed citizenry is a critical element of our system of self-government," said Chief Judge Dana L. Christensen of the District of Montana. "As these students approach voting age, it is important that we encourage them

to study and understand the principles set forth in the Constitution and Bill of Rights, and the *Miranda* decision is a great example."

For more information about the district contest, please contact Kelsey Hanly at (406) 829-7154 or [kelsey\\_hanly@mtd.uscourts.gov](mailto:kelsey_hanly@mtd.uscourts.gov).



## Planning on holding a Law Day 2016 event? Let us know!

The American Bar Association's theme for Law Day 2016 is "Miranda: More than Words" in honor of the 50th anniversary of the landmark *Miranda v. Arizona* decision.

Law Day is held on May 1 every year to celebrate the role of law in our society and to cultivate a deeper understanding of the legal profession. Local bar associations and other legal entities are

encouraged to hold educational events in conjunction with Law Day on or around May 1.

*Miranda* is perhaps the best-known Supreme Court case, having permeated popular culture through the countless recitation of the *Miranda* Warning in film and television shows.

Law Day 2016 will explore the procedural protections afforded to all of us by the U.S. Constitution, how these rights are safeguarded by the courts, and why the preservation of these principles is essential to our liberty.

If you are planning a Law Day event or know of any planned events, contact Joe Menden, editor of the Montana Lawyer, at [jmenden@montanabar.org](mailto:jmenden@montanabar.org) or 406-447-2200.

## State Bar News

### Fee and assessment statements to be mailed on March 1

The State Bar of Montana will mail annual statements to attorneys on March 1.

Payments for all fees are due April 1 and can be made by check or online with a credit card.

Reminder: The current CLE reporting year ends March 31, 2016. Please check

your record online using the MyMTCLE function at [www.mtcle.org](http://www.mtcle.org). You can claim any unposted credits by sending attendance information to [cle@montanabar.org](mailto:cle@montanabar.org).

### Nominations accepted for State Bar Trustee, ABA delegate

Election season is under way for State Bar positions. The following positions are

up for election: Trustees for Areas A, B, C, D and G; President-Elect and State Bar Delegate to the ABA. Original nomination petitions must be postmarked or hand-delivered to the State Bar **by April 4**.

The nomination petition form is printed on page 9 of this issue. The form will also be posted on the Bar website, [www.montanabar.org](http://www.montanabar.org).



# 2016 Nomination Petition

## State Bar President, ABA Delegate and Trustee Election

I, \_\_\_\_\_, residing at \_\_\_\_\_, am a candidate for the office of ( ) President-Elect; ( ) Area A Trustee; ( ) Area B Trustee; ( ) Area C Trustee; ( ) Area D Trustee; ( ) Area G Trustee; ( ) State Bar Delegate to the ABA at the election to be held on June 3, 2016. I am a resident of Montana and an active member of the State Bar of Montana. I request my name be placed on the ballot. The term of office of the President-Elect is one year. The term of office of the ABA Delegate and of the Trustee is two years.

Signature \_\_\_\_\_

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

NAME

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**Return this petition to State Bar of Montana, P.O. Box 577, Helena MT 59624, postmarked no later than April 4, 2016.**

*Ballots will be mailed to Bar members on May 2, 2016, and must be returned to the Bar by May 23, 2016.*

# Trustees OK proposal on ethics rules relating to confidentiality of electronic documents

The State Bar Board of Trustees voted at its December meeting to recommend to the Montana Supreme Court an Ethics Committee proposal to incorporate the ABA's Model Rules of Professional Conduct as they relate to technology and confidentiality into Montana's rules.

The Ethics Committee proposal passed with opposition from one trustee. There was lively discussion at the meeting, with some who spoke at the meeting who argued that the proposal does not go far enough to ensure that attorneys protect a client's confidential electronic information.

The Ethics Committee's recommendation is not identical to the ABA's Resolution on technological competence. The State Bar's Technology Committee has unanimously supported the adoption of the rules amendments promulgated by the ABA in Resolution 105A.

The Ethics Committee's proposal unanimously agreed to add the following language to paragraph 5 of the preamble of the Montana Rules of Professional Conduct. The language comes, in part, from the ABA's recommended additional language to the Comment of the ABA's Rule 1.1 on Competence:

"In all professional functions a lawyer should be competent, prompt and diligent. **Competence implies an obligation to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.** A lawyer should maintain communication with a client concerning the representation.

A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law." (Emphasis added.)

Ethics Committee Chair Peter Habein said he believes that incorporating this language in the preamble arguably is a stronger endorsement of the concept than relegating it to a comment.

The ABA's resolution also calls for adding a new subsection to the confidentiality rule, Rule 4.4(c): **"A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."** (Emphasis added.)

The Ethics Committee, citing concern about sustaining a Montana tradition of respect for confidentiality and civility in the bar, proposed the following language for a new subsection (c), which the board approved with amended language shown in bold:

"A lawyer shall not knowingly access or use electronically stored information in a communication or document received from another lawyer, for the purpose of discovering **protected** work product, privileged or other confidential information unless the receiving lawyer has obtained permission to do so from the author of the communication or document. Communication or document as used in this rule excludes documents produced in discovery and information that is the subject of criminal

investigation."

A draft petition to the Supreme Court will be prepared by Bar Counsel for review by the Executive Committee and Board for the April Board meeting.

## Other Board of Trustees actions

**Memorandum of agreement with commissions:** The board approved a memorandum of agreement between the State Bar and certain commissions of the Montana Supreme Court on issues including salaries, personnel files, office space and indirect costs. State Bar President-Elect Bruce Spencer noted that it was clear after negotiations with the commissions that there needs to be more communication and a clear understanding of responsibilities between the bar and the commissions.

**Paralegal Section Bylaws:** The Board approved changes to the Paralegal Section bylaws involving dues and carryover of CLE credits. Under the new rules, only interactive credits earned in excess of the section's 10-credit yearly requirement may be carried over for the next two consecutive years, up to 20 credits. Under previous rules, any credits could be carried over, up to a total of 15 credits.

**Young Lawyer Delegate to the ABA:** The board approved including language to the bylaws regarding an additional delegate. The board also approved reimbursement for "reasonable and necessary travel and lodging expenses" incurred by the delegate to attend meetings of the ABA House of Delegates.

## Attorneys help judge Montana We the People competition

Fergus County High School won this year's We the People: The Citizen and the Constitution competition held in Helena Jan. 26.

Six teams from five schools with a total of 150 students participated in the competition.

Fergus will advance to represent Montana at the national finals at the University of Maryland, April 22-25.

Fourteen of the 18 judges for this year's competition were attorneys. Among them were Brenda Wahler and Sarah Norcott of the State Bar's Law Related Education Committee and five law clerks from the Montana Supreme Court.

Also attending the competition were six teachers who are receiving professional development in civic education as part of the James Madison Legacy Project. This group of teachers will receive more training with help from Professor Anthony Johnstone of the University of Montana's Blewett School of Law and Professor Patrick Peel of the UM political science department.

# Court orders study of steep decline in bar passage rates in Montana

The Montana Supreme Court on Jan. 28 ordered the formation of a committee to consider issues relating to the recent decline in bar exam passage rates in Montana.



Kirgis

The order is in response to a Jan. 14 memo from Paul Kirgis, dean of the Alexander Blewett III School of Law at the University of Montana, calling for the creation of such a committee. In his memo, Dean Kirgis pointed out the historically low bar passage rate in Montana, and specifically for recent graduates of the UM law school.

Kirgis asserted in his memo that the steep decline is largely attributable to the fact that the bar exam passing score in Montana was raised in 2013 from 260 to 270 on a 400-point scale.

The Supreme Court's order calls for the committee to provide a report and any recommendations to the court concerning matters addressed in Kirgis' memo within sufficient time for a public comment period and consideration by the court prior to the July 2016 administration of the bar exam.

Justice Jim Rice will chair the committee, which will also contain one member to be named by the Montana Board of Bar Examiners; one member to be named by the UM law school; and two members to be named by the State Bar of Montana, at least one of whom must be a representative of the New Lawyers Section of the State Bar.

In July of 2015, UM law school graduates taking the bar for the first time passed at a 68 percent rate, down from a 69 percent rate in July of 2014. Kirgis noted that

in the 10 years from 2003-2012, the pass rate for UM law school averaged about 88 percent.

Passing rates have fallen across the country, but Montana has experienced the steepest decline.

Kirgis acknowledged the argument that some have made that the recent decline in bar passage rates is due to law schools accepting less able students because of a decline in applicants in recent years. Kirgis said the law school's analysis of the entering credentials of its students found that the graduates from 2014 and 2015 had LSAT credentials similar to or better than the graduates of previous years, but failed in much higher numbers than their credentials would predict based on past experience.

The court's order and Kirgis' memo are posted at [montanabar.org](http://montanabar.org).

## Admission on Motion rules in effect as of Jan. 1

Effective Jan. 1, people can apply for admission on motion to the State Bar of Montana.

The Montana Supreme Court approved final rules for admission on motion to the State Bar of Montana on Dec. 17 of last year.

Six people have been admitted to the bar under the new admission on motion rules as of the time of publication. There were an additional 17 current admission on motion applications.

The Supreme Court will have a special swearing-in ceremony following the Montana Law Seminar.

Applicants for admission on motion:

- must be a graduate of an ABA accredited school;
- must have been admitted by bar exam to practice law;
- may never have been denied admission to practice law in any state because of character or fitness deficiency;
- may not have taken and failed the Montana Uniform Bar Exam within five

years preceding application;

■ may not ever have been admitted to practice law in Montana, unless they withdrew or resigned while in good standing, or practiced under pro hac vice admission or an order of temporary admission issued by the Montana Supreme Court;

■ may not have been previously denied admission to practice law in any jurisdiction unless their motion was denied solely because they exceeded the number of allowed pro hac vice admissions;

■ may not ever have engaged in the unauthorized practice of law in any jurisdiction;

■ must be a member in good standing in every jurisdiction in which the applicant is or was admitted to practice law;

■ shall submit evidence of a passing scaled score on the Multistate Professional Responsibility Examination;

■ shall establish that they possess the character and fitness to practice law in Montana;

■ and must attend the Montana Law Seminar.

Applicants for admission on motion must pay a \$2,500 application fee, which includes the Montana attorney application fee; Montana Law Seminar registration fee; and the first year's bar dues and fees, including fees for the Office of Disciplinary Counsel, Lawyers' Fund, and annual attorney license. The State Bar of Montana application fee does not include the fee for the character and fitness investigation conducted by the National Conference of Bar Examiners.

The Montana attorney application fee is waived for an applicant who is employed by or has secured employment with an access to justice organization as defined in the Montana Rules of Civil Procedure, or who is seeking admission to emeritus status. These applicants must, however, pay all other fees and assessments for new admittees.

The complete rules for admission are posted at [montanabar.org](http://montanabar.org) under the "Admission" tab.



# Supreme Court to hear oral arguments in Missoula, Bozeman in high-profile cases

The Montana Supreme Court has picked two high-profile cases to hear for oral arguments it has scheduled in Bozeman and Missoula in April.

The court will hear an oral argument in the city of Missoula's eminent domain lawsuit against Mountain Water Co. and The Carlyle Group on Friday, April 22

The following week, on Wednesday April 27, the court will travel to Bozeman for an oral argument in the battle between author Jon Krakauer and the Montana University over disciplinary records of a University of Montana student that Krakauer sought for his book "Missoula: Rape and the Justice System in a College Town."

## Missoula v. Mountain Water

Friday, April 22, University of Montana's Dennison Theatre; introduction at 8:30 a.m., argument begins at 9 a.m.

The Fourth Judicial District Court has granted a preliminary order of condemnation allowing the city of Missoula to take over the Missoula water system now operated by Mountain Water Company. The court ruled that municipal ownership of the system is a "more necessary public use" than private ownership.

Although Mountain Water and its parent company raise several issues on appeal, the court has limited oral argument to the question of whether the District Court correctly applied the law as set forth in § 70-30-111, MCA, and *City of Missoula v. Mountain Water Co.*, 228 Mont. 404, 743 P.2d 590 (1987).

## Krakauer v. Montana

Wednesday, April 27, Strand Union Building, Ballroom A, on Montana State University; introduction at 9:30 a.m., argument at 10 a.m.

Krakauer asked the commissioner of higher education for copies of disciplinary records of a University of Montana student and, when the Commissioner refused to provide those records, brought



Members of the Montana Supreme Court are, front, from left, Justice Jim Rice, Justice Patricia Cotter, Justice Beth Baker; back, Justice James Jeremiah Shea, Justice Laurie McKinnon, Chief Justice Mike McGrath, and Justice Mike Wheat.

this action to force disclosure of the records. The First Judicial District Court ruled that Krakauer is entitled to the requested records under the right-to-know provision of the Montana Constitution and a since-repealed public records statute, § 2-6-102, MCA. The court also ordered the Commissioner to pay Krakauer's attorney's fees and costs.

The Commissioner appeals, arguing that disclosure of the records is prohibited by the federal Family Educational Rights and Privacy Act of 1974 (FERPA); a Montana requirement that a university shall release a student's academic record only upon request by the student or a court-issued subpoena; and the student's right to privacy under the Montana Constitution. The commissioner also argues that the District Court abused its discretion in ordering him to pay Krakauer's attorney's fees and costs.

The court has accepted friend-of-the-court briefs from the United States

Attorney for Montana (concerning FERPA) and from several journalistic organizations that support Krakauer.

## Ibsen v. Caring for Montanans

The court also has a case scheduled for Feb. 24 at 9:30 a.m. in its courtroom in Helena. A Helena urgent care clinic sued after Blue Cross and Blue Shield of Montana charged consumers—including Ibsen's employees—insurance premiums that included kickbacks to the Montana Chamber of Commerce, which had marketed the plans to its members. The Montana Insurance Commissioner has fined BCBS \$250,000 for this practice, which she determined violated the Unfair Trade Practices Act. The First Judicial District Court dismissed Ibsen's lawsuit against BCBS's successors Caring for Montanans and Health Care Service Corporation on grounds that there is no private remedy for violation of the UTPA.

# Court orders public censure, declines reciprocal disbarment for attorney Edward P. Moriarity

**Summarized from Jan. 12 order in case No. PR 14-0564**

The Montana Supreme Court on Jan. 12 ordered a public censure for attorney Edward P. Moriarity, opting not to impose reciprocal disbarment based on a Supreme Court of Arizona ruling in July 2014.

The public censure will be imposed at 1 p.m. on Feb. 9 in the Courtroom of the Supreme Court in Helena.

Moriarity's discipline in Arizona was in relation to ethical violations in his representation of a now-disbarred Arizona attorney.

The Montana Office of Disciplinary Counsel filed a petition for reciprocal disbarment in August 2014. Moriarity filed objections to the petition, arguing that disbarment in Montana was not justified under the unique facts of this case.

The Commission on Practice conducted a hearing in October 2015, recommending that Moriarity not be subject to any discipline.

The court disagreed with the Commission on Practice that no discipline whatsoever should be imposed. The commission based its recommendation largely on its interpretation that admission of wrongdoing by the attorney is required under the Montana Rules for Disciplinary Enforcement on reciprocal discipline, and Moriarity did not admit to wrongdoing. The court disagreed with

this interpretation. The court noted that Moriarity himself testified at his hearing before the Commission on Practice that he believed some kind of discipline was warranted.

The court noted, however, that while MRLDE accepts another state's final ruling as conclusive evidence of misconduct, the rule provides that identical discipline will not be imposed under certain circumstances. One of these circumstances is that the misconduct in question warrants substantially different discipline in Montana.

The commission determined, and the court agreed, that Moriarity's conduct that was the subject of the Arizona discipline — filing claims without legal or factual basis, mischaracterizing his representation of his client as pro bono, and having the client sign and file the complaint rather than signing it himself — is not the type of conduct for which disbarment has typically been ordered.

## Appointments

### Jud. Nomination Commission

Two new members were recently appointed to the Judicial Nomination Commission.

The Supreme Court appointed Missoula attorney Karl Englund to the commission on Dec. 15. Englund takes

over the spot previously held by Ryan Rusche.

Englund was appointed as an attorney actively engaged in the practice of law in Montana and residing in the 4th Judicial District. His term started on Jan. 1 and ends Dec. 31, 2019.

On Jan. 7, Gov. Steve Bullock appointed retired Missoula teacher Jan Bishop as a lay member to the commission. Bishop takes over the spot on the commission previously held by Mona Charles of Kalispell.

## District Court Council

The Montana Supreme Court recently reappointed the Honorable Gregory R. Todd of Billings and Butte Silver Bow Clerk of Court Lori Maloney to three-year terms on the District Court Council. Their positions had expired on June 30, 2015. Their new terms will expire on June 30, 2018.

## Commission on Courts of Limited Jurisdiction

The Montana Supreme Court on Dec. 15, 2015, appointed the Honorable Heidi Ulbricht as a member of the Commission on Courts of Limited Jurisdiction. Her term will end on Dec. 31, 2018.

Judge Ulbricht replaces the Honorable Douglas Harkin, who resigned his position.

## Access to Justice forum set for March 16 in Billings

The next in the Access to Justice Commission's series of forums about the need for civil legal services for low- and moderate-income Montanans will be held in Billings on Wednesday, March 16.

The series is an effort of the Montana Supreme Court Access to Justice Commission with the support and assistance of others working within the framework of access to justice efforts. The series of regional public discussions, which began with a forum in October 2015 in

Kalispell, will be held in seven different locations across the state. The series will conclude in the fall of 2016 in Helena.

Each two-hour forum will include a listening panel and witnesses, both of which are by invitation only. The forums are open to the public, and there will be 30 minutes for public comment.

The Access to Justice Committee will use the testimony as part of the basis for recommendations to the Supreme Court, the Legislature and the State Bar of Montana to increase availability of legal assistance in civil matters.

**Upcoming forums (venues, times TBA):**

**Wednesday, March 16, Billings.**  
Contact: Patty Fain, pfain@mt.gov, 406-794-7824

**Wednesday, April 14, Missoula.**  
Contact: Lisa Mecklenberg-Jackson, lmecklenberg-jackson@mt.gov

**Wednesday, May 18, Bozeman.**  
Contact: Jennifer Brandon, jbrandon@mt.gov, 406-582-2165

**Wednesday, Sept. 21, Butte.** Contact: Michele Robinson, Michele.robinson45@gmail.com

**Wednesday, Oct. 19, Helena.** Contact: Melena Reynolds, mreynolds@co.lewis-clark.mt.us



# 42% report they have been received threats or violence

**By Stephen D. Kelson**

Violence is an increasingly concerning issue in our country where even the legal profession has been affected. In 2015, national media groups reported a number of sensational acts of violence against the legal profession.

For example, in Indiana, a family law attorney was targeted, in an alleged murder plot, by a mother and son with a syringe containing a lethal dose of anesthetic succinylcholine. In Mississippi, an attorney was shot and killed during a deposition. In Oklahoma, an attorney, in self-defense, shot and killed a client who attacked him. In North Carolina, a man drove a burning truck, loaded with propane tanks and gasoline, into the law office of his girlfriend's attorney. In Alabama, a city attorney while at his office was shot in the chest. In Delaware, a man attempted to hire an undercover detective to kill his former defense counsel and a prosecutor. In Texas, a judge

was ambushed and shot in front of her home.

The reporting on these isolated incidents might lead one to think that threats and violence against the legal profession are exceptionally rare. That would be an incorrect assumption. Many members of the legal profession, including members of the Montana legal profession, experience threats of violence and actual violence in their practices – some regularly. To better evaluate and understand the degree of threats and violence against attorneys, from Oct. 12, 2015, through Nov. 16, 2015, all active, in-state members of the Montana legal profession were invited to participate in an online survey regarding violence and threats of violence experienced in the practice of law. This article provides a brief summary of the responses to this survey and a glimpse into work-related threats and violence experienced, but seldom discussed, by members of the Montana legal profession.



## Statewide Studies of Violence against the Legal Profession

To date, 21 other statewide surveys have been conducted regarding violence against the legal profession. The results provide a rare insight into the nature and frequency of work-related threats and violence experienced by the legal profession, the overwhelming majority of which have never been publically reported.

Reported threats of violence include stalking, phone calls, written letters, emails, texts, online posts, verbal threats of physical violence and death threats, and even attempts to hire “hit men” to kill attorneys. Acts of violence reported by attorneys in these state surveys include assaults and batteries, as well as vandalism to attorneys’ businesses, house and personal property. The results of each of these state surveys clearly show that threats and violence against members of the legal profession are much more prevalent than reported by the media or commonly perceived by practitioners.

### Threats and Acts of Violence

The survey’s primary question asked attorneys if, while serving as a member of the Montana legal profession, they had ever been the recipient of a threat or had been the victim of a violent act. Of the 403 responses to this question, 169 (41.9 percent) of the respondents reported that they had been threatened and/or physically assaulted at least once.

Respondents to the survey provided more than 180 examples of work-related threats and violence perpetrated against them. Some examples of reported threats and violence experienced by members of the Montana legal profession include:

*“My office was bombed.”*

*“I was in an office-sharing arrangement several years ago where another attorney’s client killed himself outside of my office with a shotgun.”*

*“A pro se party sent repeated threatening and abusive letters to me and my co-counsel at our office.”*

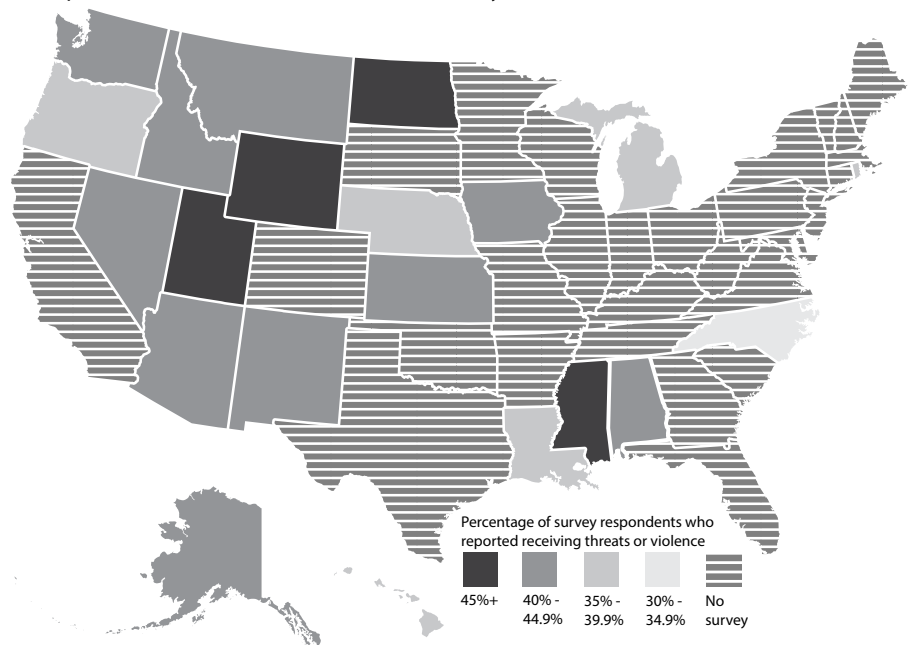
*“I received in the mail a newspaper clipping about a lawyer who was shot in the courtroom by an opposing party. The clipping was pasted to a piece of paper.”*

*“Two different criminal defendants*

**Survey,** next page

## Threats, violence against attorneys

In a survey conducted in late 2015, 169 out of 403 Montana attorneys who responded, or 41.9%, said they have received a threat or been the victim of a violent act while serving as a member of the Montana legal profession. The map below shows how Montana compares with other states where similar surveys were done.



Source: Stephen D. Kelson survey

## About the survey

The survey was conducted independently by the author, using an email list created from alternative online sources, and administered through SurveyMonkey.com. The questions sought responses regarding:

- Whether respondents had ever received threats or been the victim of violence
- Types of threats and/or violence
- Number of threats received
- Whether threats and/or violence occurred while employed in public or private practice
- Locations where threats occurred
- Association between threats and assaults
- Relationship with perpetrator
- Whether incidents were reported to the police
- When threat and/or violence last occurred
- Change in conduct
- Demographic information

For the survey, a “threat” was defined as: “A written or verbal intention to physically hurt or punish another, and/or a written or verbal indication of impending physical danger or harm.” In October 2015, the Montana legal profession consisted of 3,247 active, in-state attorneys and judges. The survey received a total of 403 responses, representing 12.4 percent of all active, in-state attorneys and judges. The following briefly summarizes the responses of members of the Montana legal profession who responded that they have received violence and/or threats of violence.

lunged at me while in a courtroom after being sentenced....”

“Threatening to harm individuals, taking threatening stance with staff, family members visiting office for ‘justice of their own.’”

“Attempts were made to run me off the road....”

“Letter described my home and family indicating that I had been watched.”

“I have had windows at my office shot out a couple of times.”

“[M]y [car] was trashed with baseball bats by disappointed client and his associate....”

“Threat by an opposing party in a foreclosure action to kill me if I appeared for a hearing[;] [p]hysical challenge by an opposing attorney who was angry about a legal position I took[;] [v]ague physical threats against me and my children by the father of a former client.

“I was hit by a defendant in court.”

“Threats to hire a hit man; threats to be tried and if convicted hung from bridge; [t]hreats against property; bounty against property; bounty of 1 million dollars for my apprehension.”

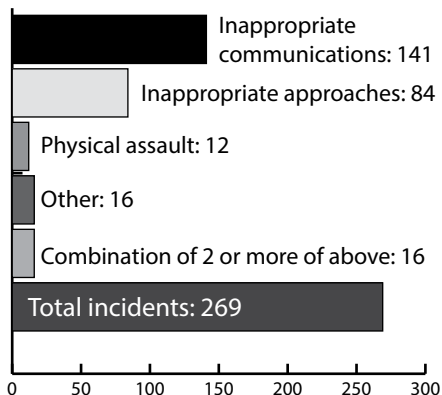
As part of the survey, respondents were asked to identify the area of law which comprises the majority of their legal practice. Not surprisingly, a significant percentage of respondents who reported threats and violence practice in the areas of criminal defense/prosecution (25.4 percent) and family law (12.4 percent). However, a significant percentage of respondents in other areas of practice also reported being the recipients of threats and violence: General litigation (23.7 percent); judge (8.3 percent); administrative (1.8 percent); corporate/commercial/real estate (4.1 percent); wills/estates (1.8 percent); and labor/employment/civil rights (0.6 percent). Moreover, an additional 21.9 percent of respondents, practicing in other areas of law, including medical malpractice, education, mediation, bankruptcy, disability, etc.

### Types of Threats and Violence

The survey asked respondents to identify the types of threats and acts of violence received relating specifically to their responsibilities as a legal practitioner. There were 159 respondents who reported the responses (see graphic on this page). Inappropriate and threatening

## Types of threats and/or violence

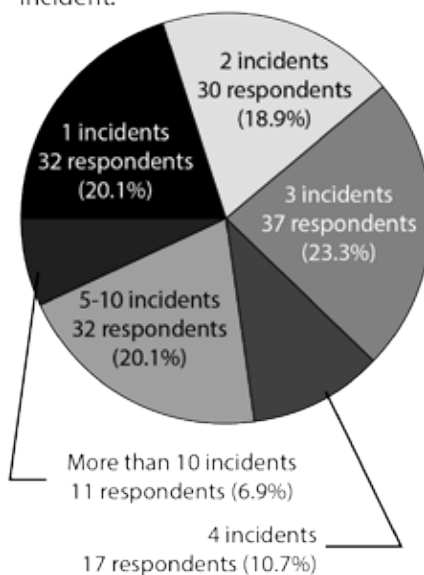
159 Montana attorneys responded in a survey that they have received threats or were victims of violence during their time in the Montana legal community. The following graph shows the breakdown of types of incidents reported.



Source: Stephen D. Kelson

## Threats received

Nearly 80% of respondents who reported receiving threats or violence said they have had more than one incident.

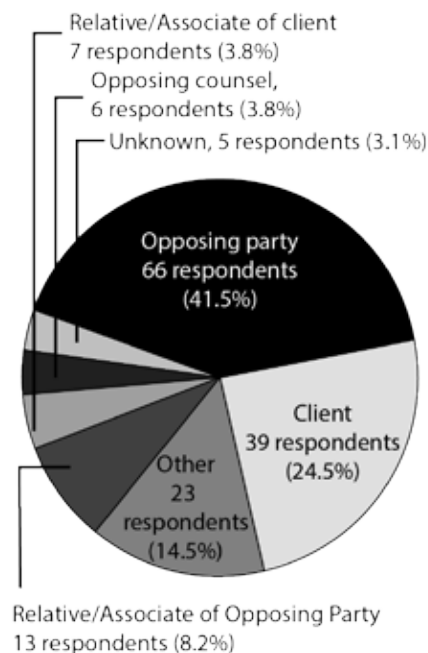


Source: Stephen D. Kelson

communications were those communicated verbally (in person and by phone), through other people, letters, court briefs,

## Perpetrator of threat

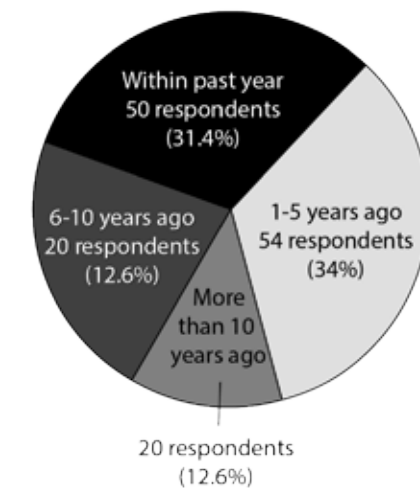
Those who responded to the survey said an opposing party was the most likely source of a threat or violence.



Source: Stephen D. Kelson

## Time of last threat

Nearly two-thirds of those who reported threats or violence against them said the most recent occurrence was within the past 5 years.



Source: Stephen D. Kelson

facsimile, email, text, and online posts and through Facebook. Inappropriate approaches included face-to-face

confrontations, attempts to commit violence, and being followed. A total of 12 respondents (7.6 percent) who identified themselves as recipients of threats and violence reported being the victim of a physical assault. (Note, because some people started the survey and didn't answer all the questions, some of the numbers do not agree.)

Similar to the results of the other 21 states surveyed, an overwhelming majority of respondents identified inappropriate and threatening communications and approaches. Inappropriate communications were made primarily in person or by phone, and included direct and veiled threats. For example, individuals made threats of: "I'll kick you @\$"; "Your blood will flow in the streets"; "I'll rip your guts out"; "I'll get you"; "I will get your family"; "You will pay"; "I'll kill you"; "I'll strangle you"; "Time to get out the body bags"; "watch your back"; "I'll shoot you"; "I'll beat you up"; "you're not going to live very long"; "I'm coming to your office to settle this"; "I'll blow your foot off"; etc. As described, the majority of reported threats were made directly against attorneys. However, multiple threats were directed against attorneys' families and children. A small number of respondents learned of threats made against them from opposing counsel, the police, and mental professionals. Many respondents described learning of threats through other forms of inappropriate communications, including vandalism to their vehicles and office. Several respondents reported how their office windows were smashed or shot out.

#### **Number of Threats Received**

The survey requested those respondents who identified themselves as recipients of threats and/or violence to indicate the number of threats they received. A total of 159 respondents reported they had received threats in the practice of law. Based on the responses shown in the graphic on page 12, 127 (79.9 percent) of the respondents who were recipients of threats and/or violence, have received more than one threat during their career.

#### **Threats and/or Violence as a Public or Private Attorney**

The survey asked respondents to identify whether the most recent threat(s) and/or violence experienced occurred while they were employed as public or private

attorneys. Of 159 respondents, 84 (52.8 percent) identified the last threat and/or violence occurred while employed in private practice, 58 (36.5 percent) occurred while employed in public practice, and 17 (10.7 percent) identified that it occurred while employed in both public and private practice. These responses may suggest that Montana attorneys employed in public practice are more likely to experience threats and violence than those in private practice.

#### **Locations of Threats**

The survey asked members of the Montana legal profession to identify the location(s) where they experienced threats. Respondents identified the most prominent locations of threats and violence as the business office (98 responses) and the courthouse (60 responses). These results are similar to the survey answers from other states and probably not surprising to many practitioners. However, many respondents reported numerous threats and violence beyond the office and courthouse, including at home (18 responses) and elsewhere (47 responses). For example, attorneys reported threats and attacks made while at jail, at bars, convenience stores, city hall, restaurants, parking lots, and on public streets.

#### **Threats, Subsequent Assaults**

Attorneys who received threats were asked to identify if the individual who made the threat was the same person, or connected to the person, who subsequently assaulted them. Of 159 responses, only 7 incidents of subsequent physical assaults were reported, and an additional 1 could not identify whether the assault was related to the threat.

#### **Relationship with the Perpetrator of Threats/Assaults**

Recipients of threats and violence were also asked to identify their association with the individual who most recently threatened and/or assaulted them. (See graphic on page 12). Similar to the surveys conducted in other states, 159 respondents reported that threats and violence were primarily perpetrated by opposing parties and the attorney's own client. However, responses show that threats and violence can occur from any individual involved in a legal case, unfortunately including other members of the bar. Reported incidents involved direct threats and invitations to fistfight. For

example, one respondent reported that opposing counsel backed him up against a wall and punched him in the chest during a trial recess. Another respondent reported that during a recess in a jury trial, out-of-state opposing counsel threatened to have him killed.

#### **When threats/assaults last occurred**

Respondents were asked when they last received a work-related threat or when they were the victims of a physical assault. (See graphic on page 12). Results show that of 159 respondents to the question, the majority, 104 (65.4 percent), reported such acts had last occurred within the past five years.

#### **Reported to Police**

Attorneys who reported being the victim of threats and/or violence were asked if it was reported to police. Of 159 respondents, only 60 (37.7 percent) indicated yes, while 66 (41.5 percent) said no. Another 33 respondents (20.8 percent) did not find the question applicable.

#### **Change in Conduct**

The survey also asked respondents who had received threats and/or had been the victim of physical assault if such threats and/or violence had altered the way they conducted their legal business. Of 154 respondents to this question, only 9 (5.8 percent) reported that such incidents had affected their conduct a great deal, 57 (37.0 percent) indicated that their conduct had been somewhat affected, and 88 (57.1 percent) identified that it did not at all alter the way they conducted business. Some reported changes in conduct include: changing the area of law in which they practiced and carrying weapons.

### **Conclusion**

The purpose of the survey is not to instill fear in attorneys or in any way to discourage the practice of law. Instead, they show that, contrary to the general perception, a significant number of members of the Montana legal profession have experienced threats and violence related to the practice of law. Simply because one hasn't yet received threats or been the victim of work-related violence, it should not be assumed that threats and violence against attorneys are entirely random or can only happen to someone else. The reality is that work-related violence can come from any side of a given case and can reach beyond the courthouse and office.



# Montana Supreme Court case summaries for November and December 2015

By Beth Brennan  
Brennan Law & Mediation

**Kulko v. Davail, Inc., 2015 MT 340 (Dec. 8, 2015) (Cotter, J.) (7-0, rev'd)**

**Issue:** (1) Whether the district court erred in concluding that corporate dissolution is an exclusive remedy under § 35-1-939, MCA; and (2) whether the district court erred in dismissing Kulko's claims for lack of subject matter jurisdiction on the basis that the corporate dissolution eliminated any case or controversy.

**Short Answer:** (1) Yes; and (2) yes. Reversed and remanded

**Facts:** Alex and Sharon Horn incorporated Davail, Inc. in Montana in 1982 for estate planning purposes. Their children – David Kulko, Ilsa Kaye and Michael Horn – are Davail's sole shareholders, officers and directors. Kulko owns 46 percent of the shares and is a director and vice-president; Kaye owns 46 percent and is a director and president; and Horn owns the remaining 8 percent. Davail's principal asset is a recreational property near Condon called Falls Creek Ranch.

Alex and Sharon founded the Odyssey Study Group, a secretive spiritual organization that some call a cult. Kulko was affiliated with the group until 2000, when he left the group and became estranged from his family. Kulko maintains that during the period of his estrangement, he was excluded from Davail director and shareholder meetings, denied access to corporate records, and denied all monetary and non-monetary benefits of ownership.

In November 2013, Kulko sued Davail and his siblings for dissolution of the corporation and damages for fraud and breach of fiduciary duties. Eventually the parties agreed to dissolution, and the district court dissolved Davail and appointed a receiver. The process of liquidating and distributing assets is ongoing.

In July 2014, Kulko moved to amend his complaint to add a punitive damages claim and to clarify his request for compensatory damages. Kaye and Horn responded that Kulko obtained the remedy he sought, and that no case or controversy exists.

**Procedural Posture and Holding:** The district court held that the governing statute authorizes dissolution or other equitable remedies, but not both, and dismissed Kulko's complaint for lack of subject matter jurisdiction, denied his motion for leave to amend, and declined to rule on his pending discovery motions. Kulko appeals and the Supreme Court reverses.

**Reasoning:** (1) The statute providing alternative relief to dissolution, § 35-1-939(1), MCA, codifies the holding in *Maddox v. Norman*, 206 Mont. 1 (1983). However, Kulko was not seeking an equitable remedy to avoid corporate dissolution

*Editor's note: This article contains summaries of selected Montana Supreme Court cases. Summaries of all Montana Supreme Court cases are available at [brennanlawandmediation.com/mt-supreme-court-summaries](http://brennanlawandmediation.com/mt-supreme-court-summaries)*

but a traditional remedy – money damages – as an injured shareholder. According to the ABA Official Comments to the Model Business Corporation Act, upon which the Montana Business Corporation Act is based, dissatisfied shareholders may seek traditional remedies for breach of fiduciary duty. The district court therefore erred.

(2) Kulko's claim for dissolution was distinct from his claim for damages. The district court erred in concluding that Davail's dissolution made Kulko's claims moot.

**Teton Co-Op Canal Co. v. Teton Coop Reservoir Co., 2015 MT 344 (Dec. 15, 2015) (Baker, J.) (5-0, rev'd)**

**Issue:** Whether the Water Court erred in determining that off-stream water storage in the Eureka Reservoir was included as part of the Teton Canal's April 18, 1890, Notice of Appropriation.

**Short Answer:** Yes. Reversed and remanded

**Facts:** Teton Canal was formed in 1903 for the purpose of appropriating, transporting, storing and using water for irrigation in Teton County. It claims its priority date for the Eureka Reservoir under an April 18, 1890, Notice of Appropriation. In that notice, Teton Canal's predecessors claimed 3,000 inches of Teton River water for the purpose of gathering water in a reservoir and using it to irrigate adjacent lands. Under an April 29, 1891, Notice of Appropriation, Teton Canal's predecessors claimed 10,000 inches of Teton River water for irrigating, reservoirs and other purposes.

After filing the 1890 notice, Teton Canal's predecessors immediately began constructing the Glendora Canal, and eventually formed the Eureka Reservoir Canal and Irrigation Company. In 1908, in *Perry v. Beattie*, the court decreed that Teton Canal is entitled to 3,000 inches of water under the April 1890 decree. Teton Canal's claims under the 1891 notice did not survive the *Perry* decree.

In 1921, Teton Canal filed a notice of appropriation for 100 cfs of the flood waters of the Teton River for the purpose of storing water in a reservoir, the description of which corresponds with the Eureka Reservoir's current location and its location on the 1892 plat map. The Water Conservation Board filed a declaration of intent to store, control and divert water on Dec. 3, 1936, by "means of the 'Teton Cooperative Canal Company Project.'" Teton Canal and the Water Conservation

Board jointly constructed the Eureka Reservoir from 1936-1937. The Water Conservation Board turned over ownership of the reservoir to Teton Canal in 1946, and in 1947 and 1957, the capacity of the dam was increased to its current 5,500 acre feet.

Teton Canal filed a statement of claim in 1982 for six distinct water rights, all of which appeared in the Temporary Preliminary Decree with a priority date of April 18, 1890. Teton Reservoir and the Lower Teton Joint Objectors objected to all six claims. Eventually all parties but the Teton Reservoir settled their objections. Teton Reservoir contends that Teton Canal predecessors developed the 1890 notice, which did not contemplate the Eureka Reservoir, that Teton Canal did not proceed with reasonable diligence in developing the reservoir, and that Teton Canal's priority date for the reservoir is based on the 1936 Declaration.

**Procedural Posture & Holding:** The Water Master held a hearing on Teton Reservoir's objections in October 2012, and the Water Court order was issued in February 2015, concluding that Teton Canal's claims for the Eureka Reservoir were properly administered under the 1890 notice. It further concluded that later additions to the Eureka Reservoir were expansions of the original appropriation that must be reflected in more junior water rights claims. It determined that Teton Canal's total annual volume for all claims is 14,000 acre feet, that its period of use runs from April 20-Oct. 14, and that its historical place of use totals 17,332 acres with a 7,650-acre limit on annual irrigation. Finally, it determined that Teton Canal's stockwater claims are valid reflections of historical use. Teton Reservoir appeals, and the Supreme Court reverses.

**Reasoning:** The evidence establishes that the Glendora Canal is the diversion point described in the 1890 notice, which was developed by Teton Canal's predecessors. The Water Court's finding to the contrary is clearly erroneous. The evidence further shows that Teton Canal's predecessors intended to, and did, develop and maintain off-stream water storage in the Glendora Reservoir under the 1890 notice, and intended to, and did, convey water in the Eureka Canal under the 1891 notice, which did not survive the Perry decree. The court's findings that the Eureka Reservoir's priority date is based on the 1890 notice is clearly erroneous.

Teton Canal argues that it simply moved the 1890 notice's diversion point two miles upstream after Perry. Regardless, the evidence shows Teton Canal failed to proceed with reasonable diligence in developing the reservoir. Even if the diversion point was moved, the reservoir's completion in 1937 cannot relate back to the 1890 filing. Reasonable diligence requires a steady, ongoing effort in good faith to develop the reservoir. The record shows this did not occur until the mid-1930s.

The Court remands to the Water Court to determine a priority date for the Eureka Reservoir that is in accordance with the evidence.

**State v. Robertson, 2015 MT 341 (Dec. 8, 2015) (Cotter, J.) (5-0, rev'd)**

**Issue:** Whether the district court erred in dismissing the aggravated assault charge against Robertson based on the state's failure to issue a fitness-to-proceed report within 90 days of Robertson's commitment.

**Short Answer:** Yes, because Robertson waived the

timeliness argument. Reversed and remanded

**Facts:** Ross Robertson has been in and out of the state hospital at least seven times since 2004. Robertson attempted to rob a convenience store using a weapon in 2005. After a competency evaluation, he pled guilty but mentally ill and was sentenced to DPHHS's custody for 15 years with 5 suspended.

In January 2012, Robertson violently attacked and seriously injured a nurse at MSH. He was transferred to Montana State Prison the next day where he continued serving his sentence for attempted robbery. While there, the state charged him with aggravated assault to which Robertson pled not guilty in February 2013. After he was found fit to proceed in July 2013, he quit taking all medications. In October 2013 and January 2014, he was found unfit to proceed. During this time, he continued serving his attempted robbery sentence.

On Jan. 10, 2014, the district court suspended the aggravated assault proceeding and ordered Robertson back to MSH. Robertson was transferred to MSH on Jan. 22, 2014. On April 16, 2014, MSH doctors issued a report finding Robertson unfit to proceed, and asked that his commitment to MSH be extended for 90 additional days. The court held a phone conference and issued the order on April 18, 2014. In June 2014, MSH doctors determined Robertson fit to proceed.

**Procedural Posture & Holding:** On June 24, 2014, Robertson moved to dismiss the assault charge on the basis that § 46-14-221(3)(a) required the state to determine whether he was fit to proceed within 90 days of his commitment. The district court granted Robertson's motion, and the state appeals. The Supreme Court reverses.

**Reasoning:** The statute says the "committing court shall, within 90 days of commitment, review the defendant's fitness to proceed." § 46-14-221(3)(a), MCA. Here, the order of commitment was issued Jan. 10, which Robertson claims started the statutory period, but Robertson was not transferred to MSH until Jan. 22, which is when the state contends the period began. The Court does not decide which interpretation is correct. Robertson did not raise the issue of timeliness at the April 18 phone conference at which he agreed to continuing treatment at MSH. Robertson therefore waived his objection to the timeliness of the doctors' report.

**Roose v. Lincoln County Employee Group Health Plan, 2015 MT 324 (Nov. 17, 2015) (Wheat, J.; McKinnon, J., dissenting) (4-1, aff'd)**

**Issue:** (1) Whether the district court abused its discretion in certifying the proposed class; and (2) if the class was properly certified, whether the district court abused its discretion by defining the class over broadly.

**Short Answer:** (1) No, and (2) no. *Affirmed*

**Facts:** Kent Roose was severely injured in a car accident in October 2007. The other driver, Stearns, was killed in the accident; his negligence is undisputed. Stearns' liability insurance carrier tendered the limit of its coverage to Roose, and Stearns' estate also paid Roose; however, these payments did not cover Roose's \$320,000 medical bill from Kalispell Regional Hospital.

At the time of the crash, Roose's wife was an employee of Lincoln County, which provided health benefits via a group



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# Data backup plan

## Essential practices for your paperless office



By Jim Calloway and Ernie Svenson  
ABA TECHSHOW Faculty 2015

**E**verybody appreciates the importance of good backup procedures. But everyone does not implement great backup procedures. Part of the reason is that hard drives today are much more reliable than those of the few generations ago. But the main reason is that because we are all so busy, it is easy for a backup procedure involving a lawyer or law firm staff to be overlooked or delayed.

A convincing argument can be made that good backup receipt procedures are not only a requirement of running a business today, but also an ethical requirement for lawyers. The need for a firm to appropriate backup to protect client data is implied in RPC 1.1, 1.3, and 1.4.

We are both strong believers in the need for a paperless office and digital workflows.

Many lawyers making the transition to paperless today

still keep a duplicate paper client file, but there are significant downsides in using a paper file as a backup. These range from the tendency of lawyers to revert to using the paper file and failing to update the digital file to a lawyer relying on paper file at the last minute only to discover that the law firm's reliance on paperless processes means that the paper file has not been updated and is missing important documents or notes.

Our profession is in a transition from reliance on paper files and other physical information storage systems to a complete reliance on digital client files and paperless workflow.

An important part of making that transition is absolute rockhard certainty that you will always have access to your digital information when you need it. This means that no law firm should have its future and its client matters protected by only one form of backup. It also means that lawyers and staff should be trained on how to cope with a data loss, temporary

inaccessibility of data, loss of power or loss of Internet access.

## Backing Up data to the cloud

When it comes to backups, there is a rigid mantra that all savvy computer consultants know by heart: the only truly reliable backup is an offsite backup.

In other words, while it's nice to have a backup that you make from your computer to an external hard drive, that's not truly secure. Why? Well, because whatever physical catastrophe can happen to your local computer will probably affect the local backup as well.

Here are some examples:

- Fire in your office
- Tornado that hits your office building
- Flood that fills your office with standing water.
- Theft of your computer equipment.

People tend not to think about the theft example, but it happens. Filmmaker Francis Ford Coppola had his computer stolen which had 15 years worth of his movie scripts. He had a local backup on an external hard drive. But when the thieves took his computer, they also stole his external hard drive.

So, again, you want a backup that sends your data offsite so that local catastrophes don't affect the backup.

In the old days, having an "offsite backup" meant doing a nightly backup and then physically transporting the backup tapes to another location. This took time, was cumbersome, and only allowed for nightly backups to the aken offsite. If a disaster happened during the day, all of the new data was going to be lost. Plus if the individual who is transporting the hard drive home loses the drive or has their car stolen, you may find yourself in the position of having to notify all of your clients that there's been a potential data exposure

of their confidential information.

Today, the solution is to use a cloud-based backup service that continuously backs up data as it is being created: immediately and reliably. These services are very affordable, and are the easiest way to reliably backup local data in a way that provides incredible peace of mind.

Among those that provide these services are:

- Carbonite
- Backblaze
- Crashplan
- SpiderOak

These services work with any kind of computer—Mac or PC. If you find a service that doesn't work with both types of computer then consider that a bad sign. The whole point of cloud backup services is to make life easy and if you have to start thinking about what kind of computer you can buy to make them work, then life isn't going to be as easy.

Some of the online backup services also offer syncing across to other computers. Crashplan offers such services, and so you might want to consider if you not only need backup, but also real time syncing to other computers.

The prices for basic online backup (without syncing) vary slightly, or greatly depending on add-on features you select, but in general expect to pay in the range of \$5 to \$12 per month for "personal level" features. Most of these services offer a free trial period so you can investigate how they work and decide which one is best for your purposes.

These services offer business class backup, as well as personal backup. Maybe you can get away with using the lower-cost personal services, but in general you want to use the business class service if you can afford it.

One typical feature of business class services is centralized administration,

which allow you to control backups happening on the various computers that everyone in your firm is using. You don't want to rely on going to each computer and physically checking to see if backups are occurring, or to tweak settings if that becomes necessary. And with the business class services you can even backup your local servers if you have that need.

## How many belts should go with your suspenders?

In conclusion, this is really the ultimate question, even if it is worded colloquially. You have a set of data on your computer and your computer network. You understand that you need at least one additional copy of the data.

It is our experience that this functions much better when done on automated, online process rather than relying for an individual in a busy law firm to do it manually. But then what? Does just making an image of your computer and saving it periodically makes sense? Should you get a portable hard drive and make an additional copy of the backup from time to time? Should you get two portable hard drives so that one can always be stored off-site?

At some level, this is still a matter for each individual lawyer or law firm to decide. But, it is also fair to say at this point that having no backup is not a rational and responsible decision for your clients and your law practice.

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## Montana's Lawyers Assistance Program Hotline

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# Optimizing iOS devices for the enterprise

By Ivan Hemmans  
ABA TECHSHOW Board 2016

Imagine a spectrum with security on one end and convenience on the other. An iPhone — or iPad — would sit on the convenience edge of such a spectrum, without question. Out of the box, the device walks its new user through a fairly simple setup process that promotes establishing an iCloud account and setting an “unlock” code. Neither the code nor iCloud account are required, but following the path of least resistance leads most people to a pretty good place. Lawyers who handle confidential or privileged information and use an iPhone or iPad as a routine part of their practices will want to make a few setting changes to optimize iOS and ensure that its safeguards their valuable data.

## Establish a complex passcode

A device passcode prevents unauthorized people from gaining access to data stored on an iPhone or iPad. As mentioned earlier, iOS doesn’t require establishing one during device setup, but chances you already have. A complex code, one that contains both letters and numbers, is much harder to guess than a simple numeric one. To set a device passcode, touch Settings > Touch ID & Passcode or Settings > Passcode. In older versions of iOS, the passcode setting is available under Settings > General. For devices without Touch ID or Touch ID devices where fingerprints haven’t been stored, it is possible to “Require Passcode” after a short idle-time delay. By default, passcodes are required immediately. Introducing a short delay can make using a passcode less of a hassle.

## Disable Siri on the lock screen

Siri is a powerful digital assistant that has access to any contacts, calendar appointments, text messages, and email syncing to an iPhone or iPad. By default, Siri is available on the lock screen, which means that anyone can ask basic questions and access limited information without needing to know an unlock code. Here are a few questions Siri will answer on a locked device:

- Where do I live?
- Who is my spouse?
- What’s my home address?
- Reply to my text message
- Where is my next appointment?
- What’s on my calendar for tomorrow?
- Who is [insert name of client]?

Which of my contacts work at Sony?

To disable Siri on the lock screen, touch Settings > Touch ID & Passcode > Siri or Settings > Passcode > Siri. In older versions of iOS, the passcode setting is available under Settings > General. Similarly, lawyers may choose to disable Today view, Notifications, and Reply with Message on the lock screen.

## Disable text message previews on the lock screen

By default, the Messages app shows the full text of any text messages or iMessages on the lock screen. Lawyers may, depending on the sensitivity of the matters on which they work,



choose to customize notifications for the Messages app. On the Home screen, touch Settings > Notifications > Messages > Show Previews. With “Show Previews” disabled next message notifications will still appear on the lock screen, but in lieu of the full message text, each notification will simply read “Text Message.” One must unlock the device to read any messages.

## But wait, there’s more

These are but a few of the settings available for customizing an iPhone and iPad. For example, you could spend a few moments ensuring that the default mail, calendar, contacts, notes, and reminders accounts are set the way you want. Or you could spend time arranging apps into folders on screens according to the kinds of apps you keep or kind of work you do. There are many virtual knobs and levers available to tweak in an effort to make your i-device sing. With the settings mentioned above, your iPhone or iPad can slide closer to the security end of the spectrum.

***This article is but a taste of what awaits you at the ABA TECHSHOW 2016, March 16-19 at the Hilton Chicago. We want you to know that as a member you can get a discount on the ABA TECHSHOW 2016. This discount only applies to registrants that qualify for the Standard registration. You can register online and include this unique discount code: EP1625 to receive a discount. Reprinted with Permission. 2015© by the American Bar Association. All rights reserved.***

### Panarella to receive 2016 Ruffatto Memorial Award

The University of Montana Alumni Association has announced Professor Sam Panarella of the School of Law as the recipient of the 2016 John Ruffatto Memorial Award. The award was established to encourage and reward University of Montana faculty who impart practical, applicable principles into their classroom presentation.



Panarella

The University of Montana Alumni Association will honor Professor Panarella and the seven other Charter Day award recipients at the annual Charter Day Awards Ceremony and

Reception on Thursday, Feb. 18. The ceremony, which will cap off the celebration of UM's 123rd birthday, starts at 5:30 p.m. in the University Center Ballroom.

### Law school gets grant to study conservation status of species

The Rocky Mountain Mineral Law Foundation has awarded a grant to the Blewett School of Law for a research project on conservation agreements and their application to the conservation status of species.

Professor Martha Williams applied for the grant requesting funds for a graduate student in the School of Forestry and Conservation, a graduate student in the School of Journalism, and law students to work collaboratively in their research.

Williams said the grant is for \$10,000 and goes directly to the students working on the research.

The students and Williams will publish an article detailing the results of their study and produce a handbook people can use as a practical guide to entering conservation agreements. Williams said she hopes to have the research finished by the end of next summer, with the handbook and scholarly article finished by next fall.



Williams

The foundation is a collaborative, educational nonprofit organization dedicated to the scholarly and practical study of law relating to mining, oil and gas, water, public lands, energy, environmental protection and other related areas.

## Modest Means

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

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

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

### What are the benefits of joining Modest Means?

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

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

### Questions?

Call the State Bar of Montana at 442-7660.



**For more information** about upcoming State Bar CLEs, contact Meagan Caprara at [mcaprara@montanabar.org](mailto:mcaprara@montanabar.org). You can also find more info and register at [www.montanabar.org](http://www.montanabar.org). Just click in the Calendar on the upper left of the home page to find links to registration for CLE events. We also mail out fliers for multi-credit CLE sessions, but not for one-hour CLE or

# Cutting-edge topics on agenda at Real Estate CLE

Attendees at the Annual Real Estate CLE at Fairmont Hot Springs will hear cutting-edge updates in real estate law – and cutting-edge information on using technology in your law practice.

The CLE, which will be Friday, Feb. 12, is approved for 6 CLE (1 Ethics).

This year's Real Estate CLE brings together Montana practitioners from varying areas of principal practice for a comprehensive collection of current real estate issues. Set against the backdrop of Fairmont Hot Springs in February, it also promises a much-needed escape from the daily practice of law.

Topics on the agenda:

Issues in Litigating Real Property Cases, presented by David Legare; Tech Checklists: Questions You Should Be Asking Your Clients and Why You Should Be Asking Them, by Sam Alpert, State Bar Information Technology Program Manager; Conservation Easements, by Christian Dietrich; Maintenance of LLCs: How to Avoid Imposition of Personal Liability of LLC Members and Unintended Liquidation, by David Dietrich; A Realtor's Duties, or Lack Thereof, by Amanda Beckers-Sowden; and Airspace, Drones, and Subsurface Rights by Kristen Juras.

### Upcoming CLE of interest

Feb. 10, noon — Wednesday Webinar: Child Support Enforcement Division Guidelines Revisited, 1 CLE

Feb. 11 — Free CLE: Indian Wills, noon to 1 p.m., Montana Supreme Court courtroom, 215 N. Sanders St., Helena.

Feb. 12—Fairmont Hot Springs—Annual Real Estate CLE

Feb. 17, noon – Wednesday Webinar – Cybersecurity in the Law Firm and the Effect of Cyber Crime on Attorneys, 1CLE

Feb. 24 – Wednesday Webinar – Estate Planning - Basic Documents, 1 CLE

March 4 – Missoula, St. Patrick Hospital – Estate Planning End of Life and Health Care Planning

March 11—Fairmont—Annual St.



## State Bar launching new webinar series Feb. 10

A new series of lunch-hour webinars give State Bar of Montana members a convenient way to meet their CLE requirement and stay up to date on the practice of law.

The Wednesday Webinars series kicks off Feb. 10 with Child Support Enforcement Division Guidelines Revisited: Policy Changes and Tips, presented by Robin Hall and Caroline Riss, the two administrative law judges for CSED in Montana.

Many more webinars are planned, and more will be added to the schedule throughout the year.

Upcoming webinars are:

**Feb. 10, noon to 1 p.m.: Child Support Enforcement Division Guidelines Revisited: Policy Changes and Tips** (1 CLE), presented by Robin Hall and Caroline Riss. Topics covered will include: cost of health insurance as a permissible deduction; how to calculate self-employment income; imputed income; the need for supporting evidence; and long-distance parenting when a parent works out of state.

**Feb. 17, noon to 1 p.m.:**

**Cybersecurity in the Law Firm and the Effect of Cyber Crime on Attorneys** (1 ethics CLE), presented by attorney Erin MacLean, Freeman and MacLean in Helena, and paralegal Deborah M. Micu, Micu Consulting in Helena. This introductory webinar will give attorneys a basic understanding of cybersecurity, cyber threats to law firms and the effect of cybercrime on attorneys and their clients, including attorneys' ethical and legal obligations related to these topics.

**Feb. 24, noon to 1 p.m.: Estate Planning** (1 CLE), presented by Louis C. Villemez, an attorney who specializes in elder law. The webinar will give a brief introduction to powers of attorney, living wills, homestead declarations, beneficiary deeds, and living wills.

Webinars run from noon to 1 p.m., and each webinar is good for one live CLE credit. More information and registration for each webinar can be found in the calendar at [montanabar.org](http://montanabar.org).

Recordings of webinars will be available online following the original presentation. To find the catalog, go to [montanabar.org](http://montanabar.org) and select "On-Demand CLE" under the "Store" heading.

Patrick's Day CLE

March 18 — Helena — Hidden Profitability: What Is It and How Can Attorneys Tap Into it? 6 CLE

March 24 — Helena — Trends in Environmental Law

March 30 — Webinar — TBD

April 1 — Great Falls—Don't Be Fooled

April 6 — Webinar — TBD

April 8 — Great Falls — MTLA Spring CLE

health plan that was part of JPT, a pool of local government health plans, and administered by EBMS. The plan would not pay medical costs if auto or third-party liability insurance was available to pay them.

The hospital asserted a medical lien for \$40,000. Stearns' insurer tendered its \$100,000 liability limit to Roose in a check made out to him and the hospital. The hospital refused to sign the check or release its lien until Roose agreed to pay the hospital \$40,000 of the \$100,000, which Roose did.

Roose contacted EBMS to object to the fact that the \$40,000 hospital charge was paid out of liability insurance rather than health insurance, and requested reimbursement. EBMS denied his request, and Roose sued. In *Diaz v. State* (Diaz III), the Court held that exclusions such as those in the plan violated § 2-18-902(4), MCA, the made-whole law. Appellants reimbursed Roose the \$40,000.

On remand, Roose moved for partial summary judgment and class certification, arguing that Appellants' systematic practices amounted to seeking subrogation before Roose was made whole. Roose moved for class certification of every member of Appellants' plans subject to Montana law and containing the coverage exclusion. He requested declaratory judgment that the exclusion and the systematic practices violate Montana law, and an injunction ordering Appellants to cease illegal practices. On his own behalf, Roose requested a trial on actual and punitive damages for bad faith.

**Procedural Posture & Holding:** The district court certified a class for equitable relief under Rule 23(b)(2) and authorized notice to potential class members. It ruled that JPT must provide coverage for medical expenses regardless of third-party liability coverage, and ordered Appellants to remove the illegal exclusion from their plans and cease systematic practices that violate the law. It further ordered Appellants to process all claims incurred in the past without the illegal exclusion. It granted Roose's motion for a trial on his bad-faith claim in a separate order. Appellants appeal the class certification, and the Supreme Court affirms.

**Reasoning:** (1) Appellants contend Roose failed to meet Rule 23(a)'s requirements for numerosity, commonality, and typicality, and adequacy of representation. The party seeking class certification bears the burden of proof.

The heart of the numerosity requirement is that joinder is impracticable. Appellants argue that a search of their records showed that Roose was the only person whose made-whole rights were violated by having liability payments applied to medical coverage when submitting claims to EBMS. The district court evaluated the evidence and determined other individuals are certain to be found even though they have not submitted claims.

Appellants argue that Roose's bad-faith claim destroys commonality and typicality and makes Roose an inadequate representative. They argue that Roose seeks money damages, which falls outside the scope of Rule 23(b)(2). The U.S. Supreme Court has held that class certification under Rule 23(b)(2) is inappropriate where monetary relief is "not incidental" to the injunctive or declaratory relief sought. *Wal-Mart*. Here, any money damages would be incidental and therefore do not prohibit certification under Rule 23(b)(2). Nothing in Roose's bad faith claim implicates issues in the class action.

Notice for Rule 23(b)(2) classes is discretionary, as opposed to the mandatory notice for 23(b)(3) damages classes. Rule 23(b)(2) classes are mandatory; class members may not opt out. Appellants argue notice in this case was improper. The district court held that, despite Appellants' removal of the illegal exclusion, all policyholders are entitled to notice of its removal.

(2) The Court finds the class definition appropriately narrow and within the district court's discretion.

**Justice McKinnon's Dissent:** The Court "conflate[s] the requirements of Rule 23 to facilitate discovery for a plaintiff at the expense of procedural fairness for a defendant." ¶ 43. Roose is the only person who had his claims treated in this manner, which does not suffice for numerosity. Moreover, notice for a mandatory class does not serve any due process interest if it is issued after the substantive decision had been made by the court. Justice McKinnon believes class certification was contrary to Rule 23 and an abuse of discretion.

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## Missoula county attorney releases report on activities

The Missoula County Attorney's Office has released an 11-page report on some of its activities during the past year, including insights and trends from the 1,687 cases its criminal division filed in 2015.

The report notes that the most significant change to the office has been the development of its Integrated Special Victims Unit, which prosecutes cases involving more vulnerable victims.

Missoula County Attorney Kirsten

Pabst said this is the first time a year-end report has been compiled by the office she now leads, and it is designed to increase transparency and provide the public with more detail on the types of cases her staff handles.

The report notes that total criminal cases are roughly the same as in 2014 but down by 166 from the 1,853 cases filed in 2012. Pabst told the Missoulian that this is due to a decrease in misdemeanor cases filed. Part of the decrease in misdemeanor

cases is that the office has backed off misdemeanor marijuana charges and put resources toward prosecuting felony drug charges, according to Pabst.

According to the report, drug crimes make up 20 percent of the office's criminal cases. It notes that methamphetamine cases were up about 15 percent from 2014 and 137 percent from 2013.

You can read the full report by in an article posted in the Montana news section of [montanabar.org](http://montanabar.org).

# Longtime Silver Bow, Lake county attorneys pass away

## Robert 'Bob' McCarthy

Butte lost an advocate, historian, storyteller and intellect on Jan. 13. Robert "Bob" McCarthy was born on Sept. 15, 1941, in Helena, the first of three children born to Helen Mullane McCarthy and



McCarthy

Robert Emmett McCarthy. He died from a heart attack in Butte on Wednesday.

Bob attended kindergarten at Helena Cathedral School at the age of 4, due to the fact he could fluently read, which provided him with passion and intensity unlike any other endeavor. His voracious appetite for reading defined his personality.

During the war, his family lived in Bremerton, Washington, and then moved to Butte in 1948 where he attended St. Patrick's Grade School and graduated from the eighth grade at Immaculate Conception School. He graduated from Butte High School in 1959. He attended Gonzaga and began working in Reno, Nevada, at the Virginia Club, where his math skills were put to great use.

Bob was drafted into the U.S. Army in 1964 and did Basic Training at Fort Ord, California. He then was stationed at the Presidio of San Francisco and clerked for a priest who provided him with temporary relief from the realities of war, and treated him to tickets to Giants games.

After discharge from the Army in 1966, Bob graduated from the University of Montana in Business Administration and began law school in 1970. During this time, he met Loretta Downey and they were married July 22, 1967. Upon graduation in 1973, his family came back to Butte where he began his legal career where he served the Butte Community until his retirement at the age of 67. In 2000, he married Fran Doran until 2007, where they traveled often and made the journey to Ireland and his family's home on the Beara Peninsula. He often commented his family was so far south, they were in the ocean.

Bob's keen sense of observation provided him with a great skill as a lawyer. His advocacy for the Butte Silver Bow city-county consolidation in 1977 was representative of his love of law and the

foundation a city must be based. Writing statutes and improving existing codes became a mainstay of his career and he tirelessly worked for the city of Butte. Bob's gifts of intellect, recollection and memory were evident throughout his years of service as the County Attorney for 28 years.

Bob's life was defined by service to his community. He loved Butte and fiercely fought for its people, community and betterment. He advocated for the marginalized and sought for fairness and justice, and he held himself to a high degree of volunteerism. He served on numerous boards and commissions and valued the need for their existence (too many to list).

A celebration of Bob's life was held on Jan. 20 at the Immaculate Conception Church. Rite of Committal was in Holy Cross Cemetery.

Memorials can be made to the Montana Multiple Sclerosis Society (2047 Broadwater, Suite 2, Billings, MT 59102), Butte Central Foundation (550 E. Mercury), Butte Athletic Council (401 S. Wyoming) or to a charity of the donor's choice.

## Richard Peter Heinz

POLSON – Richard Peter Heinz, 94, passed away on Thursday, Nov. 12, 2015. He was born July 23, 1921, in Chicago. He served as a medic in the U.S. Army's 84th Infantry Division in Europe during



Heinz

World War II. He graduated from DePaul University in Chicago with a bachelor's degree in history in 1948 and a juris doctorate in 1951. He married Carolyn J. Heinz on Dec. 23, 1973.

Richard, his first wife, Trudi, and their daughter, Kathryn Ann, moved to Montana in 1954. He passed the Montana bar in 1957, established a law practice and went on to serve four terms as Lake

County attorney (1963-66, 1970-83). He also served as president of the Montana County Attorneys Association, chairman of the Lake County Democratic Central Committee, exalted ruler of the Elks Lodge in Polson and president of the Flathead Sailing Association. Additionally, he was instrumental in helping the Reservation Pioneers establish the Polson-Flathead Historical Museum.

Richard loved to sail and tend his large rose garden. He also loved working with his hands, and built a cabin in the Mission Mountains and added two extra stories to the family home on Hillcrest Drive. He loved the Lord and his family and was a very active parishioner at Immaculate Conception Catholic Church in Polson. He was a tireless advocate for

and practitioner of justice, fairness and charity throughout his legal career and life.

Richard is survived by his wife, Carolyn; his son, Scott; Scott's wife, Denise; his granddaughter, Samantha; and his great-grandson, Henry. He was preceded in death by his parents; his brother, Eugene; his first wife, Trudi; and his daughter, Kathryn Ann.

In lieu of flowers, memorial donations may be made to the Humane Society of Lake County, Glacier Presbyterian Camp or the Polson-Flathead Historical Museum.

Memories and condolences may be sent to the family at [thelakefuneralhomeandcrematory.com](http://thelakefuneralhomeandcrematory.com). Arrangements are under the direction of The Lake Funeral Home and Crematory.

### John Howard Maynard

John Howard Maynard, 64, passed away unexpectedly while home with his family on Jan. 5. John was a kind-hearted, gentle soul with an amazing sense of humor and love for life. He was born March 29, 1951 in Billings, Montana. He graduated from Billings West High School and the University of Montana, where he earned his Bachelor of Arts and Juris Doctor degrees.



Maynard

After graduation from law school in 1978, John worked as a law clerk for the Montana Supreme Court, an administrative law judge, an assistant attorney general, and administrator of the Tort Claims Division. He entered private practice in 1990 with Browning, Kaleczyc, Berry & Hoven, P.C.

In 1998, John joined the firm now known as Crowley Fleck PLLP. In the past few years, John served as the chairperson of the Litigation Department.

He was dedicated to the firm and his clients. He was committed to mentoring associates and sharing his love of the law. He had his last trial the week before Christmas 2015. He was so pleased with the defense verdict because of how much he cared for and believed in his clients. It was important to John to treat everyone involved in his work, including his opponents, with kindness and respect. He worked with many lawyers throughout his career, including Gary Kalkstein, whom he often remarked was like his brother.

John was married to Marcia Davenport Maynard. They married on Valentine's Day in 1997. They have two children, Jackson and Jessica Maynard. John loved his family. He was focused on making beautiful memories with them and being the best husband and father. He was so proud and thankful for his children. John was previously married to, and remained friends with, Beverly Magley.

John's friends were a big part of his

life. His fellow "bonders" and "51ers" (and spouses) were his extended family. Over the decades, they had many adventures foling, backpacking, camping, floating, barbequing, hot potting, playing pool, and just being together to share love and laughter. John treasured his many friends dating back to his youth.

John was a former hospice volunteer, and was a volunteer for Babe Ruth and American Legion Baseball. He was a member of the Clinical Board of Visitors for the University of Montana School of Law, the Montana Supreme Court Uniform District Court Rules Commission, the International Association of Defense Counsel, and the Montana Defense Trial Lawyers Association.

Memorials may be sent to Hospice of St. Peter's Hospital, the local American Heart or Cancer Society, the Humane Society, or any charity of choice. Please visit [www.aswfuneralhome.com](http://www.aswfuneralhome.com) to offer the family a condolence or to share a memory of John.

### Gregory Lloyd Ingraham

RONAN – Gregory Lloyd Ingraham, age 58, passed away on Dec. 6, 2015, at his home in Ronan from cardiac arrest. He was born Nov. 6, 1958, to Lloyd and



Ingraham

Peggy Ingraham. Greg's youth was spent at the Dairy Queen, fishing at Spring Creek and hiking the Mission Mountains. Greg loved the outdoors and hunting for morel mushrooms and huckleberries. As a fourth-generation Montanan, Greg knew all of the hiking trails of the Mission Mountains. He was especially proud of the trip he and his 85-year-old father took to Mullen Lake.

Greg was an avid athlete in cross county and played basketball. He was on the first debate team for Ronan in the state meet. He graduated from Ronan in 1977 and in 1977-1979 he attended the University of Montana. He graduated from Amherst College in 1981 with a B.A. in business administration. He then

graduated from Gonzaga University with a law degree in 1985. He then returned to Ronan where he joined his father as a partner in the law firm and worked there until his father's death two years ago. Greg continued in that practice until his passing.

Few people get the opportunity to marry their high school sweetheart. Greg waited over 38 years and did just that. After not seeing Linda Foust for over 30 years as fate would have it. They were married six weeks ago, Oct. 15, 2015. They were blessed to spend the past month traveling Europe together viewing the historical monuments. He spent the precious time he had left with the love of his life.

In 2009, Greg was united with Linda and Seth, their son. He was then blessed with a beautiful family. They had become the focus of his life. He always took pride in his relationships and lifelong friends. Greg had a close relationship with all of his nieces and nephews. Teaching them to ski, water ski, fish, jet ski and snow mobile. Like any man he faced trials in

this life. But he always had the strength to overcome the obstacles, and helped others overcome their own obstacles being an active member of AA. He was a member of the Montana Trial Lawyers Association and Lake County Bar Association.

He was survived by his wife, Linda Foust Ingraham; son, Seth (Kirsten) and children, Autumn, Asher, Addy, Ammon; five sisters, Glenda (Gordon) Pate, Cheryl (Stan) Hughes, Nancy (Tony) Hedley, Marla (Steve) Lango, Jill (Peter) Curtis; five nieces and five nephews and Linda's children and grandchildren, Devin (Ashley) Heward, Hannah, Leo, Mava, Charlie and Daylin (Travis) Baker, Shawn VonHeeder and Kayla (Josh) Miliate and Valin (Kaitlyn) Heward and Karlena Heward (Jeremiah Dawson) and Quinn Heward. Greg was preceded in death by his father, Lloyd Ingraham, in August 2014 and mother, Peggy Ingraham, in September 2015.

Funeral services were held Friday, Dec. 11, in Ronan.



## Job Postings and Classified Advertisements

**CLASSIFIEDS Contact** | Joe Menden at [jmenden@montanabar.org](mailto:jmenden@montanabar.org) or call him at (406) 447-2200.

### ATTORNEYS

#### **ASSOCIATED ATTORNEY:**

Helena and Missoula-based law firm seeks associate residing in Helena or willing to commute to Helena approximately two days per week. Experience in litigation preferred. Flexible schedule and telecommuting offered. Salary DOE. E-mail [mike@doggettlawoffice.net](mailto:mike@doggettlawoffice.net) with a resume and coverletter if interested."

#### **ASSOCIATE ATTORNEY:**

The well established and busy law firm of Guza, Nesbitt & Putzier, PLLC, with offices in Bozeman and Whitehall, is seeking an associate attorney to work in a fun, easy going, fast-paced, hardworking, professional atmosphere. GNP has a wide and diverse practice, including civil litigation, criminal defense, construction disputes, employment disputes,

contract disputes, domestic relations, municipal law and personal injury. Candidates must be licensed to practice in Montana and have excellent communication skills, social skills and a strong work ethic. Starting salary D.O.E. Position available March 1, 2016.

Please submit cover letter, law school transcripts, references and resume to Guza, Nesbitt & Putzier, PLLC, Attn: Matthew Haus, 25 Apex Drive, Suite A, Bozeman, MT 59718 or via email to [mhaus@gnplaw.com](mailto:mhaus@gnplaw.com). Please visit our website at [www.gnplaw.com](http://www.gnplaw.com) for information about our firm.

#### **ENVIRONMENTAL LAWYERS:**

The Montana Department of Environmental Quality will be seeking attorney applicants with experience in environmental law and related fields over the next couple months. If interested in working in a fast-paced, challenging, and rewarding

field, periodically check the online job listings at [montanabar.org](http://montanabar.org), the State of Montana employment website at: <http://mt.gov/statejobs/default.mcp> to see the job listings when posted (under "Lawyer" or "Attorney") or contact Peggy MacEwen at (406) 444-6717 or [pmacewen@mt.gov](mailto:pmacewen@mt.gov) for details.

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**CITY ATTORNEY:** The City of Libby located in northwestern Montana is seeking a City Attorney. This position provides legal advice to the

City of Libby and prosecutes cases through the Libby City Court. A minimum of 5 years' experience is required. This is a contracted position without benefits, compensation will be negotiated depending on experience. For further information please contact Jim Hammons, City Administrator at 406-293-2731 or email him at [jim.hammons@cityoflibby.com](mailto:jim.hammons@cityoflibby.com).

**ASSOCIATE ATTORNEY:** Six member firm in Billings with a Statewide practice is looking for a new associate with at least 3 years of experience. Some interest in Trusts and Estates, Estate Planning, and Probate is preferred. However, much of the practice will involve litigation of all kinds. Send materials to Towe, Ball, Mackey, Sommerfeld & Turner, P.O. Box 30457, Billings, MT 59107.

**ATTORNEY:** Missoula law firm specializing in real estate, construction, water and agricultural law (both litigation and transactional) is seeking a full-time litigation attorney. Competitive salary/benefit package offered, DOE. Please send cover letter, resume, writing sample, and list of references to: Office Administrator, Gangle Law Firm, PC., P.O. Box 16356, Missoula, MT 59808, or email information to [sgangle@ganglelaw.net](mailto:sgangle@ganglelaw.net).

**ASSOCIATE ATTORNEY:** Helena law firm is accepting applications for an associate attorney. Experience in litigation and trial preferred, but will work with and train

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**CLASSIFIEDS continued  
on next page**

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**PARALEGAL, Billings:** Paralegal certificate or equivalent experience of two years required. Strong communication skills and writing abilities required. Direct client and witness contact, drafting of pleadings, discovery, research and trial preparation. Emphasis on family law and civil litigation (plaintiff's personal injury). Must be proficient in Word and Excel. Salary DOE. Benefits include paid health insurance, SRA match, paid vacation and holidays.

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#### **LEGAL ASSISTANT/PARALEGAL:**

Kalispell law firm seeks a legal assistant/paralegal for full time, long-term employment in a medical malpractice defense litigation practice. Attention to detail and advanced computer proficiency required; medical background or experience in the medical field is strongly preferred. Salary DOE. Generous benefits package offered. Visit [www.mcgallaw.com](http://www.mcgallaw.com) for full details.

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

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**It's easy to join:** Membership of the LRIS is open to any active member of the State Bar of Montana in good standing who maintains a lawyers' professional liability insurance policy. To join the service simply fill out the Membership Application at [www.montanabar.org](http://www.montanabar.org) -> Need Legal Help-> Lawyer Referral and forward to the State Bar office. You pay the registration fee and the LRIS will handle the rest. **If you have questions or would like more information, call 406-442-7660 or email [tgray@montanabar.org](mailto:tgray@montanabar.org).** Someone will be happy to better explain the program and answer any questions you may have. We'd also be happy to come speak to your office staff, local Bar or organization about LRIS or the Modest Means Program.

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