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State Bar of Montana
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Bar passing score changes

The Montana Supreme Court has ordered to adjust the score for passing the bar exam in Montana from 270 to 266

ALSO: State Bar of Montana petitions court for changes to Rules of Professional Conduct to address lawyer use of technology

Legislative Committees Tackling Big Issues in Law

Committees created by 2015 Legislature studying major issues dealing with attorneys, courts and the justice system, including redistricting of state district courts, rules on criminal sentencing, the future of the Montana Office of the Public Defender, and the Study of Sexual Assault in Montana.

NEW THIS MONTH!

Quarterly column debuts, offering appellate practice tips and summaries of 9th Circuit cases that originated in Montana

Also in this edition:

MONTANA LAWYER

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Correction

A headline in the May edition of the Montana Lawyer incorrectly indicated that attorney Edward Moriarity had been suspended by the Montana Supreme Court. The court did not suspend Moriarity. The court merely referenced him in its suspension of a different Montana attoney. We regret the error.

MLSA rebuilding legal aid model

I recently participated in ABA Days in Washington, D.C., as part of a Montana delegation that met with our members of Congress to discuss the need to maintain federal funding for the Legal Services Corporation and request support for sentencing reform legislation to reduce the level of non-violent offenders in federal prisons. The delegation included Bob Carlson and Jock Schulte (they did the heavy lifting) and we marked the 20th anniversary of ABA Days, which was founded by the ABA in response to a proposal in Congress in 1996 to eliminate funding for legal services.

Since then, these ABA-facilitated meetings have made important contributions to maintaining legal aid funding and promoting the rule of law. The state of Montana does not provide any funding for legal aid, so federal funding is critical to Montana Legal Services Association (MLSA).

MLSA is celebrating its 50th anniversary as a champion of civil legal aid and access to justice in Montana. Founded in 1965 in response to President Lyndon B. Johnson's declaration of "war on poverty," MLSA fights to protect the rights of low-income Montanans. In this benchmark year, MLSA is redoubling its efforts to provide legal help to low-income Montanans.

MLSA is a private, nonprofit law firm with the mission to protect and enhance the civil legal rights of Montanans living in poverty. MSLA has field offices in Helena, Missoula and Billings but also serves clients in every corner of the state, including Montana's seven Indian reservations, providing assistance to low-income Montanans facing issues of consumer law, public benefits, housing law, Indian law, domestic violence, and low-income tax issues.

Currently, 182,000 Montanans live at or below the federal poverty rate and a Montana Justice Foundation study shows that nearly half of those have at least one civil legal need. In 2015, over 6,000 people contacted MLSA for assistance. Lack of adequate funding for civil legal aid means that MLSA is only able to help about 45 percent of low-income individuals who call for assistance. Put another way, there is only one legal services attorney in Montana for every 12,133 people living in poverty, compared to one private attorney for every 274 people above the federal poverty line. This stark contrast in access to attorneys for individuals who can't afford to hire a private attorney is perhaps the best example of the real gap in justice in Montana.

In addition to the high demand for civil legal services and the limited resources available, MLSA also faces the challenge of reaching a largely rural population. In order to address these barriers to justice, MLSA has been innovative in its provision of services and partners with the local bar to pair pro bono attorneys with clients. In addition, MLSA has partnerships with other service providers, the courts, and the law school to ensure that as many people as possible receive the help they need.

While MLSA works to serve as many Montanans living in poverty with their civil legal issue as possible, the private bar has been instrumental in making access to justice a reality for those who cannot afford an attorney. Without the help of pro bono attorneys in Montana, whether providing services through MLSA or independently, hundreds of Montanans each year would go without help. For many, that can mean loss of housing, changes in child custody and loss of public benefits crucial to supporting a family. The Bar is an invaluable partner in MLSA's mission and has made significant contributions to ensuring that those least able to advocate for themselves have a voice.

In addition to building partnerships, MLSA has a commitment to technological innovation, which has been critical to reaching our state's most geographically isolated populations. MLSA is launching a new initiative aimed at improving access to justice for these underserved and rural communities. The Montana Pro Bono Connect Phone Advice Project seeks volunteer attorneys to provide free legal advice over the phone to clients with family law matters. This platform allows individuals in rural areas with limited legal resources to get the help they need. The project also enables attorneys to volunteer time and expertise at their own convenience. MLSA is also working to launch a similar model on an online platform called Montana Online Justice. To find out more about the Phone Advice Project or Montana Online Justice, please contact Angie Wagenhals at awagenha@mtlsa.org or 406-543-8343 ext. 207.

We congratulate MSLA for 50 years of service dedicated to overcoming systemic poverty and injustice and, in so doing, ensuring the health and safety of communities across the state.

"MLSA is launching a new initiative aimed at improving access to justice for underserved and rural communities. The Montana Pro Bono Connect Phone Advice Project seeks volunteer attorneys to provide free legal advice over the phone to clients with family law matters."

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.

If you would like to submit an announcement in Member and Montana News, email it to jmenden@montanabar.org. Articles are subject to editing. For photos, high-resolution JPEG images are preferred (at least 200 ppi).

Sammons joins Wills Law Firm in Missoula

Wills Law Firm of Missoula has announced that Shea A.B. Sammons has joined the firm as an associate attorney specializing in the representation of employers and insurers in workers' compensation cases and other employment law.


Sammons

Sammons is a fifth-generation Montanan, born in Missoula and raised in Charlo. He attended UM-Western where he earned his B.A. in 2012. He went on to the UM School of Law graduating with his J.D. in 2015. In Law School, Sammons was captain of the Jessup Moot Court team and was awarded a member of the Order of Barristers for outstanding oral advocacy.

Sammons clerked for the Brown Law Firm and Wills Law Firm during law school. He is admitted to practice in all Montana courts and the U.S. District Court- District of Montana.

Strong associates with Whitefish firm

R. Blair Strong has associated with Ramlow & Rudbach, PLLP, of Whitefish.

Strong previously practiced over 30 years with Paine Hamblen, LLP in Spokane, Wash. His practice emphasizes energy, the use of land and water, water rights, commercial transactions, government regulation, litigation about the environment, natural resources development, tribes, public utilities and mining.


Strong

He graduated from the University of Montana Law School, Dartmouth College and Bozeman Senior High School. He is admitted to practice in state and federal courts in Montana, the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court. He served four years on active duty as an officer in the U.S. Army infantry.

Bryan presents at environmental law conference held in April in Ireland


Bryan

Professor Michelle Bryan of the University of Montana's Blewett School of Law presented at the 14th Annual Law and the Environment Conference at University College Cork in Cork, Ireland, in April.

The conference theme, "Novel Challenges – Novel Solutions: Innovation in Environmental Law," included speakers and attendees from across Ireland and Europe. Topics ranged from genetically-modified crops, to emerging pollutants, to unmanned shipping vessels, to the use of technology in environmental crime enforcement. Bryan's talk was on the role of community land use regulation and fracking.

Bryan is currently serving as a visiting scholar at the University College Cork School of Law, a sister program with the Alexander Blewett III School of Law.

Cochenour accepted for Supreme Court Fellowship Program in Washington, DC

Assistant Attorney General Matt Cochenour of the Montana Department of Justice's Legal Services Division (LSD) has been accepted to participate in the National Association of Attorneys General Supreme Court Fellowship Program in Washington D.C.


Cochenour

Cochenour's three-month fellowship begins this fall. His work as a Supreme Court Fellow will consist of providing oral advocacy assistance to state attorneys who are arguing before the Supreme Court, attending oral arguments, providing states with written advocacy assistance, and writing for the Supreme Court Report.

Cochenour has been an assistant attorney general at Montana DOJ since 2008, working in LSD's Appellate and Civil Bureaus. His practice focuses primarily on constitutional litigation. He holds an undergraduate degree from Montana State University; he earned his law degree with high honors from the University of Montana School of Law.

Goodrich & Reely firm opens in Missoula, Billings

Malcolm Goodrich, formerly of Goodrich Law Firm, P.C., and Shane Reely, formerly of Reely Law Firm, P.C., announce that they have opened Goodrich & Reely, PLLC, effective June 1.

Goodrich & Reely will provide legal services in the areas of bankruptcy, commercial transactions and litigation, creditor and debtor disputes, water law, estate planning, probates, tax planning, liquor and gaming licensing, family law, and business transactions.

The new firm will consist of the following attorneys:

■ Malcolm Goodrich has been in practice for the past 32 years, after receiving his law degree from the University of

Montana with honors. He is a Business Bankruptcy Specialist, nationally certified by ABC/ABI, and his practice focuses on commercial transactions and litigation, farm and ranch matters, debtor and creditor disputes, and bankruptcies. He has served as past president of the State Bar of Montana Bankruptcy Section, has spoken at numerous education seminars on bankruptcy and he is the current Montana Bankruptcy Bar lawyer representative to the Ninth Circuit. He is listed in Best Lawyers, Mountain States Super Lawyers, and Bar Register of Preeminent Lawyers. Malcolm will work in the Billings office.

■ Judy Williams received her law degree from the University of Montana in 1985 and was admitted to the Montana State Bar the same year. For the past 31 years her practice has focused on family law, poverty issues, adoptions, and child protection. She is a Child Welfare Law Specialist (CWLS) certified by National Association of Counsel for Children and approved by the ABA. She works in the Billings office practicing primarily adoption law and accepts select other cases by referral only.

■ Shane Reely graduated from the University of Montana Law School in 1994 with honors. He opened Reely Law Firm in 2008, after working for the two largest Montana law firms. Shane continues to focus on estate planning, tax, probate, business transactions, and transactions involving liquor and gaming licensing. He is listed in Best Lawyers. He has been practicing in these areas for 21 years, and will work in the Missoula office.

■ Michael Lawlor graduated from the University of Montana Law School with honors and has been practicing law for 12 years. He began his work specializing in estate planning, taxation and business transactions before accepting a position with the Montana Department of Revenue in Helena. His practice now focuses primarily on alcoholic beverage licensing transactions and business transactions in the Missoula office.

■ Maggie Stein graduated from the University of Colorado at Boulder in 2005 and was admitted to the Montana State Bar the same year. She specializes in commercial transactions, debtor and creditor disputes, bankruptcies, and water law matters. She resides near Bozeman and will divide her time between Billings and Bozeman, where the firm intends to establish a separate office in the foreseeable future.

The new firm will maintain offices at 2812 1st Ave. North, Suite 301, Billings, MT 59101, phone: 406-256-3663; and 3819 Stephens Ave., Suite 201, Missoula, MT 59801, phone: 406-541-9700; www.goodrichreely.com.

Proposed changes to Rules of Professional Conduct address lawyers' use of technology

Supreme Court orders 90-day comment period on changes that largely follow American Bar Association Model Rules

By Joe Menden
Montana Lawyer

The Montana Supreme Court has ordered a 90-day comment period on a proposal to modify the Montana Rules of Professional Conduct to provide guidance regarding lawyers' use of technology.

The State Bar of Montana petitioned the Montana Supreme Court, urging the court to revise Montana's Rules of Professional Conduct to address attorneys' ethical obligations regarding the use of technology.

The Bar's petition calls for revising the MRPC's Preamble; terminology defining "writing"; Rule 1.6 on Confidentiality; and Rule 4.4 on Respect for Rights of Third Persons.

The State Bar's Ethics Committee recommended and the Board of Trustees approved the changes, which incorporate aspects of American Bar Association Model Rules.

The Bar's proposal follows the ABA's Model Rules for the most part, but it includes significant departures. For example, the Ethics Committee and Trustees agree that the ABA's Comments to the Model Rules not be adopted. Instead of adopting the ABA Comments, the petition calls for incorporating language from the comments into the preamble of the Montana Rules.

The proposed revisions are intended to address the challenges lawyers face from the fast-paced development and increasing complexity of technology and the potential consequences those changes bring to lawyers, the profession and the public. According to the ABA's 2015 Legal Technology Survey Report, 15 percent of law firms have experienced some form of data breach. That number only represents those who know they have been breached, and it is highly likely that many more have been breached unknowingly.

The Bar's petition calls for the following changes to the MRPC:

- The word "email" is changed to "electronic communication" in Rule 1.0(p), the subsection on the definition of "writing."
- The following language is added to paragraph 5 of the Preamble, regarding competence: "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 new subsection was added to the rule regarding confidentiality of information, Rule 1.6(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."

In addition to the revisions contained in the Bar's petition submitted May 17, the Ethics Committee's recommendation also called for a newly created subsection 4.4(c), stating that a lawyer "shall not knowingly access or use electronically stored information in a communication of document received from another lawyer, for the purpose of discovering 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. …"

The Board of Trustees initially approved the new subsection, which would have been unique to Montana, at its December 2015 meeting, but in response to additional comments received after that meeting, Trustees removed the subsection at their April 2016 meeting. This will be addressed at a later date by the Technology and Ethics Committees.

Supreme Court lowers bar passing score

The Montana Supreme Court has decided to lower the bar exam passing score from 270 to 266 effective immediately.

The order will allow people who failed the bar exam with a score of 266 to 269 between the July 2013 and February 2016 exams to be admitted to the bar. This is because of an existing Montana rule that allows people to transfer a passing score on the Uniform Bar Exam from within the past three years.

The court made its decision at its public meeting May 31. The court had not issued an order as of press time. Updated information will be available at montanabar.org as it is available.

The court received comment from 17 individuals or organizations, including the State Bar of Montana, on an ad hoc committee's recommendation to lower the passing score. The bulk of the commenters favored lowering the score.

While the Bar's Board of Trustees did not reach a consensus on whether to support or oppose the recommendation, it did comment on issues related to implementing any changes. The trustees also let the court know in their comment that they struggled with the issue, and discussed some of the reasons individual trustees support and oppose the proposal.

A poll of board members during a May 10 conference call to discuss the comment showed that several members supported the committee's recommendation to lower the passing score, a nearly equal number said they were opposed, and others indicated they were not comfortable taking a position for or against.

The court formed the ad hoc committee at the request of Dean Paul Kirgis of the University of Montana's Alexander Blewett III School of Law, who submitted a report to the Court earlier this year. Kirgis noted plummeting bar passage rates in Montana since 2013, when the state transitioned from the Multistate Bar Examination to the Uniform Bar Examination and simultaneously raised its passing score from 260 to 270. According to the dean's report, the decrease is not explained by lower LSAT scores for incoming students as is true at many other law schools. Instead, the dean's report suggested that the change in the passing score accounts for the lion's share of the decrease and asked the court to determine whether the lower score is warranted.

Most of the 17 comments submitted to the court by the public, many of which came from Montana attorneys including some who recently passed the bar, were in favor of the change to a 266 passing score. Several commenters were opposed, including at least one who felt the passing score should be raised.

Some argued for returning the passing score to its previous

Exam, next page

Supreme Court unveils Standards of Review Handbook

The Montana Supreme Court has a new research tool for litigants, practitioners and court staff regarding standards of review applied by the court.

The Standards of Review Handbook includes standards of review for hundreds of issues. It is broken into five sections: Definitions, General, Civil, Criminal, and Extraordinary Writs. You can find the handbook online at https://courts.mt.gov/sorh. There is also a link to it on the Supreme Court website, https://courts.mt.gov/supreme.

There is also a link on the page to a 2015 publication on standards of review from the Alexander Blewett III School of Law, written by former Professor Jeffrey T. Renz.

The court notes that the handbook does not express the opinion of the Montana Supreme Court and shall not be cited as authority. The handbook is issued only as a research tool for litigants, practitioners, and court staff regarding standards of review applied by the Court. It is not intended to be comprehensive, and parties involved in appeals should conduct their own independent research.

The handbook was added to the court's website in late May.

The court welcomes suggestions on the handbook. They should be directed to Chris Wethern, Montana Supreme Court staff attorney, at cwethern@mt.gov."

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mark of 260. Among them was Professor Anthony Johnstone of the Blewett School of Law. Johnstone noted that one of the committee's arguments against returning to the 260 score is the fear of attracting less qualified out-of-state test-takers to Montana. In fact, Johnstone wrote, the percentage of out-of-staters taking the test increased from 57 percent to 63 percent the year the passing score was raised to 270.

Johnstone also said there is no evidence of significant benefit to the public from raising the score.

The court "should take this opportunity to return the passing score to 260 unless and until the benefits of an increased passing score demonstrably exceed the costs," Johnstone wrote.

Several of those who submitted comment questioned whether the Uniform Bar Exam is an effective tool to measure attorney competency, and suggested the court should find another indicator of competency.

"It is such a shame that, because of this test, potentially great lawyers are held back because of an exam that does not give a true representation of competency," wrote Kristina Cassone.

US Supreme Court rules right to speedy trial doesn't extend to sentencing phase

Montana solicitor general argues case for state, Supreme Court rules unanimously in *Betterman v. Montana*

By Montana Lawyer Staff

A unanimous Supreme Court ruled in May that a delay in imposing a Montana man's prison sentence did not violate the Constitution's right to a speedy trial.

The justices upheld the sentencing of Montana defendant Brandon Betterman, who waited in jail for 14 months before being sentenced on a bail-jumping charge.

Montana Solicitor General Dale Schowengerdt presented the state's argument to the Supreme Court on behalf of the Attorney General's Office.

The court was being asked for the first time to extend the right to a speedy trial that is part of the Sixth Amendment to the sentencing phase of a case.

According to reporting by The Atlantic, multiple state supreme courts and most of the federal appellate courts have held or assumed that the Sixth Amendment's protections apply during the sentencing phase.

But the Montana Supreme Court disagreed, ruling against Betterman and drawing a distinction between the trial itself and the sentencing phase that follows it. The U.S. Supreme Court had not explicitly ruled on the issue before.

Justice Ruth Bader Ginsburg said for the court that "the right does not extend post-conviction."

Montana Attorney General Tim Fox praised the ruling.

"In its unanimous ruling, the U.S. Supreme Court affirmed the arguments made by the Montana Attorney General's Office," Fox said. "While this office certainly recognizes the need for sentencing to occur as quickly as possible after conviction, the court agreed with us that a sentencing delay does not violate a person's constitutional right to a speedy trial. I am grateful to Solicitor General Dale Schowengerdt, who argued before the court in March, as well as Assistant Attorneys General Mark Fowler, Tammy Hinderman, and Jonathan Krauss, who invested their time and talent into developing a strong case on behalf of Montana. As a result of their hard work, this case will have an impact on jurisprudence throughout the country."

Shown from left are Montana Assistant Attorney General Jonathan Krauss, Attorney General Tim Fox, Solicitor General Dale Schowengerdt, and Assistant Attorney General Tammy Hinderman, who worked on the Montana Department of Justice's prevailing case before the U.S. Supreme Court in *Betterman v. Montana.*

2016 Ninth Circuit Civics Contest

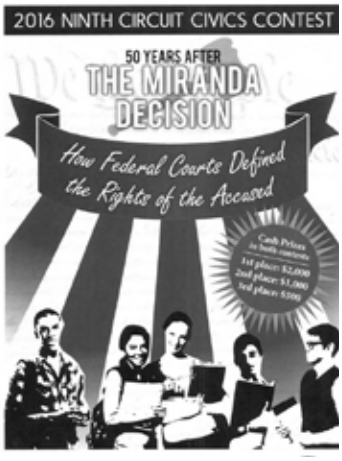
The United States Courts for the District of Montana are proud to announce the winners of the 2016 District of Montana civics contest. High school students from around Montana submitted video and essay entries addressing the contest's theme of "*50 Years After the Miranda Decision: How the Federal Courts Defined the Rights of the Accused*."The winners were selected by a panel of judges consisting of practicing attorneys and federal court personnel. The top three entries in each category will receive cash scholarships and go on to compete in the Ninth Circuit-wide competition, where they will have the opportunity to earn additional scholarship awards. The first place essay, written by Capital High School senior Kaitlynn Lindbo, is reproduced on the opposite page. Each of the winning essay and video entries will be posted on the District of Montana website at mtd.uscourts.gov.

2016 Essay Contest Winners

First Place	*Second Place*	*Third Place*
Kaitlynn Lindbo	**Trevor Canty**	**Andrew Driscoll**
Capital High School	**Billings West High School**	**Billings Senior High School**
$2,000	**$1,000**	**$500**

2016 Video Contest Winners

First Place	*Second Place*	*Third Place*
Jordan Christian & Patrick Brennan	**Andrew Driscoll**	**Jamie Steers**
C.M. Russell High School	**Billings Senior High School**	**Fort Benton High School**
$2,000	**$1,000**	**$500**



The scholarship awards for the Montana winners were made possible by generous donations from each of the following Montana law firms and legal organizations:

Holland & Hart, LLP
Montana Defense Trial Lawyers Association
American Board of Trial Advocates - Montana Chapter
State Bar of Montana - Federal Practice Section
Goodrich Law Firm, P.C.
Crowley Fleck
Garlington, Lohn, & Robinson
Ugrin, Alexander, Zadick, & Higgins PC
Montana Trial Lawyers Association
Axilon Law Group

Senior at Helena's Capital High School wins state federal courts' Miranda essay contest

By Kaitlynn Lindbo

Anyone who has watched a cop show has witnessed the burly bad guy slapped into handcuffs by the successful cops while heroic music plays in the distant background. The bad guy is ducked into a lit up police car while the officer recites a series of rights as if reading off of a script. This script is based in reality, and this series of rights are known as the Miranda rights or Miranda warnings.

The development of these rights originated from the 1966 United States Supreme Court case *Miranda v. Arizona*. In that case, a young, uneducated man, Ernesto Miranda, was taken in for questioning on a kidnapping/rape case. Two police officers spent a few hours alone with Mr. Miranda and emerged with a written confession. The issue before the Court was what special procedural requirements, if any, should be used to ensure that criminal confessions are voluntary. The Court ruled that statements made to police are only admissible in court if the defendant was advised of his right to remain silent and to have an attorney present during questioning.


Lindbo

The Miranda warning is so important, and yet it consists of just seven sentences:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to talk to a lawyer and have the lawyer present with you while you are being questioned.
4. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish.
5. You can decide at any time to exercise these rights and not answer any questions or make any statements.
6. Do you understand each of these rights as they have been explained to you?
7. Having these rights in mind, do you wish to talk to us now?

First, Miranda provides the right to silence, followed by the warning in the second sentence. If the person being questioned chooses to speak after this warning, what the person says can be used by the prosecution during the trial. This warns the person in custody not to make any self-incriminating statements, therefore protecting the person's civil rights. Federal courts safeguard these rights, in that if these rights are not given before the individual in custody is being questioned, then any evidence or statements made are involuntary or considered void in a criminal trial. These rights ensure that, even under arrest, a person's civil rights are protected.

The next two sentences notify the person in custody that he has the right to an attorney regardless of whether he has the money to pay for one. This ensures that all people are treated equally under the law while in police custody, regardless of their economic situations. Justice should be blind, and this helps make it so. It also helps ensure a fair trial and gives meaning to "innocent until proven guilty." The Miranda rights also directly correlate with the Fifth Amendment to the United States Constitution. The Fifth Amendment protects defendants from self-incrimination by indicating that the defendant "shall [not] be compelled in any criminal case to be a witness against himself."

The remainder of the Miranda rights allows the police to continue questioning someone in custody if the person has knowingly waived the protections provided by the right to remain silent and representation by counsel. It adds yet another layer of protection, though, by allowing a person in custody to change his mind and decide to quit speaking or to ask for legal counsel. With those protections in place, the police may interrogate a suspect, and the confessions or statements made during that interrogation will be admissible in a criminal trial.

The Miranda rights help ensure fairness in our justice system and provide protection for each citizen's civil liberties. The Miranda rights are just one of the many assurances we have in our justice system that prevents a United States citizen's right to life from being unjustly stripped away. *Miranda v. Arizona* is critical to our criminal justice system and, in the 50 years since the opinion was issued, it is so familiar to us that we know what it is when we see it on the cop shows, even though most do not know that a poor, uneducated criminal defendant in Arizona was the source of these critical civil liberty protections.

A blueprint for obtaining judicial notice of a fact that need not be proven at trial

By Professor Cynthia Ford

June 2016 marks the 140th anniversary of the Battle of the Little Bighorn. It is thus fitting to continue our exploration of the doctrine of judicial notice by reference to several "facts" about the Battle:

- George Armstrong Custer was killed in the Battle of the Little Bighorn;
- The Battle of the Little Bighorn occurred on June 25-26, 1876;
- Custer "died for our sins."

If there were a modern trial in a Montana state court where these three facts were relevant, and it was your job to prove them, could you use judicial notice as a shortcut? As we will see below, the answer to that question is different for each of these three statements, because M.R.E. 201 (Judicial Notice of Fact) applies differently to each.

Last month, I discussed in some detail the types of facts which the Montana Supreme Court has held to be and not to be suitable for judicial notice. I also compared the Montana and federal versions of Article II of the Rules of Evidence, which differ significantly. Here, I will deal with the exact procedure for obtaining/opposing judicial notice of fact under the two arms of M.R.E. 201, and the effect of a court's ruling granting[1] judicial notice.

FIRST: HOW NOT TO TAKE JUDICIAL NOTICE

Before M.R.E. 201 was effective, the Montana Supreme Court analyzed a Worker's Compensation Proceeding in which the judge below took judicial notice of the contents of the claimant's medical file. Relying on F.R.E. 201, the Court observed that the federal rule allowed judicial notice of adjudicative facts only (a distinction eliminated in the 1978 M.R.E.) but did not expressly find whether or not the letters in the file from doctors who did not testify were adjudicative or not. Instead, the Court zeroed in on the need for indisputability before judicial notice can be taken. The Court's holding still applies today:

> Disputed medical conclusions by doctors contained in medical reports cannot be judicially noticed. It should be remembered judicial notice is intended to save time and expense by not requiring formal proof for Undisputed facts**. Judicial notice cannot supply evidence in the form of unsworn hearsay testimony in letters, absent agreement of the parties**. (Emphasis added).

Hert v. J. J. Newberry Co., 178 Mont. 355, 365, 584 P.2d 656, 662 (1978)[2].

This case, and warning, illustrate a common problem: lawyers who use judicial notice inappropriately to fill in gaps in their cases. In the *Hert* case, for example, the defense appears to have assumed its letters would get in without objection, not realizing that they were outright hearsay (or thinking opposing counsel would not know the hearsay rule?). When the plaintiff did in fact object, defense counsel tried a Hail Mary, invoking judicial notice. The pass went through at trial, but the review team in Helena reversed the victory. The only way to admit the doctors' opinions as to the claimant's prognosis is through live (or deposition) testimony, subject to cross-examination under oath, which of course is the whole point of the hearsay rule. Opinion testimony is by its very nature not "indisputable" as required by Rule 201, so is not properly judicially noticeable. Improper judicial notice cannot trump Rule 802.

GENERAL PROCEDURE FOR AVOIDING THE NEED TO PROVE A FACT AT TRIAL

At the very beginning of your case, you should begin a blueprint of the evidence you will need to adduce at trial, and continue to refine it as you prepare for trial. (I will spend a whole column on this blueprint approach this fall). Once you identify the applicable law, it will provide the elements you need to prove to prevail on your claim or defense. Then, under each element, you list the facts which show this element is met, and how you will prove each fact. There are three, and only three, options for proof of a fact at trial:

1. Witness testimony;
2. Exhibit(s);
3. Judicial notice.

When a fact on your list is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned," Rule 201, you should pursue the third method of proof, judicial notice.

As with most things evidentiary, the best first step is to call your adversary and ask for a stipulation before you go to the

1 The effect of a denial of a request for judicial notice is simple: you have to prove the fact at trial, using witnesses and/or exhibits to do so, according to the M.R.E.

2 Hert's holding about the non-admissibility of letters from doctors was changed administratively, for Workers' Compensation proceedings only, in 1990 by the adoption of Rule 24.5.317, ARM. Miller v. Frasure, 264 Mont. 354, 365, 871 P.2d 1302, 1308 (1994).

trouble of a motion for judicial notice.[3] If the fact truly is indisputable, by definition your adversary would be unreasonable to refuse to stipulate to it. M.R.Civ.P. 16, "Pretrial Conferences," explicitly encourages parties to agree to facts in order to streamline trials:

> (2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters: …
> (C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, …
> (D) avoiding unnecessary proof …

(My trusty source in the Ravalli County Attorney's Office tells me that criminal trials usually also have a pretrial conference and stipulated facts, even though I was unable to find quickly any specific statewide rule on this aspect of criminal procedure, as to which my ignorance is boundless). Proposing agreement as to a clear fact is a win/win for you. If your opponent unreasonably refuses to agree, you can mention that in your motion for judicial notice and at the pretrial conference and at least get credit for trying to simplify the trial. If your opponent does agree to the fact, you simply insert the fact into the pretrial order section[4] entitled "Admitted Facts" and remove the task of proving it from your list. Then, you include the admitted fact in your proposed jury instructions, and "Viola!" as one of my former students used to say.

HOW TO TAKE JUDICIAL NOTICE IF NO STIPULATION

If your adversary refuses to stipulate to a fact you think meets the criteria of Rule 201, you should file a motion in limine identifying the exact fact and asking the court to take judicial notice of it. The procedure is the same as for all other motions, requiring you to support the motion with a brief addressing the legal criteria for judicial notice, starting with M.R.E. 201, and how your request meets it. You must include with your request the information necessary for the court to conclude that the fact is indisputable, because it is either "(1) generally known within the territorial jurisdiction of the trial court" or "(2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." M.R.E. 201(b). Under M.R.E. 104, the information you submit to demonstrate indisputability need not itself be admissible at trial.

Let's take these one at a time. "Generally known within the territorial jurisdiction of the trial court," as to Montana's district courts, could mean either the judicial district or the state. Although I could not find any Montana cases on point, M.C.A. 3-5-312. "Jurisdiction of judges coextensive with the state," provides that "The jurisdiction of the judges of the district courts of the state of Montana in… shall be coextensive with the boundaries of the state of Montana as to all matters presented to or heard by them and of which they have jurisdiction." Thus, I read Rule 201 to mean something like "everyone in Montana knows that …"

Everyone in Montana (if not the U.S.) for sure knows that "George Armstrong Custer was killed at the Battle of the Little Big Horn." This fact is "generally known" within Montana, and is indisputable. A party might be able to prove the fact at trial, but would waste substantial resource in doing so. This is a prime example of a fact eligible for judicial notice.

The Montana Evidence Commission (MEC) comment to the "generally known" subdivision of M.R.E. 201(b)(1) states:

> Facts to be judicially noticed under subdivision (b)(1) which are "generally known" have been judicially noticed in many cases in Montana using slightly different terminology that [than?] these facts are "common knowledge". See State ex rel. *Schultz-Lindsay v. Board of Equalization*, 145 Mont. 380, 401, 403 P2d 635 (1965) and *Clark v. Worrall*, 146 Mont. 374, 380, 406 P2d 822 (1965) for recent examples.

In the *Schultz-Lindsay* case cited by the MEC, the plaintiff challenged a state statute imposing a license fee on nonresident contractors, calculated by a percentage of the contractors' gross receipts. In holding the statute unconstitutional, the Supreme Court did not use the phrase "judicial notice" per se, but as part of its opinion stated baldly:

> It is a **matter of common knowledge** that there is a vast difference between profit and gross receipts. In the instance of profit all expenses have been paid, and it is net to the recipient; as to gross receipts nothing has been paid for expenses and there may be no profit. (Emphasis added).

145 Mont. at 401.[5]

Clark v. Worrall, the other case cited with approval by the MEC, was a slip-and-fall case arising at a bowling alley. The plaintiff alleged that floor beneath her seat was wet from spilled beverages, and that a piece of cellophane on that wet floor should have been cleaned up. She also claimed negligence in the failure of the bowling alley to warn her that floors are slippery when wet and/or covered with debris. The court accepted the defense view of the law, that "there is no obligation to protect the invitee against dangers which are known to her, or which are so apparent that she may reasonably be expected to discover them and be able to look out for herself." The court then went on to observe:

> …it is a **matter of common knowledge** that a tile floor will be slippery when wet…. Concerning (3), we feel that the folding nature of chairs such as these, customarily found in auditoriums, etc., is so readily apparent that the plaintiff could reasonably be expected to recognize it. (Emphasis added).

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3 Note that in civil cases, per M.R.Civ.P. 36, you can formally request the admission of any fact, whether it would qualify for judicial notice or not and, under Rule 37(c)(2), obtain the fees and expenses of proof for an unreasonable failure to admit.)

4 Montana Uniform District Court Rule 5 establishes the form for the Pretrial Order in contested civil cases, which includes at the very beginning a section entitled "AGREED FACTS: The following facts are admitted, agreed to be true, and require no proof: (Here enumerate all agreed facts, including facts admitted in the pleadings.).

5 It does not appear that either party asked for judicial notice of the definitions of "profit" v. "gross receipts;" under the current version of M.R.E. 201(c), "[a] court may take judicial notice, whether requested or not."

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Clark v. Worrall, 146 Mont. 374, 380-81, 406 P.2d 822, 825 (1965).

That "everyone knows" that Custer was killed at the Little Big Horn could be proven by submitting with the motion for judicial notice the results of a poll of Montanans, showing that most said they knew the fact. Obviously, though, acquiring this information would be expensive and time-consuming, exactly the opposite of the purpose of the doctrine of judicial notice. The cases cited by the Commission indicate that such proof would be unnecessary; it suffices to argue that the fact "is a matter of common knowledge."

There is a caveat: the requisite degree of knowledge is "general" in the jurisdiction. The judge's personal knowledge or opinion is not enough. In *Rose v. Myers*, 223 Mont. 13, 724 P.2d 176 (1986), an agister foreclosed on the statutory lien for keeping and feeding horses. Fifty-five horses were sold at auction and the proceeds applied to the amount due for the care and feeding of the horses. In her Order after trial, Judge Barz stated:

> The Court takes notice of two factors. The Court takes judicial notice that the sum of $12 per head per month cannot possibly include the cost of providing extra feed for the horses. The Court further notes that the Plaintiffs have shown knowledge of this fact by making $7,000 payment to the Defendant prior to March, 1985. (114 head X $12 per month X 8 months = $1,824) The Court takes note of this, not to rule on the merits of the contract dispute, but rather as a factor in the notice Plaintiffs had regarding the sale.

223 Mont. at 19. The horse owners appealed. The Supreme Court held that the judicial notice was (harmless) error: "Appellants are correct when they say the court incorrectly calculated the bill and took judicial notice of a fact not appropriate for judicial notice." Unfortunately, the Court did not explain its conclusion other than to recite the provisions of Rule 201, simply going on to observe there was other testimony to the same effect as the facts the court judicially noticed, so the error was wrong.

The alternative ground to finding a fact to be indisputable under M.R.E. 201 is that it is "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." In another case decided before M.R.E. 201 became effective, the defendants were convicted of selling "intoxicating liquor" to a 15-year-old boy. The drink in question was a "vodka and squirt." (Oh, to be 15…) On appeal, the defendants argued that the judge improperly instructed the jury that: "Vodka squirt and Vodka Collins as used in the testimony in this case are intoxicating liquors." The Supreme Court upheld this instruction (and the convictions), citing the statutory precursor to M.R.E. 201 and citing several extrajudicial authorities:

> Vodka is a well-recognized potent intoxicating liquor. It possesses much power and authority. Even when mixed with squirt it continues to pack somewhat of a wallop. Webster's New International Dictionary, 2d ed., defines 'vodka' as, 'A Russian distilled *alcoholic liquor* commonly made from rye, sometimes from potatoes, and rarely from barley. Sometimes, in Russia, any kind of whisky, brandy, etc.' (Emphasis supplied.)
>
> Funk & Wagnalls Standard Dictionary defines 'vodka' as, 'A distilled spirituous liquor, usually made from rye, sometimes from barley or potatoes; also, any spirituous liquor, as brandy, gin, etc.' And the same authority defines 'spirituous' as, 'Containing alcohol; especially, containing a large percentage of alcohol.' Funk & Wagnalls New Standard Encyclopedia, Vol. 24, p. 405, in defining 'vodka' said: 'Russian brandy, a strong spirituous beverage * * * Vodka as manufactured contains about 90 per cent of alcohol, but is diluted to 60 and 40.'
>
> As heretofore shown, R.C.M.1947, § 94-35-107, makes any beverage containing *one-half of one per centum* or more of alcohol, an intoxicating liquor. Under R.C.M.1947, § 93-501-1, the court may take judicial notice of the commonly accepted and generally understood definitions of the word 'vodka'…

State v. Wild, 130 Mont. 476, 492, 305 P.2d 325, 334 (1956).[6] This fact, that vodka is intoxicating, might have fit under the "matter of common knowledge" branch of Rule 201, but providing such authorities as the two dictionaries here for sure meets the "resort to sources" of undeniable authority.

The second fact in our Little Bighorn example is that the battle was fought on June 25-26, 1876. Although most, if not all, Montanans know that Custer died at the Little Big Horn, I myself always have to look up the exact date of the battle and I expect that is true of most other normal Montanans.[7] If I had to prove the date at trial, I could call an expert historian (because there are no living survivors who could testify from their personal knowledge per Rule 602). It would be cheaper and easier to simply ask the court to take judicial notice of the fact that "the Battle of the Little Big Horn was fought on June 25-26, 1876." Because this fact is not "generally known," I would have to use the other half of Rule 201(a), and this time, as in the Wild case discussed above, submit to the court "sources whose accuracy cannot reasonably be questioned."

In the olden days (such as when I began practice), I would have presented the Encyclopedia Britannica or some similar tome to the court as a clearly accurate source. I probably would have had to go to the local public library to find the volume, or consulted with a local history professor to locate the most

6 It is not clear whether the judge below took judicial notice that vodka is intoxicating, or whether the Supreme Court itself took judicial notice of that fact on appeal, as part of its analysis of the contested jury instruction. It is clearly the language of the Supreme Court that vodka "even when mixed with squirt…continues to pack somewhat of a wallop."

7 It is my own cross to bear that my stellar husband has a master's degree in Western American History and actually does remember every single significant date of events like this.

authoritative historical source. Today, from my home office computer, I googled "Battle of the Little Bighorn." In 1.01 seconds, my search yielded "about 810,000 results." In order, the first 5 results were:

- https://en.wikipedia.org/wiki/**Battle_of_the_Little_Bighorn**
- www.history.com/topics/native-american-history/**battle-of-the-little-bighorn**
- www.eyewitnesstohistory.com/custer.htm
- https://www.nps.gov/libi/learn/.../**battle-of-the-little-bighorn**.htm
- www.historynet.com/**battle**-of-**little**-**bighorn**

That most people use Wikipedia occasionally is a "matter of common knowledge" and thus probably makes that fact itself judicially noticeable without resort to any source. However, without doing much research, I am confident that Wikipedia is not an appropriate basis for judicial notice (or any other courtroom use), precisely because its accuracy is very open to question:

> Over three hundred federal judicial opinions have cited Wikipedia as a source. Most opinions cite Wikipedia in footnotes to define terms used in the opinion. Some judges, however, like the BIA in the Badasa case, have used Wikipedia as a source on which to base decisions. Judicial use of Wikipedia as a source of evidence or a basis for making decisions is a serious problem, because the nature of Wikipedia undermines the common law system. Wikipedia is an online encyclopedia that contains articles that anyone can create, alter, or revise. Additionally, Wikipedia is not only merely a secondary source, but the articles are subject to change on a daily, sometimes hourly, basis. For these and other reasons this comment will explore, federal judicial opinions should not cite Wikipedia. Wikipedia may be a starting point for research, but this comment will discuss many of the reasons why federal judges and members of the federal bar should not cite Wikipedia as a source. Additionally, Wikipedia's reliability is questionable at best, and for this reason alone Wikipedia should not be cited as an authoritative source on any topic. (Footnotes omitted)

Amber Lynn Wagner, "Wikipedia Made Law? The Federal Judicial Citation of Wikipedia," 26 J. Marshall J. Computer & Info. L. 229, 231 (2008).

However, although they are online sources, the non-Wikipedia entries appear to be much more reliable, particularly the fourth listing, maintained by the National Park Service. Most importantly, all five of these sources (including Wikipedia) give the same dates for the battle: June 25-26, 1876. Taken together, they are "sources whose accuracy cannot reasonably be questioned" and they establish the indisputability of the fact that "the Battle of the Little Bighorn was fought on June 25-26, 1876." In support of my motion for judicial notice of this fact, I would submit an affidavit detailing my Internet search and its results, and attach as exhibits thereto the printouts of the face sheet of my search and of each of the first five results. (I would include the Wikipedia entry for completeness, but I would place it last in the pile.) I expect the judge will grant judicial notice of this fact under the second half of Rule 201(b). With this method, I have saved my client all time, energy, and money I would have needed to prove this date at trial through an expert historian.

That leaves the last "fact": "Custer died for your sins." This is drawn from the title of a book published in 1969 by Vine Deloria, Jr.; its subtitle is "An Indian Manifesto." Again using the amazing Internet, I found that Amazon sells the book in hardcover, paperback, and "board book" formats. Besides the book itself, I found another Wikipedia entry about it, and numerous "study guides." The book is clearly influential and widely read, 11 years after its author died. However, wide distribution does not satisfy Rule 201(b)'s standard for indisputable fact—the very subtitle "manifesto" disqualifies its premise from judicial notice. Merriam Webster Dictionary, cited as an unquestionably accurate source in the vodka case (*State v. Wild*) discussed above, defines "manifesto" as "a written statement declaring publicly the intentions, motives, or views of its issuer.[8]" Thus, the book simply promotes the author's opinion that "Custer died for y/our sins" rather than establishes an incontrovertible fact. Just as the Montana Supreme Court observed in the Hert case discussed at the beginning of this column, under "How Not to Take Judicial Notice:" "Disputed … conclusions by [authors] contained in [books] cannot be judicially noticed."

Therefore, I cannot establish that "Custer died for your sins" via judicial notice. No judge in the land would grant such a motion because it is a controversial opinion, not an indisputable fact. I still can get this contention before the jury, but without the imprimatur of the court's finding that it is a true fact. I would have to call an expert to give this opinion, assuming it is relevant to a claim or defense in the fictional case. The expert will have to meet the requirements of expertise in her/his field, helpfulness of that field to the jury, and reliability of the underlying methodology. If the judge as gatekeeper allows this testimony, the opponent is entitled to put on controverting evidence, most likely from another expert with similar qualifications and a different conclusion. The jury will have to weigh this competing testimony and credit one over the other in reaching its verdict. This is what trial is meant to do, and it is the default whenever judicial notice is questionable.

The scorecard on the three "facts" presented at the beginning of this column is 2 out of three, not bad. The issue now is what effect the judicial notice of the first two facts is on the jury. The answer to that question depends on whether the case is civil or criminal.

THE JURY INSTRUCTIONS: CIVIL V. CRIMINAL

Obtaining judicial notice of a fact under Rule 201 is a victory, but it means nothing unless you convert that pretrial victory into capital at trial. The way to ensure that the jury knows it can consider the fact as established, even though no proof was adduced at trial, is through an instruction from the judge to the

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8 The online version of the dictionary, found at http://www.merriam-webster.com/dictionary/manifesto.

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jury. You may want to ask the judge to give the judicial notice instruction at the beginning of the trial, so the jury will have the fact in mind as the rest of the evidence is received. For sure, you want to include the judicial notice instruction as part of your proposed final instructions, so that the jury will remember it as they deliberate.

The Montana Civil Pattern Jury Instructions 2d[9], Instruction 1.10, confusingly entitled "Judicial Notice (Agreed Facts[10])" states:

> A court may take "judicial notice" of some facts, and if it does, no evidence is required to prove them. In this case, the court has taken judicial notice of the fact that …

The Criminal Pattern Jury Instructions, helpfully, are posted online for free by the Montana Attorney General's Office.[11] However, free or not, I could not find any criminal corollary in the Criminal Pattern Instructions on the subject of judicial notice.

Notice that the proposed civil instruction does not tell the jurors whether or not they are bound by the judicially noticed fact. This is a big deal, and should be clarified in the pattern instruction. Rule 201(g) provides different effects of this instruction for civil and criminal cases:

> (g) Instructing the jury. In **a civil** action or proceeding, the court shall instruct the jury to accept as **conclusive** any fact judicially noticed. In a **criminal** case, the court shall instruct the jury that it **may, but is not required to, accept as conclusive any fact judicially noticed**.

The Montana 201(g) is substantially the same as F.R.E. 201(f). The Montana Evidence Commission recognized that this difference between the effect of judicial notice in civil and criminal cases was not part of Montana law prior to the adoption of the M.R.E. The MEC consciously chose to follow the federal version of the rule, and thus this difference:

> The Commission feels that there is no strong reason to ignore the civil-criminal distinction of the Federal Rule while there are these reasons to adopt it: first, it will be uniform with the Federal Rule, and second, it insures that all facts necessary to prove each element of a crime will be proven beyond a reasonable doubt, not dictated to be found through judicial notice in instructing the jury. This view is consistent with the reason for Congressional changes in this subdivision to its present form because mandatory instructions in criminal cases are "contrary to the spirit of the Sixth Amendment right to a jury trial".

Shortly after the M.R.E. became effective, the Supreme Court noted with approval a criminal jury instruction given by the trial court in accordance with Rule 201(g). The defendant was convicted of theft by accountability, and part of the evidence before the jury consisted of the trial judge's judicial notice of pleadings charging the two principals with theft. The Supreme Court held:

> We can find no error in the District Court's decision to take judicial notice of the fact of the pleadings against Harris and Gunsch, especially in light of the court's instruction on judicial notice. We consider initially just what was judicially noticed the charges against Harris and Gunsch. The fact of the charges against these women was not "subject to reasonable dispute" and, moreover, the fact of the charges was capable of "accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned" namely, the District Court files which contained the original copies of the charges against the two principals. It is important to note that we are discussing the fact of the charges here and not their validity.
> **Even if the taking of judicial notice in any way tainted the fairness of defendant's trial, any taint would be eliminated by the instruction given to the jury. The District Court instructed the jury that it was allowed to accept as conclusive any fact judicially noticed but that it was not required to do so.** See Rule 201(g), Mont.R.Evid. Having drawn the jury's attention to the pleadings which had been judicially noticed, the court made it clear that the court's decision was not binding on the jury and that they could disregard the fact of the pleadings against Harris and Gunsch. It was then the jury's prerogative to accept or reject the judicially noticed facts as evidence, and we will not disturb its decision. State v. McKenzie, supra; State v. Stoddard (1966), 147 Mont. 402, 412 P.2d 827.

State v. Hart, 191 Mont. 375, 388-89, 625 P.2d 21, 29 (1981) (Emphasis added). The Court later cited Hart with approval:

> Finally, this Court has ruled that taking judicial notice of proceedings against a codefendant does not taint the fairness of the defendant's trial if the court instructs the jury that it has the prerogative to accept or reject the judicially-noticed facts as evidence. *State v. Hart* (1981), 191 Mont. 375, 389, 625 P.2d 21, 29, *cert. denied,* (1981) 454 U.S. 827, 102 S.Ct. 119, 70 L.Ed.2d 102. The jury was so instructed at Oatman's trial.

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9 The Civil Pattern Instructions are not available anywhere online, and even in this age where Amazon provides all things, can be purchased only through the State Bar of Montana. (Amazon lists the Montana Civil Pattern Instructions as "currently unavailable.") I was able to get this language without paying an inordinate sum by simply calling the Jameson Law Library at the ABIII School of Law in Missoula. As always, Library Director Stacey Gordon graciously found the instruction, scanned it and emailed it to me.

10 Although the Pattern Instruction does not actually cover "agreed facts" as to which judicial notice is not required, a minor alteration to the preface should suffice: "The parties may agree that some facts are true, and if the parties so agree, no evidence is required to prove those facts. In this case, the parties have agreed that the following facts are true:…"

11 https://dojmt.gov/agooffice/criminal-jury-instructions/

Blocking out block quotes

New column debuts, offering appellate practice tips, case summaries from 9th Circuit

Editor's note: This column is the first in what will be a recurring feature in the Montana Lawyer. The column is planned to run quarterly and will consist of two parts: A tip on appellate practice and summaries of recent opinions from the Ninth Circuit Court of Appeals that originated from Montana.

By Michael Manning

This tip may seem purely stylistic, but ignoring it could have a substantive impact on your case: Beware of block quotes. You are probably saying to yourself, I'm not the kind of lawyer who thinks that 12 consecutive pages of block quotes is effective appellate writing. See *United States v. Ulloa-Porras*, 1 F. App'x 842, 845 n.3 (10th Cir. 2001). Nor are you someone who uses only block quotes in lieu of citing authority and providing analysis. See *Jaso v. Coca Cola Co.*, 537 F. App'x 557, 561 (5th Cir. 2013). But if you use them at all, be careful.

The reason is simple — appellate judges think block quotes are lazy, and they are likely to skim them or even skip them entirely. Former Ninth Circuit Chief Judge Alex Kozinski has been especially outspoken on the issue, having written that any time he sees a block quote, he "figures the lawyer had to go to the bathroom and forgot to turn off the merge/store function on his computer." Alex Kozinski, "The Wrong Stuff," 1992 BYU L. Rev. 325, 329 (1992). He has also admitted that instead of reading block quotes, he starts to daydream about gardening, chickens or his next snowboarding trip. See Interview with Bryan Garner, available at http://www.lawprose.org/bryan-garner/garners-interviews/judges-lawyers-writers-writing/judge-alex-kozinski-u-s-9th-circuit-court-of-appeals-pasendena-overquoting (last visited Feb. 24, 2016). And he is hardly the only prominent appellate judge who feels that way. Both the late U.S. Supreme Court Justice Antonin Scalia and the late Judge Daniel Friedman of the Federal Circuit had similar views. See Antonin Scalia & Bryan Garner, "Making Your Case: The Art of Persuading Judges" (1st ed. 2008); Daniel M. Friedman, "Winning on Appeal," 9 Litig. 15, 17 (Spring 1983).

That is not to say block quotes are always inappropriate. But if one is absolutely necessary — quoting a statute, for example — explain both the meaning of the important language and how it applies to your case before the quote. That way, if the judges read the quote, they will do so with your point in mind. Explaining the point up front will also ensure that the quote essentially serves as a backup, giving judges the convenience of having the precise language readily available, without forcing them to rely on it to understand your argument.

Simply put, no matter how strongly you believe that the best way to say something is to use exact language from the source, remember that appellate judges disagree. If your point is made solely in a block quote, chances are that your point will never be made. So if at all possible, paraphrase.

With that, here are the Ninth Circuit cases originating in the District of Montana that resulted in published opinions in the first five months of 2016:

UNITED STATES V. MAGALLON-LOPEZ

F.3d --, 2016 WL 1254033 (9th Cir. 2016)

Criminal. The standard for determining whether probable cause or reasonable suspicion exists is an objective one; it does not turn on the subjective thought processes of the law enforcement officer making the stop or on whether the officer is truthful about the reason for the stop. Accordingly, where information gleaned from a lawful wiretap and subsequently verified by lawful surveillance gave officers reasonable suspicion to stop a car traveling on Interstate 90 near Bozeman, and the details they corroborated during the stop gave them probable cause to seize the car, the district court correctly refused to suppress drugs found during the search merely because an officer deliberately lied and told the driver that the stop was due to an improper lane change.

Judge Berzon wrote separately to emphasize that she would not foreclose the possibility of holding in another case that either state law or due process requires law enforcement officers to disclose the true reason for the stop, should the defendant make that argument.

UNITED STATES V. NICKLE

F.3d --, 2016 WL 1084759 (9th Cir. 2016)

Criminal. The district court committed numerous errors. First, Federal Rule of Criminal Procedure 11(b) does not

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Theft of funds often results in prison for attorney in addition to disbarment

Editor's note: This is the third installment of an article detailing some of the most prominent Montana attorney discipline cases involving misappropriation of client funds.

As discussed in the first two installments, misappropriation of funds typically results in the most serious discipline, disbarment. Many of those who have been disbarred have also been prosecuted with criminal charges and served prison time. Randy S. Laedeke, was was dibarred in June 2015, has been indicted on federal wire fraud charges.

Last month, we looked at cases from the creation the Commission on Practice in 1965 through 2001. This month, we examine cases since 2002, when the Office of Disciplinary Counsel was created to prosecute disciplinary cases.

By Shaun Thompson
Office of Disciplinary Counsel

Patrick M. Springer (2003)[1]

This is the first case that appears in this article that was prosecuted by the Office of Disciplinary Counsel ("ODC"). ODC was created by Order of the Montana Supreme Court dated Dec. 11, 2001, to have separate entities perform prosecutorial and adjudicatory functions.[2]

Springer represented Patrick Tye in a criminal case.[3] Tye was sentenced to prison.[4] Tye gave Springer a general power of attorney so Springer could manage his financial affairs.[5] Tye and Springer agreed Springer could occupy a house Tye owned in Kalispell.[6] Springer was supposed to pay maintenance costs, taxes and insurance on the house.[7] Springer, however, sometimes used Tye's money to pay those expenses.[8]

Springer also took $300 from Tye's funds to reimburse Tye for delinquent payment of property expenses.[9]

Without Tye's authorization, Springer drafted two promissory notes whereby Springer was loaned a total of $35,350 from Tye's funds.[10]

At one time, Springer handled over $300,000 of Tye's funds.[11] Tye requested an accounting from Springer.[12] The accounting Springer provided Tye was incomplete and inaccurate.[13]

ODC filed a formal complaint against Springer alleging, among other things, misappropriation.[14] In Springer's response to the complaint, he admitted most of ODC's factual allegations, but denied knowing violating the rules.[15]

After a hearing conducted on July 9, 2003, the COP recommended that Springer be disbarred.[16] By order dated Dec. 1, 2003, the court disbarred Springer.[17]

Springer's problems were just beginning. Springer, who was Flathead county attorney from 1974 to 1978[18], was charged with theft, a felony, for stealing from Tye.[19] On July 18, 2005, Springer pled no contest.[20] On Sept. 15, 2005, Springer was sentenced to six years deferred with conditions — including paying restitution totaling $54,191.26.[21]

Rebecca T. Dupuis (2006)[22]

Prior to filing a formal complaint against Dupuis, ODC requested the COP ask the court to place her on interim suspension.[23] The court placed Dupuis on interim suspension during the pendency of either criminal or disciplinary proceedings on the grounds that "the allegations against DuPuis are extremely serious and may well implicate a substantial threat of serious harm to DuPuis' clients or the public."[24]

After ODC filed a formal complaint, the COP conducted a hearing and submitted its findings of fact, conclusions of law and recommendation to the court.[25] The court approved and adopted the findings, conclusions and recommendation

1 Order (filed Dec. 1, 2003), *In re Springer*, Case No. 03-113.

2 *In re the Creation of the Office Of Discipline Counsel; the Adoption of Structural Changes to the Commission on Practice; and the Adoption of Changes to Montana's System of Disciplining Lawyers*, 2001 MT 257, 307 Mont. 210, 53 P.3d 861 (2001).

3 COP's FOF, COL and Recommendations (filed August 25, 2003), FOF 3, *In re Springer*, Case No. 03-113.

4 *Id.*

5 *Id.*

6 COP's FOF, COL and Recommendations (filed August 25, 2003), FOF 4, *In re Springer*, Case No. 03-113.

7 *Id.*

8 COP's FOF, COL and Recommendations (filed August 25, 2003), FOF 5, *In re Springer*, Case No. 03-113.

9 COP's FOF, COL and Recommendations (filed August 25, 2003), FOF 6, *In re Springer*, Case No. 03-113.

10 COP's FOF, COL and Recommendations (filed August 25, 2003), FOF 7, *In re Springer*, Case No. 03-113.

11 COP's FOF, COL and Recommendations (filed August 25, 2003), FOF 12, *In re Springer*, Case No. 03-113.

12 COP's FOF, COL and Recommendations (filed August 25, 2003), FOF 9, *In re Springer*, Case No. 03-113.

13 COP's FOF, COL and Recommendations (filed August 25, 2003), FOF 10-11, *In re Springer*, Case No. 03-113.

14 Complaint (filed February 19, 2003), *In re Springer*, Case No. 03-113.

15 Response to Complaint of the Office of Disciplinary Counsel, (filed March 24, 2003), *In re Springer*, Case No. 03-113.

16 COP's FOF, COL and Recommendations (filed August 25, 2003), FOF 10-11, *In re Springer*, Case No. 03-113.

17 Order (filed Dec. 1, 2003), *In re Springer*, Case No. 03-113.

18 Chery Sabol, *Former county attorney arrested*, The Daily Inter Lake (December 17, 2004).

19 Amended Information (filed July 20, 2005), *State v. Springer*, Eleventh Judicial District, Cause No. DC-04-458(B).

20 Minute Entry (filed July 18, 2005), *State v. Springer*, Eleventh Judicial District, Cause No. DC-04-458(B).

21 Judgment and Sentence (filed September 27, 2005), *State v. Springer*, Eleventh Judicial District, Cause No. DC-04-458(B).

22 Order (filed September 27, 2006), *In re Dupuis*, Case No. PR 06-006.

23 *See* Transmittal of Evidence and Recommendation for Interim Suspension (filed Nov. 28, 2005), *In re Dupuis*, Case No. 05-682.

24 Order (filed Jan. 4, 2006), *In re Dupuis*, Case No. 05-682.

25 COP's FOF, COL and Recommendations (filed July 11, 2006), *In re Dupuis*, Case No. PR 06-006.

for disbarment.[26]

The COP's findings of fact include the following.

Ronald Hout, Sr. died on July 28, 2004.[27] Dupuis was retained by Matthew Hout, son of Ronald Hout, Sr., as personal representative of the Estate of Ronald Hout, Sr., to handle the probate of the estate.[28]

On or about Nov. 3, 2005, Dupuis received $74,144.45 from the Plum Creek Pension Plan on behalf of the estate.[29] Said monies were retirement benefits earned by Ronald Hout, Sr., while employed by Plum Creek Lumber Company, Inc.[30]

Dupuis misappropriated at least $52,131.21 of the money.[31] The State Bar of Montana's Lawyers Fund for Client Protection reimbursed the estate.[32]

At the hearing, Dupuis admitted also misappropriating money from two other clients.[33]

Dupuis claimed to suffer from depression and alcohol and gambling addictions.[34]

The court approved and adopted the COP's findings, conclusions and recommendation.[35]

At the time the COP submitted its findings, conclusions and recommendation, criminal charges were pending against Dupuis.[36]

Dupuis pled guilty to three counts of felony theft. Dupuis was sentenced to be committed to the Department of Corrections for 10 years with all but six months suspended on each count, to run concurrently.[37]

Pierre L. Bacheller (2007)[38]

ODC filed a three-count complaint against Bacheller.[39] The most serious allegations, contained in Count Two, concerned misappropriation of client funds.[40] Bacheller did not file an answer to the complaint.[41]

After a default hearing, the COP filed its Findings of Fact, Conclusions of Law, and Recommendation.[42] Regarding Count Two, the COP found:

WFS Financial ("WFS"), a California corporation, retained Bacheller for the purpose of collecting deficiency judgments on vehicles that had been repossessed and enforcing security agreements and judgments.[43]

On or about Sept. 26, 2001, Bacheller, on behalf of his client, entered into a stipulation with Brad and Noel McLean wherein the McLeans agreed to make payments on their debt owed to WFS of about $13,463.[44] Said payments were to be made to WFS through Bacheller's office.[45]

From on or about Sept. 28, 2001, through on or about July 5, 2005, the McLeans paid WFS, through Bacheller, $9,350.00.[46] After WFS made inquiry to Bacheller, he paid WFS $1,950 on or about Nov. 30, 2005.[47] Bacheller failed to provide WFS with the remaining $7,400 or account for the same.[48]

The court, upon the COP's recommendation, disbarred Bacheller and conditioned any petition for reinstatement on reimbursement of the $7,400 converted from WPS.[49]

Subsequently, Bacheller was prosecuted in federal court for mail fraud and wire fraud.[50] Bacheller stole $258,873.94 from clients and others, including $143,897 from a trust fund of a minor child for which Bacheller was appointed guardian and conservator.[51] On Aug. 5, 2008, Bacheller was sentenced to a term of 30 months in prison, followed by supervised release for a term of 36 months, and was ordered to pay restitution plus interest.[52]

David P. Rodli (2011)[53]

In its Order of Discipline disbarring Rodli, the court accepted and adopted the COP's Findings of Fact, Conclusions of Law, and Recommendation, with the exception of the amount of restitution owed to one of Rodli's victims.[54] The following is a summary of the facts gleaned from the COP's findings.

Rodli helped set up an investment scheme.[55] Prospective investors were promised a large return on their money — up to 400 percent a year.[56]

Participants would enter into an agreement (drafted by Rodli) that provided they would deposit money into a trust account Rodli established at a Dallas bank.[57] They were told the funds would not be used and would stay in the account until repaid.[58] Supposedly, the funds were to be used as leverage to obtain a return.[59]

Rodli, however, used a substantial portion of the funds for other purposes.[60] At the end of the day, there were insufficient funds to pay back certain participants.[61] For example, Clear Creek

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26 Order (filed September 27, 2006), p. 1, *In re Dupuis*, Case No. PR 06-006.
27 COP's FOF, COL and Recommendations (filed July 11, 2006), FOF 4, *In re Dupuis*, Case No. PR 06-006.
28 *Id.*
29 COP's FOF, COL and Recommendations (filed July 11, 2006), FOF 5, *In re Dupuis*, Case No. PR 06-006.
30 *Id.*
31 COP's FOF, COL and Recommendations (filed July 11, 2006), FOF 6, *In re Dupuis*, Case No. PR 06-006.
32 COP's FOF, COL and Recommendations (filed July 11, 2006), FOF 7, *In re Dupuis*, Case No. PR 06-006.
33 COP's FOF, COL and Recommendations (filed July 11, 2006), FOF 11, *In re Dupuis*, Case No. PR 06-006.
34 COP's FOF, COL and Recommendations (filed July 11, 2006), FOF 10, *In re Dupuis*, Case No. PR 06-006.
35 Order (filed September 27, 2006), p.1, *In re Dupuis*, Case No. PR 06-006.
36 COP's FOF, COL and Recommendations (filed July 11, 2006), FOF 8, *In re Dupuis*, Case No. PR 06-006.
37 Judgment and Commitment (filed September 6, 2006), *State v. Dupuis*, Montana Twentieth Judicial District Court, Lake County, Cause No. DC-06-52.
38 Order (filed Feb. 21, 2007), *In re Bacheller*, Case No. PR 06-0461.
39 Complaint, (filed June. 30, 2006), *In re Bacheller*, Case No. PR 06-0461.
40 *Id*. at 4.
41 COP's FOF, COL and Recommendation (filed Nov. 8, 2006), p. 1, *In re Bacheller*, Case No. PR 06-0461.
42 *Id*.
43 COP's FOF, COL and Recommendation (filed Nov. 8, 2006), FOF 12, *In re Bacheller*, Case No. PR 06-0461
44 COP's FOF, COL and Recommendation (filed Nov. 8, 2006), FOF 13, *In re Bacheller*, Case No. PR 06-0461.
45 *Id.*
46 COP's FOF, COL and Recommendation (filed Nov. 8, 2006), FOF 14, *In re Bacheller*, Case No. PR 06-0461.
47 *Id.*
48 *Id.*
49 Order (filed Feb. 21, 2007), p. 1, *In re Bacheller*, Case No. PR 06-0461.
50 Information (filed February 29, 2008), *USA v. Bacheller*, Case No. CR-08-40-BLG-JCC.
51 Plea Agreement (filed February 29, 2008), pp. 4-6, *USA v. Bacheller*, Case No. CR-08-40-BLG-JCC; United States' Sentencing Memorandum (filed August 25, 2008), pp. 3-4, *USA v. Bacheller*, Case No. CR-08-40-BLG-JCC.
52 Judgment in a Criminal Case (filed February 29, 2008), *USA v. Bacheller*, Case No. CR-08-40-BLG-JCC.
53 Order (filed August 16, 2011), *In re Rodli*, Case No. PR 10-0412.
54 Id. at 2.
55 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 3-16, *In re Rodli*, Case No. PR 10-0412.
56 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 10, *In re Rodli*, Case No. PR 10-0412.
57 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 10, 14-15, *In re Rodli*, Case No. PR 10-0412.
58 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 13, *In re Rodli*, Case No. PR 10-0412.
59 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 10, *In re Rodli*, Case No. PR 10-0412.
60 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 29-41, *In re Rodli*, Case No. PR 10-0412.
61 *Id.*

FUNDS, from previous page

Partners, Ltd., a Texas limited partnership, was out $550,000 it had given to Rodli.[62] Another victim, Community Full Gospel Church, aka, Gateway Fellowship, of Oakley, Kansas, gave Rodli $180,000.[63] Killian Construction Co., a Missouri corporation, deposited $250,000 into one of Rodli's accounts.[64] Clear Creek, the church, and Killian all obtained judgments against Rodli.[65] Rodli's business associate, Jack Wilemon, a disbarred Texas lawyer[66], paid the church $50,000[67] and Wilemon and Rodli paid Killian its $250,000.[68]

Rodli also misappropriated money from a company he was affiliated with — SolarMission Technologies, Inc. (SMT), a Nevada corporation, headquartered at Rodli's law office.[69] At all times pertinent hereto, Rodli was an officer of SMT.[70] Rodli had also represented SMT as its attorney and served as a director.[71]

Without authorization from SMT's president or board of directors, Rodli transferred $275,000 from SMT's bank account with Wells Fargo located in Missoula to one of his trust accounts.[72] He then transferred $262,000 of the $275,000 to another trust account, which was then transferred to USPAC, Inc., a Delaware company created by Wilemon and Allan Clark.[73]

Marvin E. Alback (2011)[74]

Alback, who had served time in the Montana State Prison for stealing from clients and was disbarred in 1988,[75] was reinstated to the practice of law in 2000 by the court on the unanimous recommendation of the COP.[76]

Alback resigned his membership in the State Bar of Montana on Nov. 6, 2009.[77]

By an information filed in the United States District Court for the District of Montana on Feb. 5, 2010, Alback was charged with wire fraud and bankruptcy fraud.[78]

In Count I, the government alleged that Alback arranged an electronic transfer of $12,500 to his operating account and misappropriated the money.[79] The money was for Tammy Leischner's settlement.[80]

In Count II, the government alleged Alback represented Jesse and Christie Ellerbee in a bankruptcy.[81] He came into possession of the Ellerbees' federal tax refund check for $557 and took the money.[82]

On Feb. 23, 2010, pursuant to a plea agreement, Alback pled guilty to both counts of the information.[83]

On May 26, 2010, Alback was sentenced to the custody of the United States Bureau of Prisons for 18 months on Count 1 and 18 months on Count 2 to run concurrent.[84] Alback was also sentenced to three (3) years of supervised release on Count 1 and three (3) years of supervised release on Count 2 to run concurrent and was required to pay restitution.[85]

Alback has the distinction of being sent to both state and federal prisons for stealing from clients, and being twice disbarred.

David M. McLean (2015)[86]

McLean, who practiced in Anaconda, was admitted to the practice of law in 1968.[87]

ODC filed a 33-count complaint alleging that McLean misappropriated monies from clients in 11 cases and from the Montana chapter of the American Board of Trial Advocates ("ABOTA"), for which he was secretary/treasurer.[88] The complaint alleges that in some cases, McLean settled tort claims with the client's knowledge, forged their signatures on settlement documents and then stole the money.[89] The COP found the allegations to be true.[90] In its Order of Discipline, the Court accepted and adopted the COP's findings, conclusions and recommendation.[91]

In his Conditional Admission and Affidavit of Consent, McLean admitted to misappropriating at least $354,580.33.[92] The court, following the COP's recommendation that McLean should not be given credit for fees, ordered McLean to pay $495,328.14 in restitution.[93]

Prior to the commencement of formal disciplinary proceedings, McLean filed a petition to be immediately disbarred with the clerk of the Montana Supreme Court, which the court treated as an original proceeding.[94] In his petition, McLean admitted he misappropriated funds. ODC opposed the petition on the grounds that McLean should not be able to bypass the lawyer disciplinary system and that McLean's petition did not address restitution.[95]

The court denied McLean's petition.[96]

By indictment filed July 17, 2015,

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62 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 17-18, 30, *In re Rodli*, Case No. PR 10-0412; Order (filed August 16, 2011), p. 2, *In re Rodli*, Case No. PR 10-0412.

63 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 20, 36, *In re Rodli*, Case No. PR 10-0412.

64 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 19 32, *In re Rodli*, Case No. PR 10-0412.

65 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 39, *In re Rodli*, Case No. PR 10-0412

66 COP's FOF, COL and Recommendation (filed June 9, 2011), footnote 2, *In re Rodli*, Case No. PR 10-0412.

67 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 37, *In re Rodli*, Case No. PR 10-0412.

68 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 31, 34, *In re Rodli*, Case No. PR 10-0412

69 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 24, *In re Rodli*, Case No. PR 10-0412.

70 *Id.*

71 *Id.*

72 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 26, *In re Rodli*, Case No. PR 10-0412.

73 COP's FOF, COL and Recommendation (filed June 9, 2011), FOF 5, 27, *In re Rodli*, Case No. PR 10-0412.

74 Order (filed Nov. 15, 2011), *In re Alback*, Case No. PR 10-0266.

75 *See second installment, Montana Lawyer, Vol. 41, No. 7 (May 2016), pp 13-14*

76 Order (filed July 18, 1988), *In re Alback*, Case No. 87-518.

77 Order of Discipline (filed Nov. 15, 2011), *In re Alback*, Case No. PR 10-0266; COP's FOF, COL and Recommendation, FOF 7, *In re Alback*, Case No. PR 10-0266.

78 Information (filed February 5, 2010), *USA v. Alback*, Case No. CR-10-18-BLG-RFC-01.

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 Minute Entry (filed February 23, 2010), *USA v. Alback*, Case No. CR-10-18-BLG-RFC-01.

84 Judgment in a Criminal Case (filed May 28, 2010), *USA v. Alback*, Case No. CR-10-18-BLG-RFC-01.

85 *Id.*

86 Order of Discipline (filed March 17, 2015*), In re McLean*, Case No. PR 14-0737.

87 COP's FOF, COL and Decision on Resubmitted Conditional Admission and Affidavit of Consent (submitted February 3, 2015), FOF 24, *In re McLean*, Case No. PR 14-0737.

88 Complaint (filed Nov. 14, 2014*), In re McLean*, Case No. PR 14-0737.

89 *Id.*

90 COP's FOF, COL and Decision on Resubmitted Conditional Admission and Affidavit of Consent (submitted February 3, 2015), *In re McLean*, Case No. PR 14-0737.

91 Order of Discipline (filed March 17, 2015), p. 2*, In re McLean*, Case No. PR 14-0737.

92 Mr. McLean's Rule 26 Conditional Admission and Affidavit of Consent (filed Nov. 14, 2014*), In re McLean*, Case No. PR 14-0737.

93 Order of Discipline (filed March 17, 2015), p. 2*, In re McLean*, Case No. PR 14-0737.

94 Mr. McLean's Verified Petition (filed August 28, 2014), *In re Petition of McLean*, Case No. OP 14-0559.

95 ODC's Response to Verified Petition of David M. Mclean (filed Sept. 22, 2014), *In re Petition of McLean*, Case No. OP 14-0559.

96 *In re Petition of McLean*, 377 Mont. 433, 348 P.3d 169 (2014).

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Legislative interim committees tackling important work affecting lawyers, courts

"We in America do not have government by the majority. We have government by the majority who participate."
— Thomas Jefferson
"Then you better start swimmin', you could sink like a stone
For the times, they are a-changin' "
— Bob Dylan

By Rep. Ellie Hill Smith and Rep. Austin Knudsen

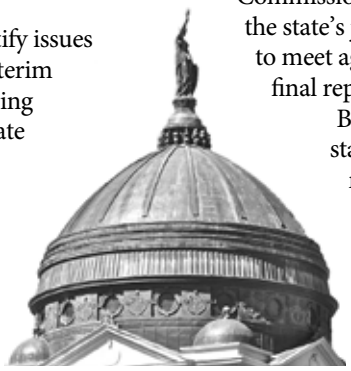
Most Montanans don't pay much attention to the work of the Montana Legislature when we are not in session, but this cycle, we hope Montana lawyers are watching our interim committee work with an eagle eye. There are big changes that may affect your work and representation currently being examined by your legislative officials and we are seeking your input.

Legislative interim committees explained

The Montana Constitution and state law require the Montana Legislature to meet in regular session for 90 working days in every odd-numbered year.

During each legislative session, legislators identify issues they want to study in more depth. They appoint interim committees to conduct these and other studies during the interims between sessions. The House and Senate leadership decide who will be on the interim committees and the members serve one 20-month term. The committees often invite experts to present information to them. Members of the public also get a chance to have their say.

In this cycle there are several committees studying issues that will have enormous impacts on the judiciary and Montana lawyers. Please join us in following the work and sending your comments to the committees. All committee meetings can be viewed in real time through the State of Montana's legislative website.



Legislative Update

Judicial Redistricting Commission

House Bill 430 (2015) created a seven-member Judicial Redistricting Commission. The bill requires the commission to study whether judicial redistricting is necessary using the following factors:

- the population of the judicial districts as determined by the latest figures prepared and issued by the United States Census Bureau;
- each judicial district's weighted caseload as determined by judicial workload studies;
- the relative proportions of civil, criminal, juvenile, and family law cases in each judicial district;
- the extent to which special masters, alternative dispute resolution techniques, and other measures have been used in the judicial districts;
- the distances in highway miles between county seats in existing judicial districts and any judicial districts that may be proposed by the commission;
- the impact on counties of any changes proposed in the judicial districts; and
- any other factors that the commission considers significant to the determination of whether the state's judicial districts should be redistricted.

The commission members include two legislators, two district court judges, a district court clerk, a county commissioner, and a member of the State Bar. The bill requires the Legislative Service Division to provide staff assistance to the commission.

Judicial Redistricting Commission Decides Against Recommending Changes

At its April 6 meeting in Helena, the Judicial Redistricting Commission decided against recommending any changes to the state's judicial districts to the 2017 Legislature and agreed to meet again before the fall to consider draft language for a final report.

Before considering several proposals to alter the state's judicial districts, the commissioners learned more about the various state-borne costs related to judges and standing masters, as well as the roles played by the state's current standing masters. The commissioners also listened to the judicial branch's current budget recommendations and anticipated costs related to adding several new judges, support staff, and a standing master. The recommendations will be presented by the judicial branch to the 2017 Legislature for its consideration, but the budget information update was provided to the commissioners at their request.

The commissioners also considered six redistricting proposals suggested by individual commissioners, taking public comment from and engaging in discussion with several district court judges on the effects the proposals could have on the judges' caseloads and travel times as well as on the people living in the affected counties.

Next meeting

The commission will meet on Aug. 16 via teleconference and shown online via the legislative website. For more information on the commission's activities and upcoming meeting, please visit the commission's website or contact Rachel Weiss, commission staff.

Commission website: www.leg.mt.gov/jrc
Commission staff: rweiss@mt.gov or 406-444-5367

Commission on Sentencing

Senate Bill 224 (2015) created a 15-member Commission on Sentencing. The bill requires the commission to:

- conduct an empirical study of the impact of existing sentencing policies and practices on Montana's criminal justice system, including state prison capacities, local jail and detention center capacities, community supervision and parole resources, judicial operations, public defense expenditures, and law enforcement responsibilities;
- identify strategies to safely reduce incarceration in state prisons and to promote evidence-based diversion programs and other effective alternatives to incarceration;
- investigate the factors contributing to recidivism, evidence-based recidivism reduction initiatives, and cost-effective crime prevention programs;
- consider issues regarding disparity in the criminal justice process, including but not limited to racial and ethnic disparity issues;
- identify opportunities to streamline and simplify the criminal code; and balance sentencing practices and policies with budget constraints;
- prepare a report of findings and recommendations for submission to the 65th legislature, including evidence-based analysis and data; and make a recommendation to the 65th Legislature as to whether the commission should continue in existence.

The commission consists of four legislators, one district court judge, the director of the Department of Corrections (or the person designated by the director), a county attorney, a private criminal defense attorney, a probation and parole officer, a county sheriff, an employee of the Montana Department of Justice, an employee of the Office of State Public Defender, and three members appointed by the governor. Two of the 15 members must be enrolled members of a state-recognized or federally recognized Indian tribe located in Montana.

Next Meeting

The commission will meet on June 22-23, 2016 at the Capitol in Helena at a time to be determined. For more information on the commission's activities and upcoming meeting, please visit the commission's website or contact Rachel Weiss, commission staff.

Commission website: www.leg.mt.gov/cos
Commission staff: rweiss@mt.gov or 406-444-5367

Task Force on State Public Defender Operations

House Bill 627 established a Task Force on State Public Defender Operations to develop a long-term organizational plan that will allow the OPD to provide effective assistance of counsel to those that qualify.

OPD, which was established by the 2005 Legislature's Montana Public Defender Act, has changed in organization over the years to include three programs: the public defender program, the appellate defender program and the conflict coordinator, each with its own chief.

- the public defender program has grown by 14.6 percent since fiscal year 2010, and despite a yearly case closing rate of 91.8 percent in 2014, had nearly 21,000 open, active cases at the end of that fiscal year.
- the appellate defender program had a 42 percent caseload increase from 2012 to 2014.
- abuse and neglect cases made up 34 percent of the case growth in the public defender program from fiscal year 2010 to fiscal year 2014, and in the appellate defender program these cases were projected to increase 43 percent between fiscal year 2013 and fiscal year 2015

The task force consists of 11 members: three members of the House or Representatives, three members of the Senate, one district judge appointed by the chief justice of the Montana Supreme Court,

The task force is charged with examining a number of issues related to the public defender program, including:

- the office's constitutional and statutory duties;
- the ethics and professional responsibilities of its attorneys;
- the effects of compensation and workloads on the recruitment and retention, and improvements that could be made for recruitment and retention;
- how other states provide assistance of counsel and fund their offices;
- and the possibility and costs and benefits of restructuring the office.

Current Work of Task Force

The task force has asked legislative staff to draft bills on a variety of topics. These drafts will be presented at the task force's Sept. 12 meeting at which time members will vote on whether to advance the bill as a committee bill. Topics include, but are not limited to:

- creating an executive director position and making the Public Defender Commission advisory.
- establishing a holistic defense pilot project in four areas throughout the state.
- assigning the Department of Revenue in charge of collecting public defender costs.
- establishing a chief administrator position.
- amending statute to prohibit OPD from providing legal counsel to a putative father.
- setting case compensation maximums, or "soft caps."

All aspects of the task force, including reporting requirements, must be concluded prior to Sept. 15, 2016.

Next meeting

The task force's next meeting is tentatively set for Sept. 12 in the Capitol.

Commission website: www.leg.mt.gov
Commission staff: juliejohnson@mt.gov or 406-444-4024

Law and Justice Interim Committee

The Law and Justice Interim Committee is responsible for monitoring the activities of the Department of Corrections, the Department of Justice, and the Office of the Public Defender and any agencies that are administratively attached to those entities. The committee serves as the liaison to the Judicial Branch.

The committee is also responsible for carrying out interim studies as assigned by the Legislature and the Legislative Council. At its June 2015 meeting, the committee tentatively adopted a work plan that outlines its process for completing the interim's

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Simple steps can prevent inadvertent disclosure of confidential information

By Breeann M. Johnson

Recently, the State Bar of Montana Board of Trustees has been considering changes to the Montana Rules of Professional Conduct regarding the use and adoption of technology in the Montana legal practice. The State Bar of Montana, like many state bars around the country, has recognized that new and evolving technology plays a significant role in the practice of law. This also means that new, and sometimes unique, ethical challenges arise from the use of technology in the practice of law.

Additionally, attorneys now need to be familiar with and understand some terms and concepts that are part of their digital world. One of these terms, and areas of ethical challenge, is with metadata in documents and images obtained and shared by attorneys. This article has two objectives: 1) clearly explain what "metadata" is; and, 2) provide practical guidance for how to deal with it in the context of non-discovery-related materials.

What is metadata?

The term metadata's linguistic roots should be relatively familiar, with "meta" coming from the Greek for "transcending," used in the sense of a new, but related discipline, designed to deal critically with the original[1] (i.e., *metaphysics*) and "data" coming from the Latin. So, *metadata* loosely translated is "data about data." In the context of electronic documents, then, it is important for attorneys to understand what constitutes "data about data."

For example, the words as they appear on this page, the typeface used, paragraph spacing, and all of the things that readily appear to your eye, are *data*. The fact that the document was originally composed in Microsoft Word 2016, the file name the document was saved under, the date and time the document was created, the operating system it was created on, the code and programming underlying the typeface and paragraph spacing, the file size, revision version; etc., or all of the things not readily visible to your eye, but that the computer relies on, are *metadata*. While the foregoing breakdown may not satisfy the most technologically advanced among us, it is a good generalization for how to think about the difference between *data* and *metadata*.

Metadata, outside of the context of discovery materials, is a significant concern for attorneys due to the potential for inadvertent disclosure of confidential client information in documents transmitted by a firm. Fortunately, there are simple steps you can take to ensure the documents you send out do not tell more about themselves than you want them to tell.

1 Source: http://www.merriam-webster.com/dictionary/metadata.

NOTICE

ATTORNEYS MUST SCRUB METADATA FROM THEIR DOCUMENTS BEFORE SHARING THEIR WORK

Practice good document hygiene

Just like washing your hands before dinner, you should clean up your documents before they leave your control. Think about it as good document hygiene.

Below are the basics that should be applied in the practice of good document hygiene:

- Before you go through any metadata removal process, save your work under a new file name[2]. Removing metadata can result in headers and footers, hyperlinks, comments, and other formatting disappearing, some of which you may want to keep[3].
- Once metadata is removed from a document, it is really, truly gone from the document file. Computers are very literal and when they are instructed to remove metadata, they do exactly that. Deleted metadata cannot be retrieved from the scrubbed document file, regardless of any software another firm or company may have to "snoop" through the scrubbed file.
- If the document is highly sensitive, then you should not be sharing it in an editable format. You should never share an editable document (e.g., Word, WordPerfect, Excel, PowerPoint, etc.) if you are at all

2 Newer versions of Microsoft Office and Adobe require that you save your document before initiating the metadata removal process.

3 In Microsoft Office, there is a useful security feature that will provide users with a warning before sending, saving or printing a file that contains tracked changes or comments. *See* http://wordribbon.tips.net/T006050_Getting_a_Warning_for_Markup.html. In Office 2016, the setting can be accessed by going to File> Trust Center Settings> Privacy Options> Warn.

concerned about anyone else's use of the document. Even if you are not concerned, it is just good practice to only send electronic files in an un-editable format, like PDF.

- Remember, if you scrub a document and then continue to edit it, you will need to remove the metadata again. Wash, rinse, repeat.
- Metadata management and removal skills are everyone's business, just like making sure a conflict check is done before accepting a new client. You and all of your firm's attorneys and staff must follow the same rules and protocols regarding metadata management and removal. Much like checking the "To" line in your emails to ensure you are emailing the correct recipients before you hit "Send", no document should leave your firm's control without consideration of the format it is being transmitted in and whether it has been properly scrubbed.
- Good document creation and editing software has security control options that can help manage metadata on the front end and scrubbing options to manage metadata on the back end. The "help" function in most software products can get you pointed in the right direction and there are typically training resources available directly from the software provider. Also, user forums tied to the online support pages for software products are often a treasure trove of practical application and troubleshooting tips. You do not need to know everything about every software product; you only need to understand the tools you do use and how those are used to protect your firm's and your clients' data.

Scrubbing: No elbow grease required

There are three common types of documents attorneys routinely work with, collaborate on, and share: WordPerfect, Microsoft Word, and PDF. There are a number of other document and file types attorneys use that may require metadata removal, but for the purposes of this article, I will focus on these three.

WordPerfect

Corel's WordPerfect has largely been replaced by the use of Microsoft Word, but it still has strong usership in the legal realm. For those familiar with WordPerfect, the "reveal code" function is a useful tool for finding and fixing formatting issues in documents[4]. Similarly, the most recent version of the software, WordPerfect X3, has a "Save Without Metadata" feature that rolls all of WordPerfect's metadata management options into one tool, but still gives the user item-by-item control over what metadata is or is not left in a document[1].

Microsoft Word

Microsoft Word's Document Inspector is the go-to tool for removing metadata from a Word document. The Document Inspector will check for various types of metadata in your document and then allow you to select which types of data are removed. The table at the bottom of the Microsoft support article is particularly helpful in understanding each type of data and what can and cannot be removed[2].

PDF Documents

PDF stands for "portable document format." The format allows users to share and access a wide variety of documents regardless of hardware or operating system specifics. PDFs are designed to capture an electronic image of text and/or graphics in order to be shared, so they tend to capture less metadata by default. However, PDF creation and editing software is becoming more commonly used in law practices, so PDFs should also still be reviewed for sensitive data.

There are several PDF software vendors in the market, with Adobe Acrobat being the most common. Regardless of the PDF software you are using, removing metadata from PDFs is as easy as removing it from WordPerfect or Word documents. Search for "remove metadata" within the help tool of your PDF software program for instructions on how to properly use the software to remove metadata from your PDF documents[3].

Some final metathoughts on metadata

In the legal profession an unnecessary amount of anxiety is attached to the term "metadata." Metadata can be easily managed with proper awareness and the tools that are seamlessly integrated into most software products. However, just like "Only you can prevent forest fires," only you can protect against the inadvertent disclosure of metadata in the documents you send out of your office. Implementing good and consistent document hygiene in your office will ensure you protect your firm's and your clients' information from inadvertent disclosure via your document metadata.

Breeann Johnson is the attorney/owner ofJohnson Water and Land Law and a member of the State Bar's Technology Committee.

ENDNOTES

1 Learn more about metadata removal in WordPerfect X3 here: http://howto.corel.com/en/c/Saving_WordPerfect_Files_Without_Metadata

2 Learn more about metadata removal in Microsoft Office here: https://support.office.com/en-us/article/Remove-hidden-data-and-personal-information-by-inspecting-documents-356B7B5D-77AF-44FE-A07F-9AA4D085966F

3 If you use Adobe Acrobat, learn more here: https://helpx.adobe.com/acrobat/using/removing-sensitive-content-pdfs.html

4 Word has a similar feature called "Reveal Formatting" (Shift + F1).

More on Rules of Professional Conduct

The State Bar of Montana has petitioned the Montana Supreme Court to change the Montana Rules of Professional Conduct to address attorneys' ethical obligations regarding the used of technology. The court has ordered a 90-day public comment period on the proposed changes. See the article on page 6 of this issue to learn more about the proposed changes.

Confidentiality should never be an afterthought

Mark Bassingthwaighte, Esq.
Risk Manager

How much time do you really spend thinking about your ethical obligation to maintain client confidences? I suspect not much. We all understand that what we learn at the office is to stay at the office. That's a good start, mind you, but is this understanding enough? How far does it really go? I believe it goes further than most of us realize because maintaining client confidences is about more than just keeping our mouths shut.

Allow me to share an example to demonstrate the point. In office share settings or executive office space it isn't uncommon to find that files are left lying about, office doors left open, file cabinets left unlocked, and even computers left on overnight. Sometimes this is reportedly due to the necessity of allowing janitorial staff access so that the space may be cleaned. When asked about confidentiality concerns in these settings, I often am told that I needn't worry because no one on the cleaning staff speaks English. I don't know about you, but that response makes me nervous. After hearing that kind of response, I would so love to take a look at any computer in that firm that was left on overnight. Call me a pessimist if you must, but I don't buy that the computers are never touched or file drawers never opened. Years ago I managed a cleaning service/skills training program and I can assure you that what can go on in your office after hours would be upsetting to many.

We need to get past thinking about our confidentiality rule as just requiring that we keep secrets by keeping quiet. With this in mind, I thought I would share some additional thoughts you might want to keep in mind.

At a minimum all tech must be password protected. This is particularly important with jump drives, external hard drives, smartphones, and tablets as these items can be easily lost and sometimes are stolen. Laptop and smartphone theft is rampant and such thefts do not occur just at the airport. You would be surprised at how many disappear from offices. Don't make it easy. What would you do if you learned that information about a client has been posted on Facebook; then upon further inquiry discovered that several days prior an attorney at the firm lost his iPhone and the posted material was on that device. Ouch.

If anyone at the firm wishes to access the firm's network using a wireless connection, this should always occur via an encrypted session. Here is how I feel about it. If you or anyone on your staff has no idea how to tell if the signal that you or they are about to connect to is from a trusted source versus a viral peer-to-peer network, then neither of you has any business using wireless for work-related purposes. If you wish to risk your own identity, that's your own choice. Client confidences are another matter. Further, I don't care if it is a free Wi-Fi hotspot at your favorite local coffee shop or your own home router for that matter. Just because it's convenient doesn't mean it's safe. In simple terms, always use a VPN (Virtual Private Network) connection when working over a wireless connection. Always!

Yes, just about everything in the cellular service world is now digital, which we all equate with being secure. That's a positive development; but so what. What I don't understand is why so many continue to walk around with Bluetooth headsets always on and/or having private conversations in public places. Making matters worse, I continue to laugh at those folks who seem to believe that because the mike is back by their ear they must speak QUITE LOUDLY in order to be heard. I must have missed this in science class; but apparently sound doesn't travel around the side of one's head very well. Again, Bluetooth's convenience doesn't make it secure. To me, that blinking blue light says "victim here." When not in use, turn the Bluetooth functionality off, and for goodness sake, stop talking at full voice and find a private place to make all work-related calls. The guy sitting next to you at Starbucks doesn't want to be forced to hear all about your client's problems.

This list could go on and on, but hopefully you begin to get the point. As attorneys, we have an affirmative duty to preserve and maintain client confidences, and this duty requires more of us than simply keeping quiet when outside the office. Lock doors and/or file cabinets. Put files away and log off computers if a cleaning service or others will have access to the space after hours. Properly secure closed file storage areas; password protect all tech (and you might also consider encrypting those drives); and take steps to make certain that conversations are not able to be overheard by others, even those clients sitting in a conference room that happens to be next to your office. These things are not something that can be an afterthought. A client, whose information ultimately finds its way to the Internet, isn't going to be pacified with a statement along the lines of "We didn't anticipate that this kind of thing would ever happen and we'll make certain that from here on out it won't happen again." From their perspective, it should never have happened in the first place and I couldn't agree more. If that client were me, I'd be looking for a new attorney who gets how to maintain client confidences with tech post haste and when I do, trust me, she'll be in touch.

ALPS Risk Manager Mark Bassingthwaighte, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminars to assist you with your solo practice by visiting our on-demand CLE library at alps.inreachce.com. He can be contacted at: mbass@alpsnet.com.

STATE BAR OF MONTANA

Serving the people of Montana and their attorneys

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, when you spend 50 hours on Modest Means and / or Pro Bono work (you'll need to track your time and let us know), you will receive a free CLE certificate to attend any State Bar sponsored CLE. State Bar Bookstore Law Manuals are available to you at a discount and attorney mentors can be provided. If you're unfamiliar with a particular type of case, Modest Means can provide you with an experienced attorney mentor to help you expand your knowledge.

Questions?

Please email: Andrew Martinez at *amartinez@montanabar.org or* Ann Goldes at *agoldes@montanabar.org*
You can also call us at 442-7660.

Are You Interested in Joining The Modest Means Program?

To get started, please fill in your contact info and mail to: *Modest Means, State Bar of Montana, PO Box 577, Helena, MT 59624.*
You can also email your contact info to Andrew Martinez -- *amartinez@montanabar.org*

Name:_____

Address: _____

City, State: _____

Email:_____

For more information about upcoming State Bar CLEs, contact Meagan Caprara at **mcaprara@montanabar.org**. You can also find more info and register at **www.montanabar.org**. Just click in the Calendar on the upper left of the home page to find links to registration for CLE events.

June 23 seminar to focus on legal issues related to domestic violence

Attorneys interested in learning about legal matters with a domestic violence component will want to attend the Domestic Violence CLE seminar Thursday, June 23, at the Alexander Blewett III School of Law in Missoula.

Topics covered in the CLE include:

- domestic violence dynamics and the basics of orders of protection;
- the intersection between domestic violence and immigration/human trafficking;
- victims' rights in criminal cases; and
- incorporating domestic violence information into parenting plans, marital property agreements, child support matters and more.

Faculty include Justice Jim Shea of the Montana Supreme Court; attorneys Shannon Fuller and Diana Garrett of Montana Legal Services Association; Emily Lucas of Ries Law Group; Hilly McGahan of Safe Harbor; Cascade County Attorney John Parker; Josh Van De Wetering of Van De Wetering Law Offices; Rachel Wanderscheid of Montana Coalition Against Domestic and Sexual Violence; and representatives of the domestic violence services, medical and psychological fields. Brandi Ries of Ries Law Group and Robin Turner of Montana Coalition Against Domestic and Sexual Violence will moderate.

For more on legal issues related to domestic violence, see the series of articles in the Montana Lawyer's March, April, May and June-July 2015 issues. Back issues of the Montana Lawyer are available online at http://montanabar.site-ym.com/?page=MTLawyer.

Free CLEs in Sidney, Miles City on Lawyer Assistance

Mike Larson, director of the Montana Lawyers Assistance Program, will give presentations in Sidney and Miles City on the challenges facing our profession. No advance signup is required.

June 14, Sidney: Judge Bidegaray's courtroom, noon

June 15, Miles City: Miles City Club, 1:30 p.m.

Upcoming Live CLE

June 3—New Lawyers Workshop/Road Show — Missoula, UM law school

June 3 — Road Show — Missoula, UM law school

June 3 — 9th Judicial District Annual Meeting CLE/Shootout — Conrad

June 23 — Domestic Violence CLE presented by the State Bar's Justice Initiative Committee — Missoula

July 13 — Montana Bankers Association CLE — Helena

August 4-5 — Annual Seminar of the Masters, Montana Trial Lawyers Association — Missoula

August 18-19 — Billings—Annual Bankruptcy Section CLE

September 9 — New Health Care Powers of Attorney — Billings

Sept. 22-23 — Annual Meeting — Great Falls

STATE BAR OF MONTANA

Attorney Emeritus

Attorneys in the State Bar's Emeritus program no longer maintain an active practice, but they still make a difference to those in need of legal help.

What is Emeritus status?

Emeritus Attorneys:

- Get State Bar dues waived
- Do not engage in active law practice, except in association with a qualified provider
- Annually perform 25 hours of pro bono service
- Neither ask for nor receive compensation of any kind
- Complete 10 CLE credits annually

Questions?

To learn more, contact Ann Goldes-Sheahan: agoldes@montanabar.org or call the State Bar at 406-442-7600

Funds, from page 20

McLean was charged in the United States District Court for the District of Montana with five counts of wire fraud and five counts of aggravated identity theft.[97]

In a plea agreement, on Aug. 17, 2015, McLean pleaded guilty to two counts of wire fraud and one count of aggravated identity theft.[98]

On Dec. 3, 2015, McLean was sentenced to the custody of the United States Bureau of Prisons for 42 months, presenting 18 months for each count of wire fraud, to run concurrent, and 24 months for aggravated identity theft, to run consecutively to the wire fraud counts.[99] McLean was also sentenced to three years of supervised release on the wire fraud counts and one year of supervised release for aggravated identity theft to run concurrent and was required to pay restitution.[100]

Randy S. Laedeke (2015)[101]

The court, in its Order of Discipline, accepted and adopted the COP's Findings of Fact, Conclusions of Law and Recommendation for Discipline, with the exceptions of how restitution should be calculated and whether Laedeke should be made to disgorge a fee.[102]

The following is a summary of the underlying facts:

On April 21, 2005, William Newberg died from injuries sustained in a motor vehicle accident.[103] He did not have a will. William was survived by his wife, Violet Newberg, and their minor daughter.[104] William was also survived by three adult children from a prior marriage.[105]

In September 2005, Laedeke entered into a contingency fee agreement with Violet and Max Small, a non-lawyer, who is referred to in the agreement as Violet's "advocate" to pursue survival and wrongful death claims.[106]

In October 2008, the tort claims resulting from William's death were settled for $300,000.[107] There was no allocation between the survival and wrongful death claims.[108]

On Oct. 15, 2008, the settlement proceeds were wired into Laedeke's IOLTA trust account.[109] The banks deducted $25 for wire fees.[110]

The ending balance for the account for September 2008 was $2,620.03.[111] Laedeke testified that this money belonged to him.[112] He left it in the account because he was being audited by the IRS.[113]

From September 2008 until June 2010, no other funds (with the exception of interest that was ultimately paid to the Montana Justice Foundation) were deposited in the account.[114]

The account ending balance as of March 31, 2010, was $2,414.21.[115] Taking into account the $2,620.03 belonging to Laedeke when the Newberg settlement funds were wired into the account, all the settlement proceeds and more were gone by this time.[116] As of July 1, 2010, only $10.47 remained in the account.[117]

Out of the $299,975.00, Laedeke paid Small $32,000.00.[118] Laedeke also paid $32,524.00 in various litigation costs.[119]

As of March 31, 2010 (at which time all the money was gone), Laedeke had paid Violet, or others on her behalf, $49,903.90.[120]

The remainder of the settlement proceeds totaled $185,547.10 ($299,975.00 - $32,524.00 = $267,451.00 - $49,903.90 = $217,547.10 - $32,000.00 = $185,547.10), all of which Laedeke took for his own purposes.[121]

In its Order of Discipline, the Court ordered Laedeke to pay restitution in the amount of $65,547.10.[122]

At the time Laedeke was disbarred, he was serving an indefinite suspension for misappropriating money in another case.[123]

By indictment filed March 18, 2016, Laedeke is charged in the United States District Court for the District of Montana with two counts of wire fraud in violation of 18 U.S.C. § 1343.[124]

The indictment alleges Laedeke embezzled the $65,547.10.[125]

CONCLUSION

Misappropriation of funds is one of the most egregious acts of misconduct a lawyer can commit. The lawyers mentioned in this article disgraced themselves and harmed the profession. One lawyer, Marvin Alback, was disbarred for stealing from clients, reinstated, and stole from clients again.

Given that clients generally entrust their attorneys with their affairs, and given the latitude and power attorneys have in the attorney-client relationship, it is not surprising that some lawyers engage in acts of misappropriation. When, and if, those lawyers are caught, they should be dealt with harshly.

Shaun Thompson was appointed Chief Disciplinary Counsel by the Montana Supreme Court in 2005. The Office of Disciplinary Counsel is responsible for the intake, investigation and prosecution of ethics complaints against lawyers.

97 Indictment (filed July 17, 2015), *USA v. McLean*, Case No. CR 15-30-BU-DLC.

98 Plea Agreement (filed August 12, 2015) and Findings and Recommendation Concerning Plea, *USA v. McLean*, Case No. CR 15-30-BU-DLC.

99 Judgment in a Criminal Case (filed December 7, 2015), *USA v. McLean*, Case No. CR 15-30-BU-DLC.

100 *Id.*

101 Order of Discipline (filed June 30, 2015), p. 2, *In re Laedeke*, Case No. PR 14-0471.

102 *Id.*

103 COP's FOF, COL and Recommendation for Discipline (filed April 30, 2015), FOF 3-4, *In re Laedeke*, Case No. PR 14-0471.

104 *Id.* at FOF 4.

105 *Id.*

106 *Id.* at FOF 5, 7-8.

107 *Id.* at FOF 13.

108 *Id.* at FOF 15.

109 *Id.* at FOF 16.

110 *Id.* at n. 6.

111 ODC Ex. 41. All exhibits referred to were admitted at a hearing before the COP on April 16, 2015, and are on file with the Clerk of the Montana Supreme Court.

112 Transcr., *In re Laedeke*, hearing before the COP on April 16, 2015, at 38:20 to 39:10. The transcript is on file with the COP.

113 *Id.* at 39:11-18.

114 ODC Exs. 41-62.

115 ODC Ex. 59.

116 *Id.*

117 COP's FOF, COL and Recommendation for Discipline (filed April 30, 2015), FOF 29, *In re Laedeke*, Case No. PR 14-0471

118 Order of Discipline (filed June 30, 2015), p. 3, *In re Laedeke*, Case No. PR 14-0471.

119 COP's FOF, COL and Recommendation for Discipline (filed April 30, 2015), FOF 28, *In re Laedeke*, Case No. PR 14-0471; ODC's Ex. 68.

120 ODC Exs. 67, 75b.

121 Order of Discipline (filed June 30, 2015), p. 3, *In re Laedeke*, Case No. PR 14-0471.

122 *Id.* at p. 4.

123 Order of Discipline (filed Sept. 3, 2014), *In re Laedeke,* Case No. PR. 13-0321.

124 Indictment (filed March 18, 2016), USA v. Laedeke, Case No. CR 16-33-BLG-SPW.

125 Id. at 2.

Notice, from page 16

State v. Oatman, 275 Mont. 139, 145, 911 P.2d 213, 217 (1996).

Neither *Hart* nor *Oatman* set out the exact language of the jury instructions approved by the Supreme Court as to the effect of the judicial notice in those criminal cases. However, the paraphrases by the Court support the inference that the judges gave instructions which were drawn directly from the language of Rule 201(g). Helpfully, because of the similarity between the M.R.E. and the F.R.E. 201 provisions on this point, the Ninth Circuit has online Model Criminal Jury Instructions[12] which directly address judicial notice, last updated in March 2016:

> 2.5 JUDICIAL NOTICE
>
> The court has decided it is not necessary to receive evidence of the fact that [insert fact noticed e.g., the city of San Francisco is north of the city of Los Angeles] [because this fact is of such common knowledge]. You may, but are not required to, accept this fact as true.

The comment to this model instruction is also helpful, citing both F.R.E. 201(g) and *United States v. Chapel*, 41 F.3d 1338 (9th Cir.1994). Finally, note that the Ninth Circuit Criminal Model Jury Instructions also include an instruction (2.4) on stipulations of fact, which in marked contrast to judicial notice **are** binding on the jury.[13] In light of the comprehensive analysis of the Ninth Circuit Model Instructions and the lack of a Montana Criminal Pattern Instruction on judicial notice, I recommend that criminal lawyers adopt the Ninth Circuit model for Montana state cases. I also recommend that a judicial notice instruction identical to the Ninth Circuit Model be added to the Montana Criminal Pattern Jury Instructions.

On the civil side, although there is a Montana Pattern Instruction on judicial notice, discussed above, it does not give the jury any guidance as to what to do with the judicially noticed fact. Again, the combination of the clear language of M.R.E. 201(g), its similarity to F.R.E. 201(f) on the same issue, and the fact that the Ninth Circuit does have model language argues for use of the Ninth Circuit language on the conclusiveness of judicial notice in a civil case. In fact, the Ninth Circuit Civil Model Jury Instructions[14] set the stage for judicial notice (and agreed facts) in the preliminary instructions:

> **1.6 WHAT IS EVIDENCE**
>
> The evidence you are to consider in deciding what the facts are consists of:
> 1. the sworn testimony of any witness;
> 2. the exhibits that are admitted into evidence;
> 3. any facts to which the lawyers have agreed; and
> 4. any facts that I [may instruct] [have instructed] you to accept as proved.

The specific model for judicial notice, with its accompanying comment, provides:

> **2.3 JUDICIAL NOTICE**
>
> The court has decided to accept as proved the fact that [*state fact*]. You must accept this fact as true.
> Comment
> An instruction regarding judicial notice should be given at the time notice is taken. In a civil case, the Federal Rules of Evidence permit the judge to determine that a fact is sufficiently undisputed to be judicially noticed and requires that the jury be instructed that it is required to accept that fact. Fed. R. Evid. 201(f). In a criminal case, however, the court must instruct the jury that it may or may not accept the noticed fact as conclusive. *Id.*; *see United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir.1994) (in a criminal case, "the trial court must instruct 'the jury that it may, but is not required to, accept as conclusive any fact judicially noticed'"); Ninth Circuit Model Criminal Jury Instruction 2.5 (2010) (Judicial Notice).

A Montana lawyer in state court on a civil case should use the MPI 1.10 (discussed above), but add to it the sentence recommended by the Ninth Circuit: "You must accept this fact as true." A more global fix would be for the Montana Civil Pattern Instructions to add this same sentence to its Instruction 1.10.

CONCLUSION

It is indisputable that this Evidence Corner article has dragged on far too long. Although there are several other interesting subtopics about judicial notice under the M.R.E., as a matter of common knowledge, it is time to stop for this month. I hope to conclude judicial notice in the next issue of the Montana Lawyer. In the meantime, be sure to take a moment June 25 to remember those who died on the battlefield in 1876.

Cynthia Ford teaches Civil Procedure, Evidence, Family Law, and Remedies. She coached the Trial Team for 20 years, and regularly serves on the faculty of the Advanced Trial School at the School of Law.

12 http://www3.ce9.uscourts.gov/jury-instructions/node/423

13 "2.4 STIPULATIONS OF FACT
The parties have agreed to certain facts that have been stated to you. You should therefore treat these facts as having been proved."
Comment
"Stipulations freely and voluntarily entered into in criminal trials are as binding and enforceable as those entered into in civil actions." United States v. Gwaltney, 790 F.2d 1378, 1386 (9th Cir.1986). "When parties have entered into stipulations as to material facts, those facts will be deemed to have been conclusively established." United States v. Houston, 547 F.2d 104, 107 (9th Cir.1976) (citations omitted). "[W]hen a stipulation to a crucial fact is entered into the record in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or her attorney. Unless a criminal defendant indicates objection at the time the stipulation is made, he or she is ordinarily bound by such stipulation." United States v. Ferreboeuf, 632 F.2d 832, 836 (9th Cir.1980). In any event, a trial judge need not make as probing an inquiry as is required by Fed. R. Crim. P. 11 when considering whether a defendant's factual stipulation is knowing and voluntary. United States v. Miller, 588 F.2d 1256, 1263-64 (9th Cir.1978). See also Old Chief v. United States, 519 U.S. 172, 186 (1997) (acceptance of a stipulation regarding prior conviction may be appropriate even where government objects under Fed. R. Evid. 403); JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 1.1.B (2013).

14 http://www3.ce9.uscourts.gov/jury-instructions/node/50

Committees, from page 25

work. Specifically, the committee will work on Senate Joint Resolution 24: Study of Sexual Assault in Montana.

Although recent discussions of sexual assault tend to revolve around assaults that occur on university campuses or involve university students, the study resolution emphasizes that sexual assault is a problem that affects more than just students. A 2010 Centers for Disease Control and Prevention survey found that nearly 1 in 5 women and 1 in 71 men have been raped at some point in their lives. The United States Department of Justice reports that American Indians (who make up approximately 8% of the Montana population) are 2.5 times more likely to experience sexual assault crimes than other races and that 1 in 3 American Indian women report having been raped or having been the victim of an attempted rape in her lifetime.

Along with these statistics, the study resolution points out that Montana's sexual assault laws, regulations, and policies have evolved piecemeal over the years, making a comprehensive, thorough review important. The resolution also emphasizes that cooperation between many governmental agencies, other organizations, and citizens is necessary to prevent and respond to sexual assault in communities.

Study tasks

Senate Joint Resolution 24 asks that the LJIC consider a broad list of topics as part of this study:

- current state and federal sexual assault statutes, including those governing the criminal justice process of investigating, charging, and sentencing of sexual assault-related crimes;
- current policies and practices of local, state, and university law enforcement agencies and of county attorneys that are related to investigating and prosecuting sexual assault crimes and whether the agencies and county attorneys have adequate resources to investigate and prosecute these crimes;
- societal attitudes and myths related to sexual assault and education that might help the public to overcome these attitudes and myths;
- if and to what extent best-practices training is available to stakeholder agencies and sexual assault response units;
- best practices and policies for treatment, incarceration, registration, and supervision of sexual offenders and for treatment for victims;
- measures to improve understanding of the difficulties inherent in the criminal justice system in responding to sexual assault, measures to prevent sexual assaults, and education and/or tools to improve communities' responses to sexual assault;
- jurisdictional factors that hinder responses to sexual assault, including assaults on Indian reservations and Montana university campuses; and
- information-sharing and data-collection challenges related to the analysis of sexual assault in Montana.

The resolution also requests that the Montana Attorney General's Office update the LJIC on the office's agreement with the U.S. Department of Justice and how changes resulting from that agreement might be translated into opportunities for statewide programs.

Next meeting

Next meeting for the Law and Justice Interim Committee meeting is set tentatively for June 28-29 at the Capitol.

Commission website: www.leg.mt.gov

Commission staff: jburkhardt@mt.gov or 406-444-4025

Ellie Hill Smith, D-Missoula, and Austin Knudsen, R-Culbertson, are both attorney-legislators. Hill Smith serves as the minority chair for the House Human Services Committee and continues to serve on House Judiciary and the Interim Committee of Law and Justice. She has a private practice in Missoula and can be reached at EllieHillHD94@gmail.com or 406-218-9608. Knudsen is the speaker of the House in the Montana Legislature and served on the Federal Relations, Energy and Telecommunications Committee, the Rules Committee and the State Administration Committee. He has a private practice in Culbertson and can be reached at knudsenlawfirm@yahoo.com or 406-787-6389.

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Advanced Tips for Enhanced Legal Research on Fastcase

Thursday, June 23, 11 a.m.

Introduction to Boolean (Keyword) Searches

Thursday, July 7, 11 a.m.

Introduction to Legal Research on Fastcase

Thursday, July 14, 11 a.m.

Advanced Tips for Enhanced Legal Research on Fastcase

Thursday, July 21, 11 a.m.

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Drug Treatment Court Advisory Committee created

The Montana Supreme Court has ordered the creation of the Drug Treatment Court Advisory Committee, which will make policy and funding recommendations to the District Court Council.

In its order, the Supreme Court said that drug treatment courts have proven to be an effective strategy for addressing addiction and crime, and the judiciary has an obligation to provide stnadards and strategic planning to maintain and grow successful treatment courts.

The Supreme Court ordered that the permanent committee will have the following responsibilities:

- providing ongoing review and revision to drug court standards;
- assuring communication and continuity in the operation of state drug treatment courts;
- providing ongoing review and recommendations to the District Court Council and Supreme Court regarding statewide drug court funding, budget and policy issues; and
- addressing future drug treatment court issues as they arise.

Montana's first drug treatment court started in the Fourth Judicial District (Missoula and Mineral counties) in 1996. There are now 25 drug treatment courts in Montana — including family, adult, juvenile, co-occurring mental health, DUI, and veterans treatment courts —up from 20 in 2009.

According to a January 2015 report, there were 535 active participants in a drug court, up from 350 according to a 2013 report and 253 according to a 2011 report.

The committee will consist of seven judges appointed from different treatment court types who will serve three-year terms.

The following judges were appointed effective immediately: the Honorable Greg Pinski of the Eighth Judicial District, the Honorable Mary Jane Knisley of the 13th Judicial District, the Honorable John C. Brown of the 18th Judicial District, the Honorable James A. Manley of the 20th Judicial District, the Honorable Kurt Krueger of the Second Judicial District, and the Honorable Katherine M. Bidegaray of the Seventh Judicial District. Krueger was appointed chair.

APPELLATE, from page 17

require that a defendant himself give an in-depth account of the crime or confirm that everything in the government's offer of proof is true in order to plead guilty. The district court thus abused its discretion by refusing to accept the defendant's guilty plea based on the "inapt" reason that the court did not have a clear record, even though the defendant admitted his guilt and the government's offer of proof provided supporting facts. Because the error made the defendant significantly worse off — he was convicted at trial of two offenses carrying substantially higher maximum sentences than the single count to which he tried to plead guilty — the Ninth Circuit vacated his convictions.

Second, the district court wrongly refused to allow the defendant to question three cooperating witnesses about their plea agreements, where those agreements provided that the government could move, in its discretion, for a reduction in sentence under Federal Rule of Criminal Procedure 35. The district court's reasoning — that the government had not yet filed a Rule 35 motion — was "precisely backwards." It was the fact that the government had not yet moved for a reduction in sentence that would give the witnesses the greatest incentive to tailor their testimony to convince the government to do so.

Third, the district court had no authority to order on its own motion that the defendant's forfeited assets "be held and disbursed as appropriate in reimbursement" of the costs of his court-appointed representation. Under 21 U.S.C. § 853(a), once the court ordered the assets forfeited, it was as if the government had title to them all along. Moreover, 28 U.S.C. § 524(c)(4)(A) prescribes that forfeited assets be deposited in a special fund used for various law enforcement purposes. Thus, the assets were not "available for payment from on behalf of" the defendant to reimburse Criminal Justice Act-related spending. See 18 U.S.C. § 3006A(f).

The Ninth Circuit reassigned the case on remand, given the court's serious doubt that the district judge would be able to put out of his mind "already-developed notions about what" the defendant's punishment should be.

WESTERN SECURITY BANK V. SCHNEIDER LTD. PARTNERSHIP

[1]816 F.3d 587 (9th Cir. 2016)

Civil. Section 16(a) of the Federal Arbitration Act (FAA) permits an interlocutory appeal from an order refusing to grant a stay under FAA section 3. Adopting a test from *Conrad v. Phone Directories Co.,* 585 F.3d 1376 (10th Cir. 2009), the Ninth Circuit motions panel applied a two-step process for determining whether the court had appellate jurisdiction under section 16(a). It first determined whether the appellant's underlying stay motion was captioned as arising under FAA section 3 or 4, which it was. Then, it looked beyond the caption of the motion "to the essential attributes of the motion itself," to determine whether the motion was incorrectly captioned in an attempt to take advantage of section 16(a). Applying the second step, the motions panel found that the appellants had repeatedly made clear that they did not seek to compel arbitration of their claims against Western Security Bank. Rather, they sought a judicial remedy from the district court following completion of a separate arbitration against a different party. As such, the essence of their stay motion was not for relief under the FAA, and no section 16(a) appellate jurisdiction existed over the denial of the motion. The motions panel therefore dismissed the appeal for lack of jurisdiction.

Michael Manning is an appellate lawyer in the Billings office of Holland & Hart LLP, and previously clerked for Ninth Circuit Judges N. Randy Smith and Thomas G. Nelson.

1 Full disclosure: The author represented Western Security Bank in this case

H. James 'Jim' Oleson

H. James "Jim" Oleson, former Flathead County Attorney and U.S. Magistrate, died peacefully with his wife, Jeanne, by his side on March 21, 2016.


Oleson

Jim was born in Lemmon, South Dakota, on May 24, 1934. He attended South Dakota State, where he graduated with an engineering degree. During college, Jim worked as a smoke jumper and he often talked fondly of his time fighting fires. After college he enlisted in the Navy, where he served for three years. He attended law school at the University of Montana when his time in the military had ended. He went back to being a smoke jumper to pay for his law school, a fact he was very proud of.

Jim started his career in Kalispell and worked there as a lawyer until December 2013. During that time he was a Flathead County attorney and a U.S. Magistrate, along with having his own private practice. He interests were many and varied, including collecting coins, SCUBA diving, making wine, flying, reading about and discussing military history and playing games with his grandchildren. He also took pride in being a Shriner.

In lieu of flowers, please consider making a donation in Jim's name to Epworth United Methodist Church, 329 2nd Ave. E, Kalispell, MT 59901; The Shriner's Children's Hospital, 911 W. 5th Ave., Spokane, WA 99204; The Sparrow's Nest, P.O. Box 8384, Kalispell, MT 59903; or to the charity of your choice.

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