

MONTANA LAWYER

State Bar
— of —
Montana

May 2016 | Vol. 41, No. 7

Campaign Financing

A broken system badly in need of repair, or a lot of noise about a non-existent problem?
Jon Ellingson and Kyle Gray debate the issue



Committee Urges Lowering Passing Score on Bar Exam

Supreme Court to take public comment until May 20 on proposal to drop passing grade from 270 to 266 effective immediately, retroactive to the July 2013 exam.

See page 8

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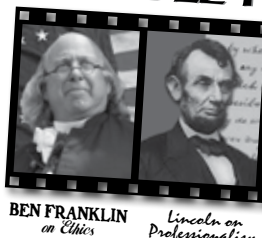
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E-mail: jmenden@montanabar.org

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Publisher | *Christopher L. Manos*

Editor | *Joe Menden*

406-447-2200; fax: 442-7763

e-mail: jmenden@montanabar.org

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INDEX

May 2016

Feature Stories

Point-Counterpoint: Campaign Financing.....	10
Discipline: Misappropriation of Client Funds.....	12
Evidence Corner.....	16

Regular Features

Member News	4
Court orders	6-8
State Bar News.....	9, 34
CLE	28
Obituaries.....	37
Job Postings/Classifieds.....	38

Submission guidelines

The Montana Lawyer welcomes contributions of news feature articles, member news, and letters to the editor. Submissions should meet these guidelines:

1. Letters longer than 250 words require prior approval of the editor.
2. the editor will make every effort to print letters submitted by members of the State Bar of Montana.
3. Articles accepted for publication will be edited as necessary for style and length, and the editor will confer with the author before content changes are made.

Email jmenden@montanabar.org or call 406-447-2200

Murphy inducted as Fellow in the College of Workers' Compensation Lawyers

Thomas Murphy was recently inducted as a Fellow in The College of Workers' Compensation Lawyers. The College of Workers' Compensation honors attorneys who have distinguished themselves locally and nationally in the field of workers' compensation. Murphy was honored for showing traits developed over 30 years representing injured workers and accident victims.



Murphy

Fellows of the College demonstrate to their peers, the bar, bench, and public that they possess the highest professional qualifications and ethical standards, character, integrity, professional expertise, and leadership. They also have a proven commitment to scholarship, teaching, lecturing, and distinguished published writings on workers' compensation. Fellows are credited with helping newer attorneys, and they have earned the respect of the bench, opposing counsel, and the community. A Fellow of the College displays civility in adversarial relationships, and avoids allowing ideological differences to affect civility in negotiations, litigation, and other aspects of law practice. Fellows demonstrate proficiency in resolving disputes, and they actively participate in their state and national bar.

Murphy is co-chairman of the Montana Trial Lawyers Workers' Compensation Section, and also serves on the board of directors for the Montana Trial Lawyers Association. On the national level, Murphy serves on the board of directors of the Workers' Injury Law & Advocacy Group. Murphy is the recipient of the 2005 Montana Trial Lawyers Association Appellate Advocacy Award.

He is the first lawyer in Montana to be inducted as a Fellow into The College of Workers' Compensation Lawyers.

Musick joins Bozeman's Guza, Nesbitt & Putzler

Guza, Nesbitt & Putzler, PLLC, a full-service litigation, family law, and transactional law firm has announced the addition of Elizabeth T. Musick as an associate attorney.

Musick was born and raised in Memphis, Tenn. She graduated from Clemson University in 2008 with a B.A. in English and a minor in education. She moved to Missoula upon graduating from Clemson. There, she worked as a paralegal prior to attending law school at the University of Montana School of Law. While attending law school, she was a member of the ABA Negotiations Competition Team for three years, and she participated in the University of Montana Criminal Defense Clinic.



Musick

After graduating from the University of Montana and passing the Montana State Bar Exam in 2015, Musick was hired by Oracle America in Bozeman. As a member of

Oracle's legal department, she worked with Oracle Sales Teams and Oracle Business Analysts to negotiate Cloud Storage Agreements and Oracle Master Agreements with customers and their legal department. She worked as a project manager to lead negotiations and draft complex amendments to the Agreements. Additionally, she reviewed acquired company agreements and amended them to meet Oracle standards.

Musick's practice will focus on the general practice of law with an emphasis in criminal defense, civil litigation, and employment law. While not working, Elizabeth enjoys fly fishing, hunting, running, hiking, and camping with her husband and two dogs.

Musick can be contacted at: Guza, Nesbitt & Putzler, PLLC, 25 Apex Drive, Suite A, Bozeman, MT 59718. Phone: 406-586-2228; Fax: 406-585-0893. Email: emusick@gnplaw.com.

MLSA welcomes Dale-Ramos as new attorney

Kallie Dale-Ramos is the staff attorney for the new Montana Health Justice Partnership grant. Dale-Ramos is originally from Helena. She graduated with a B.A. in history and a B.A. in political science from the University of Michigan. She received her J.D. from the University of Texas School of Law in 2015.



Dale-Ramos

Prior to law school she was a Peace Corps volunteer in El Salvador. During law school she represented clients during immigration proceedings and served as a Human Rights Law scholar.

Before starting at MLSA, Dale-Ramos was a legal fellow at the Indian Law Resource Center, advocating for legal reforms to increase tribal sovereignty over cases of violence against women. Dale-Ramos is glad to be back in the mountains with her family.

Berkhof joins Church, Harris, Johnson & Williams

The law firm of Church, Harris, Johnson & Williams, P.C. has announced that Roberta (Bobbi) Berkhof is now an attorney with the firm's litigation team. Berkhof's practice will focus on employment and administrative law along with commercial, property and transactional matters.



Berkhof

Berkhof was born and raised in Great Falls. The family says a 32-inch brown trout called them home to Montana after her dad's separation from the Air Force. After graduating from C.M. Russell High School in Great Falls, Berkhof attended her parents' alma mater, Calvin College in Grand Rapids, Mich. After graduation in 1997, she worked with the Grand Rapids Police Department for five years, transitioning to the 61st District Court as its bilingual probation officer.

After nearly 15 years in law enforcement, Berkhof opted for an early retirement package in order to pursue law school.

Berkhof graduated from the University of Montana School of Law in 2015. As a law student, she interned with the Office of Public Defenders arguing before the Sentencing Review Panel of the Montana Supreme Court. Her clinical placement with the University's In-house Criminal Defense Clinic resulted in briefing and oral arguing a civil rights case before the 9th Circuit Court of Appeals in San Francisco in May of 2015.

Berkhof speaks fluent Spanish, and she studied abroad in Santiago, Chile, with an international law and legal Spanish immersion program through the California Western School of Law, San Diego.

When not in the office, Bobbi loves everything culinary, including gardening, canning and recipe experimentation and anything outdoors, particularly camping, floating and attempting to fly fish.

Church, Harris, Johnson & Williams, P.C. is a full-service law firm with locations in Great Falls and Helena. The firm has served businesses and individuals, in a wide range of legal disciplines, since 1949. Visit the firm's website at chjw.com for more information.

Berkhof can be reached at 406-761-3000.

Smelko board certified in forensic psychology

Bowman Smelko, Psy.D., ABPP, became board certified in forensic psychology in April. He is now the only Montanan to be a member of the American Board of Forensic Psychology and the American Academy of Forensic Psychology.

Smelko received his undergraduate degree from Carroll College in 1998 and went on to receive his master's and doctoral degrees in clinical psychology from Forest Institute of Professional Psychology.



Smelko

Smelko is currently a forensic psychologist in private practice in Helena, where he conducts a variety of criminal and civil forensic evaluations with adults and juveniles and teaches Law, Justice, and Forensic Psychology at Carroll College. He has served as the director of sex offender treatment and evaluation at the Colorado Mental Health Institute in Pueblo, Colo., and as the clinical director of a division of youth corrections facility. In addition, he consults with numerous private and government agencies regarding forensic based issues.

He can be contacted at bowmansmelko@gmail.com or 406-282-1744. His full curriculum vita can be found at capitalcityconsultantsonline.com.

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Court suspends attorneys Schuster, Stinson

DISCIPLINE

Summarized from an April 12 order in case No. PR 16-0132

The Montana Supreme Court ordered attorney Laurence Stinson to be suspended from practice for nine months in reciprocal discipline from the Wyoming Supreme Court.

Stinson, from Cody, Wyo., objected to the Montana Office of Disciplinary Counsel's petition for reciprocal discipline. Citing *In Re Moriarity*, PR 14-0564, he asked the court to grant him a hearing before the Commission on Practice, arguing that the Wyoming procedure violated his right to due process and that the misconduct the Wyoming court found had occurred results in substantially different discipline in Montana.

The Montana Supreme Court found that Stinson's case differs from Moriarity in that the discipline imposed in Wyoming was not based on consent to discipline. Instead Stinson appeared at a multi-day hearing before Wyoming's disciplinary body, which later issued findings of fact, conclusions and recommendations for discipline.

The Wyoming suspension stemmed from a dispute between Stinson and two former clients who owned a construction company over a home construction deal that fell through.

In that case, the Wyoming Board of Professional Responsibility found numerous violations of the Wyoming Rules of Professional Conduct. Among the violations, the board found that Stinson made numerous false statements of fact to the court during a lawsuit over the dispute and provided evidence he knew to be false; made frivolous discovery requests and failed to comply with legally proper discovery requests; engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation during the lawsuit; and used means that only served to delay, embarrass or burden his former clients.

Summarized from an April 12 order in case No. PR 15-0264

The Montana Supreme Court ordered

attorney Larry G. Schuster of Billings to be suspended from practice for 60 days for non-meritorious claims he made in litigation in an attempt to defraud NorthWestern Energy.

The discipline stems from a complaint Schuster filed against NorthWestern seeking recovery for damage to a townhouse and personal property as a result of flooding that happened when Northwestern cut electrical service to the townhouse and water pipes burst as a result.

According to Commission on Practice findings, NorthWestern learned through the discovery process that Schuster did not own the townhouse and that much of the property Schuster claimed had been damaged or destroyed was actually in storage and undamaged.

The Commission on Practice concluded that Schuster's violated multiple sections of the Montana Rules of Professional Conduct: advancing non-meritorious claims, giving false deposition testimony in the litigation, dishonesty in an effort to defraud NorthWestern, and conduct prejudicial to the administration of justice.

The commission noted that several of its members would have imposed a recommendation for harsher discipline. The majority, however, recommended leniency because Schuster had no prior disciplinary record and due to extenuating personal circumstances.

Summarized from Findings of Fact, Conclusions of Law and Recommendations from the Commission on Practice, Case No. PR 16-0025

Attorney Mark Epperson of Glendive will receive a public admonition from the Commission on Practice after being held in contempt when he informed the Glendive District Court he and his client would not show up for a criminal trial.

In its discipline order, the Commission on Practice said that Epperson's conduct was particularly disturbing in its lack of respect for the court and his obligations as an attorney. It said that if he had previously been the subject of prior discipline, a more severe discipline would be warranted.

Epperson, an attorney for the Office

of the State Public Defender in Glendive, received the admonition in exchange for a conditional admission of guilt. He is also required to pay costs to the commission and to the Office of Disciplinary Counsel.

Epperson's discipline stems from a disputed plea agreement for a client charged with felony criminal endangerment, felony criminal child endangerment and other charges.

When Glendive District Judge Richard A. Simonton refused to accept the plea agreement and instead set a trial date, Epperson emailed to inform the clerk of court among other things that neither he nor his client would show up if Judge Simonton refused to vacate the trial, "and he can throw my ass in jail for contempt if he chooses."

The judge vacated the trial, held Epperson in contempt and fined him \$250.

Summarized from Findings of Fact, Conclusions of Law and Recommendations from the Commission on Practice, Case No. PR 15-0654

Attorney Paul G. Matt will receive a public admonition from the Montana Commission on Practice for failure to comply with his obligations for the segregation of client funds.

Matt received the admonition in exchange for a conditional admission of guilt. He is also required to pay costs to the commission and to the Office of Disciplinary Counsel. The commission found that no prior disciplinary actions mitigate against a more severe discipline.

Matt admitted to the commission that he did not maintain an IOLTA trust account, as required by the Montana Rules of Professional Conduct, until 2015.

Matt deposited client funds in a personal savings account. He denied, however, that he failed to maintain a business/operating account for his practice, contending that he maintained the personal account for his solo practice. The commission found, however, that the MRCPC do require a separate business account.

Supreme Court Oral Arguments

All oral arguments begin at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, unless indicated.

Wednesday, May 18 — Clark Fork Coalition v. Montana DNRC: The First Judicial District Court invalidated a 1993 administrative rule defining “combined appropriation” for purposes of the Water Use Act permitting process. That rule limited “combined appropriations” to two or more groundwater developments that are “physically manifold” together. The court reasoned that the 1993 rule allowed large water users to evade permitting and to impact senior water rights holders by drilling multiple unconnected wells for a single large use. The court reinstated a 1987 rule on the subject and ordered the Department of Natural Resources and Conservation to reinstate rulemaking.

Appellants argue the 1993 rule is consistent with statutes and is reasonably necessary to effectuate the statutes’ purpose. They also argue that, by reinstating the 1987 rule, the court violated the Montana Administrative Procedure Act

and the public’s right to participate under the Montana Constitution. The court has accepted amicus briefs from the Montana Association of Counties, Water Systems Council, Montana Trout Unlimited, the Montana League of Cities and Towns, and a coalition of environmental groups.

Wednesday, May 25 — Talbot v. WMK-Davis, LLC: Oklahoma resident Jason Talbot was injured when he was hit by a motor vehicle while working in Billings for his Oklahoma-based employer, Cudd Pressure Control, Inc. Talbot is receiving Oklahoma workers compensation benefits. In this action, Talbot sued the employer of the driver of the vehicle that hit him. Cudd intervened to assert a lien against any recovery Talbot obtains.

At issue is whether Montana or Oklahoma law applies regarding Cudd’s lien claim. The District Court ruled that Montana law applies and Cudd cannot subrogate until Talbot has fully recovered all of his damages.

Wednesday, June 8 — Junkermier, Clark, Campanella, Stevens PC v. Alborn, Uithoven, Riekenberg PC.

Orders, from previous page

Matt was the subject of fee arbitration in the case that led to the discipline and was ordered to repay a portion of his fee due to incomplete accounting records. He then filed suit against his clients, objecting to the arbitration award.

Summarized from Findings of Fact, Conclusions of Law and Recommendations from the Commission on Practice in Case No. PR 15-0655

Attorney Mark S. Hilario was ordered to receive a public admonition from the Commission on Practice for not meeting his ethical responsibilities with a client in a bankruptcy case.

Hilario admitted he failed to meet with his client to discuss her up-to-date financial circumstances and did not amend her bankruptcy schedules after she informed him she was retiring due to a claimed medical disability. Hilario voluntarily made payment of \$700 to satisfy a medical debt that was not discharged as a result. The commission determined no further restitution was necessary.

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Supreme Court seeks public comment on recommendation to lower bar passing score

Montana Lawyer Staff

The Montana Supreme Court has issued an order asking for public comment on a recommendation to lower the bar examination pass score effective immediately.

The recommendation would lower the passing score on the exam from the current 270 to 266. The committee report says it is its intention that applicants who have scored 266-269 over the past three years, when the score was 270, would be eligible to seek admission to the bar without retaking the exam. According to the committee, this would occur by virtue of existing Bar rules of admission that allow transfer of a UBE score within three years of taking the exam. This provides a de facto retroactive application of the change in the passing score for that period.

The recommendation came from a committee that has been examining issues related to the bar exam since the court ordered its creation on Jan. 28 in response to a request from Paul Kirgis, dean of the Alexander Blewett III School of Law. The court will take comment until May 20. The committee's recommendation to change the bar exam score is posted at montanabar.org.

The State Bar of Montana Board of Trustees has a special meeting planned by telephone for Tuesday, May 10, to discuss submitting comment on the committee's recommendation.

Kirgis' request was in reaction to a steep decline in University of Montana law school graduates who passed the bar exam, from about 88 percent in the 10-year period from 2003-2012 to 69 percent in 2014 and 68 percent in 2015.

In 2013, the Supreme Court raised the bar exam passing

Read the committee's recommendation

The committee's report recommending to lower the bar exam passing score from 270 to 266 is posted online at montanabar.org.

score from 260 to 270 at the recommendation of the Board of Bar Examiners. Randy Cox, former chair of the Board of Bar Examiners, said that the board at the time was disturbed about applicants who had scored high enough to earn a passing score on the exam but clearly did not "adequately demonstrate that they had the skills to undertake the practice of law."

The recommendation to increase the score to 270 was based largely on a survey of the passing scores of states in the region. Washington, Wyoming, Utah and Nebraska all have a 270 passing score.

The committee notes in its report that a National Conference of Bar Examiners representative it consulted said it was not "particularly informative" to compare passing scores and rates in other jurisdictions because of the differing applicant pools in each jurisdiction.

Beth Brennan, who represented the State Bar on the committee, proposed setting the score at 266. She said the Board of Bar Examiners' feeling that the 260 score was not sufficient to protect the public deserves deference, but that the law school has "expertise that may measure its graduates more holistically," and that its views also deserved credit.

Score, next page

Court Orders

APPOINTMENTS

Summarized from April 20 orders in Case No. 06-0090

The Montana Supreme Court has ordered elections for nominations to replace two members of the court's Commission on Practice whose terms are expiring.

The term of Donald Harris, the attorney member from Area G (Gallatin, Park and Sweet Grass counties), expires on May 22. The term of Jean Faure, attorney member from Area D (Cascade, Glacier, Toole, Pondera and Teton counties), expires on June 19.

The members of the State Bar of Montana in the respective areas will vote in an election to choose three licensed and practicing attorneys in the area. The names of the three attorneys receiving the highest number of votes will be sent to the Montana Supreme Court, which will appoint one of them to the commission.

In Area G, Billings District Court Judge Mary Jane Knisley will be responsible for the election. Judge Knisley will distribute ballots by mail or email on or before April 29. Ballots must be returned no later than May 20.

In Area C, Great Falls District Court

Judge Greg Pinski will be responsible for the election. Judge Pinski will distribute ballots by mail or email on or before May 9. Ballots must be returned on or before May 9.

RULE CHANGES

Summarized from an April 13 order in Case No. AF 07-0110

The Montana Supreme Court has updated the affidavit for excusal from jury duty form appended to the Uniform District Court Rules, adding an option for excusal on the grounds that the person no longer lives in the county.

Fastcase training webinars scheduled for 2016

Want to learn how to get the most out of your Fastcase legal research benefit that comes free with your State Bar of Montana active attorney membership?

Fastcase offers a wide array of training across, including a series of free webinars that kicked off in April. There are three webinars in the series: Introduction to Legal Research on Fastcase; Advanced Tips for Enhanced Legal Research on Fastcase; and Introduction to Boolean (Keyword) Searches. Each webinar counts for 1 free CLE credit.

Each webinar will air once a month. Below is the upcoming webinar schedule (all times MDT):

Thursday, May 12, 11 a.m.

Introduction to Legal Research on Fastcase

Thursday, May 19, 11 a.m.

Advanced Tips for Enhanced Legal Research on Fastcase

Thursday, May 26, 11 a.m.

Introduction to Boolean (Keyword) Searches

Thursday, June 2, 11 a.m.

Introduction to Legal Research on Fastcase

Thursday, June 16, 11 a.m.

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.

Introduction to Boolean (Keyword) Searches

To see the full 2016 webinar schedule, visit fastcase.com/webinars/. For more Fastcase training opportunities, go to montanabar.org/?page=AboutFastcase.

Score, from previous page

Cox supported 266 as the passing score, expressing concern that returning it to 260 would not adequately protect the public. He noted that the 4-point drop is only a 1 percent change on the traditional 100 percent grading scale.

Kirgis continues to believe that the UM law school students' credentials indicate that the 270 score is too high. That is based on a study that compared its students' scores on the law school precursor test the LSAT to their bar exam passing rate.

Kirgis noted that New York has settled on 266 for its passing score, as have Kansas and Iowa, which he called "states with similar characteristics to Montana."

Illinois and the District of Columbia also have 266 passing scores.

The committee also endorsed Kirgis' proposal for appointment of a standing committee by the court to review, at least annually, issues related to legal education, eligibility and bar admission. Kirgis will cause a separate petition to be filed providing for this issue.

The committee consisted of Kirgis; Missoula attorney Beth Brennan, representing the State Bar of Montana; Jamie Iguchi, representing the Bar's New Lawyers Section; Randy Cox, representing the Board of Bar Examiners; and Justice Jim Rice, the committee chair.



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How the Court got it wrong and jeopardized our democracy

By Jon Ellingson

When the world went to sleep on July 3, 1776, most people had no political rights of any kind. Even the aristocrats and landowners had little power over the rulers of the day. When it awoke the next day, a new nation had been born whose founders dedicated it to a new and exceptional political ideal: "That all men are created equal..."¹ This principle remains as hopeful and inspirational today as it was 240 years ago.

Eleven years after the Declaration of Independence, this ideal was given explicit form in our new Constitution. In the words of Alexander Hamilton, this Constitution created a form of government that was, first and foremost, "dependent" on the people.²

Four score and seven years after our Declaration of Independence, Lincoln wondered at Gettysburg "whether that nation, or any nation so conceived and so dedicated can long endure." That question, so relevant in the middle of our Civil War, is relevant again today.

Through a combination of events and circumstances, American voters are justified in asking if their government serves all the people. Or does it serve instead the class that largely funds the campaigns of our elected officials? This article briefly surveys our current circumstances, and the origins of the problem. It concludes with possible reforms that could bring us back to our republican roots, re-establish political equality among all of our citizens and rededicate our government to the service of all of us.

Our Current Circumstances

So much has been reported about the recent rise in inequality and wealth in this country that one is tempted to go on at length.

Ellingson, page 22

¹ It goes without saying, but will be stated nevertheless, that the blindness of the Founders to the political rights of women, Native Americans, poor tradesmen and slaves showed a profound lack of moral clarity.

² See particularly, Federalist Papers Nos. 51, 52 and 70. Professor Lawrence Lessig has emphasized the importance of this dependency principle in a number of fora and mediums, e.g. the keynote address to the Browning Symposium on Election Law at the University of Montana School of Law, September 27, 2012.



Jon Ellingson was a Montana legislator from 1995-2006, and has been a practicing lawyer since 1975. He was a MOLLI instructor at the University of Montana, Spring 2014, Campaign Finance Reform and Free Speech: Is There a Conflict?

Is campaign finance reform even a thing anymore?

By Kyle Anne Gray

Military historians have a saying: Generals are always fighting the last war. Politicians often do the same. Bernie Sanders insists that America has a “corrupt campaign finance system,” and that massive reform is desperately needed, starting with reversal of the Supreme Court’s 2010 *Citizens United* decision.¹ Is he right?

Sen. Bernie Sanders’ campaign is but the latest battle in a war of words that has been waged for over 40 years now among candidates for public office, well-known First Amendment advocates, the general public, and within the American Civil Liberties Union.² The latter has consistently argued that any remedy for an excess of political speech by the wealthy and powerful must focus on facilitation of more political speech by all, not on government prohibition of political speech by some. As explained below, my position is that the current campaign finance reform movement is agitating for a cure much worse than the malady, in a war increasingly aimed at yesterday’s problems.

First some history: Since the founding of the Republic, it has generally been the wealthy or the famous (mostly generals) who have run for and won high office, particularly the presidency. Political corruption was systemic in the 19th and early 20th centuries, largely because of the “spoils system,” *i.e.*, the ability of the victorious side to award patronage positions to their supporters. Movie aficionados saw a depiction of that system at work in the 2012 film *Lincoln*.³ Of course, as Montanans know, there was also eye-popping candidate-level corruption, like William Clark purchasing the votes for his Senate seat in 1899, reportedly with

Gray, page 25

Kyle Anne Gray practices commercial and environmental law with the Billings office of Holland & Hart LLP. Her practice focuses on complex civil litigation, including appellate and constitutional law, and she has briefed and argued dozens of cases before the United States Supreme Court, the Montana Supreme Court, the Wyoming Supreme Court and the United States Courts of Appeals for the Ninth, Tenth and Eleventh Circuits.

counterpoint

1 See, e.g., <http://www.msnbc.com/msnbc-news/watch/sanders-campaign-finance-system-is-corrupt-603515971586>; *Citizens United v. Federal Election Comm’n*, ___ U.S. ___, 130 S.Ct. 876 (2010).

2 See https://www.salon.com/2012/01/18/is_citizens_united_just_misunderstood/ and <https://www.aclu.org/aclu-and-citizens-united> and <http://www.aclu.org/issues/free-speech/campaign-finance-reform> Jon Ellingson – who has authored a pro-campaign finance reform article for this issue of the *Montana Lawyer* – and I are both former Legal Directors of the Montana ACLU. We represent opposite sides of this long-standing debate.

3 See <https://www.youtube.com/watch?v=z1fnWLQwpGM>

History of disbarment for attorney theft from clients, part 2: 1965-2002

By Shaun Thompson
Office of Disciplinary Counsel

This is the second installment of an article detailing the most prominent Montana attorney discipline cases involving misappropriation of client funds.

As discussed in the first installment of this article in April, misappropriation of funds typically results in the most serious discipline, disbarment. Last month, we looked at cases from before the Montana Supreme Court created the Commission on Practice in 1965. This month, we examine cases that came before the COP until the Office of Disciplinary Counsel was created in 2002 to prosecute disciplinary cases.

CASE SUMMARIES

The subheadings used below reference the lawyer's name and year of disbarment.

A. L. Libra (1972)¹

Libra handled, as an executor and an administrator, two probate estates.² He failed to account for money that came into his possession, commingled the money, and used the money for his own purposes.³

In 1962, Libra had been an unsuccessful candidate for justice of the Montana Supreme Court.⁴

John L. "Luke" McKeon (1974)⁵

On April 29, 1974, the Attorney General filed an information against McKeon charging him with 58 felony counts.⁶ McKeon was accused of stealing more than \$50,000 from clients and fraudulently obtaining more than \$26,000 from the Workers' Compensation Division.⁷

On May 7, 1974, pursuant to a plea agreement, McKeon pled guilty to four counts.⁸ The counts to which McKeon pled guilty were offering false evidence, obtaining money by false pretense, grand larceny by bailee, and forgery.⁹

McKeon was sentenced to five years for each count with three years suspended — to run concurrently.¹⁰

Upon receipt of the record of conviction, the Montana Supreme Court disbarred McKeon on May 13, 1974.¹¹

At the time McKeon was disbarred, he was chairman of the Montana State Senate's Judiciary Committee.¹²

McKeon was reinstated to the practice of law on Dec. 21, 1983.¹³ The court reinstated McKeon despite the fact that the majority of the COP recommended McKeon not be reinstated.¹⁴

Richard J. Carstensen (1975)¹⁵

Carstensen was hired by the Veterans Administration to close a loan.¹⁶ The VA loaned \$21,000 to Harvey Nelson, a veteran.¹⁷ The loan was to be secured by a mortgage.¹⁸ Most of the loan was to be used to satisfy a trust indenture held by Evans Products Company.¹⁹

At Carstensen's request, the VA issued a check for \$21,000 made payable to Nelson and Carstensen.²⁰ The money was deposited into Carstensen's trust

account.²¹ Carstensen sent the VA a closing statement showing that Evans had been paid \$19,979 out of the proceeds.²² Carstensen, however, misappropriated the money.²³

On the same day the Court disbarred Carstensen, it issued an Order striking Carstensen's exceptions to the COP's findings and conclusions on the grounds they were "a sham."

In 1984, the Court reinstated Carstensen to the practice of law.²⁴

L. R. Bretz (1975)²⁵

The Court found Bretz "guilty" of the charges set forth in the COP's report attached to the Order of Disbarment.²⁶ The charges are summarized as follows.

Bretz represented Donald Barry regarding Barry's workers' compensation claim.²⁷ Barry moved to Alaska.²⁸ Bretz lost contact with Barry.²⁹ Unbeknownst to Bretz, Barry died in Alaska from a heart attack.³⁰ Bretz settled Barry's claim for \$2,400 and kept the money.³¹

Gaylord Gilbert hired Bretz to pursue a medical malpractice claim and two workers' compensation claims.³²

Bretz filed a medical malpractice claim against a hospital that was later dismissed without a settlement.³³ The lawsuit against the hospital was filed to obtain discovery about a physician.³⁴ Bretz then filed a

1 *In re Libra*, 159 Mont. 530, 503 P.2d 1005 (1972).

2 *In re Libra*, 159 Mont. at 531, 503 P.2d at 1006.

3 *In re Libra*, 159 Mont. at 533, 503 P.2d at 1007.

4 *Montana Attorney Disbarred*, Helena Independent Record (July 26, 1972).

5 *In re McKeon*, 164 Mont. 328, 521 P.2d 1307 (1974).

6 *Id.*

7 Hugh van Swearingen, *McKeon: "Guilty" on four counts*, Helena Independent Record (May 7, 1974).

8 *In re McKeon*, 201 Mont. 515, 516, 656 P.2d 179, 180 (1982).

9 *Id.*

10 *Id.*

11 *In re McKeon*, 164 Mont. at 329, 521 P.2d at 1307.

12 Steven P. Rosenfeld, *McKeon disbarred*, Helena Independent Record (May 7, 1974).

13 *In re McKeon*, 201 Mont. 515, 656 P.2d 179 (1982).

14 *Id.*

15 *In re Carstensen*, 167 Mont. 321, 539 P.2d 384 (1975).

16 *In re Carstensen*, 167 Mont. at 322-323, 539 P.2d at 385.

17 *In re Carstensen*, 167 Mont. at 323, 539 P.2d at 385.

18 *Id.*

19 *Id.*

20 *Id.*

21 *In re Carstensen*, 167 Mont. at 325, 539 P.2d at 386.

22 *In re Carstensen*, 167 Mont. at 323-324, 539 P.2d at 385.

23 *In re Carstensen*, 167 Mont. at 325, 539 P.2d at 386.

24 Order (filed May 29, 1984), *In re Carstensen*, Case No. 12913.

25 *In re Bretz*, 168 Mont. 23, 542 P.2d 1227 (1975).

26 *In re Bretz*, 168 Mont. at 24, 542 P.2d at 1228.

27 *In re Bretz*, 168 Mont. at 34, 542 P.2d at 1233.

28 *Id.*

29 *In re Bretz*, 168 Mont. at 36, 542 P.2d at 1234.

30 *Id.*

31 *In re Bretz*, 168 Mont. at 37-39, 542 P.2d at 1235-36.

32 *In re Bretz*, 168 Mont. at 39, 542 P.2d at 1236.

33 *In re Bretz*, 168 Mont. at 40, 542 P.2d at 1236.

34 *Id.*

lawsuit against the physician.³⁵ The case was settled with Gilbert's consent for \$1,500.³⁶

Regarding the workers' compensation claims, Bretz settled both claims together for \$7,650 — with \$1,650 allocated to one claim and \$6,000 to the other.³⁷ The Industrial Accident Board (IAB) sent Bretz two checks for the claims.³⁸ Bretz sent Gilbert the check for \$1,650 with a letter indicating that since Gilbert was getting the entire settlement for this IAB claim, it would cover any amount that Bretz owed Gilbert for the medical malpractice settlement.³⁹ Gilbert accepted this arrangement.⁴⁰

Gilbert had no knowledge of the \$6,000 settlement.⁴¹ Bretz forged Gilbert's name to the check and misappropriated the money.⁴²

Earl Guszregan was approached by Merrill Cline, a convicted felon and a client of Bretz, about Guszregan's workers' compensation claim.⁴³ Cline told Guszregan he knew a lawyer (Bretz) who would take care of the matter.⁴⁴

Bretz settled Guszregan's claim with IAB for \$3,000 without Guszregan's knowledge or consent.⁴⁵ Bretz signed Guszregan's name to the check.⁴⁶ About a year later, Guszregan found out about the settlement from the Legislative Auditor's Office.⁴⁷ Only then did Guszregan receive a check from Bretz.⁴⁸

Eugene Hall Sr. hired Bretz to handle his workers' compensation claim.⁴⁹ Without Hall's knowledge or consent, Bretz settled the claim for \$2,000.⁵⁰ Bretz forged Hall's name to the check from IAB and took the entire amount.⁵¹

Later, Hall received a telephone call from Bretz's secretary, who advised Hall

the case had been settled.⁵² Bretz sent Hall \$500 drawn on his operating account.⁵³ When Bretz did not respond to Hall's requests for an accounting, Hall contacted another attorney.⁵⁴ Over a year after Bretz received the settlement check, Bretz sent Hall's new attorney an accounting showing purported fees and expenses of \$1,500, leaving Hall \$500.⁵⁵

Robert Morris retained Bretz to pursue his workers' compensation claims.⁵⁶ Morris last had contact with Bretz in 1969.⁵⁷ In 1972, Bretz settled Morris' claims for \$500.⁵⁸ Someone in Bretz's office signed Morris' name to the settlement check, which was deposited into Bretz's operating account.⁵⁹

Morris did not learn of the settlement until he was contacted by state investigators in 1974.⁶⁰

Bretz claimed his fees and expenses were more than the settlement.⁶¹

The COP concluded:

The record is replete with uncontradicted and undisputed evidence that Respondent, or his legal secretaries acting on his behalf and at his direction, took the settlement drafts made payable to his clients, negotiated those drafts in local Banks in Great Falls, and either took the cash or deposited the proceeds in Respondent's own personal bank accounts. Respondent not only mingled the funds with his own, but he thereafter disbursed and used those funds for his own private purposes, wholly concealing from each client what he had done.⁶²

On the same day Bretz was disbarred (July 14, 1975), he was sentenced in Lewis and Clark County District Court to 14 years in prison, with 7 years suspended, for obtaining money and property by

false pretenses.⁶³ Bretz had allegedly filed a false workers' compensation claim and fraudulently obtained \$5,400 in benefits from the State.⁶⁴

Bretz's conviction, however, was set aside by the United States Supreme Court on double jeopardy grounds.⁶⁵

Bretz had yet more legal problems. On Dec. 1, 1976, after a jury trial in Cascade County District Court, Bretz was convicted of 14 counts of grand larceny, two counts of obtaining money and property by false pretenses, and two counts of preparing false evidence.⁶⁶ The convictions concerned Bretz's conduct in workers' compensation claims — including the five matters for which Bretz was disbarred.⁶⁷

On Dec. 13, 1976, Bretz was sentenced to 56 years in prison, the last 30 years to be suspended on the condition that Bretz reimburse the victims of the offenses within one year from the time of sentencing. Bretz was unable to pay the restitution within one year.⁶⁸

Bretz was released from supervision in 2013.⁶⁹

Marvin E. "Toby" Alback (1988)⁷⁰

In 1987, Alback pled guilty to two charges of felony theft in Gallatin County District Court involving two cases.⁷¹ Alback stole about \$95,000⁷² of funds that were in his trust account from two clients.⁷³ In one case, Alback was sentenced to eight years in prison with five years suspended.⁷⁴ In the other, he was sentenced

Disbarment, next page

35 *Id.*

36 *In re Bretz*, 168 Mont. at 44, 542 P.2d at 1237.

37 *In re Bretz*, 168 Mont. at 42-43, 542 P.2d at 1237-38.

38 *In re Bretz*, 168 Mont. at 44, 542 P.2d at 1238.

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

43 *In re Bretz*, 168 Mont. at 45, 542 P.2d at 1238-39.

44 *Id.*

45 *In re Bretz*, 168 Mont. at 46, 542 P.2d at 1239.

46 *Id.*

47 *In re Bretz*, 168 Mont. at 46-47, 542 P.2d at 1239-40.

48 *In re Bretz*, 168 Mont. at 47, 542 P.2d at 1240.

49 *In re Bretz*, 168 Mont. at 47-48, 542 P.2d at 1240.

50 *In re Bretz*, 168 Mont. at 49, 542 P.2d at 1241.

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *In re Bretz*, 168 Mont. at 50-51, 542 P.2d at 1242.

56 *In re Bretz*, 168 Mont. at 51, 542 P.2d at 1242.

57 *In re Bretz*, 168 Mont. at 54, 542 P.2d at 1243.

58 *In re Bretz*, 168 Mont. at 53, 542 P.2d at 1243.

59 *In re Bretz*, 168 Mont. at 53-54, 542 P.2d at 1243.

60 *In re Bretz*, 168 Mont. at 54, 542 P.2d at 1243.

61 *In re Bretz*, 168 Mont. at 54, 542 P.2d at 1244.

62 *In re Bretz*, 168 Mont. at 59, 542 P.2d at 1246.

63 *State v. Cline*, 170 Mont. 520, 555 P.2d 724 (1976); Arthur Hutchinson, *Bretz, Cline sentenced to 14 years*, Independent Record (July 14, 1975).

64 *State v. Cline*, 170 Mont. 520, 555 P.2d 724.

65 *Crist v. Bretz*, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978). The first trial ended, after a jury had been empaneled and sworn, when the State moved to dismiss the Information so it could file a new one. Bretz was convicted at the second trial. The U.S. Supreme Court ruled that jeopardy attaches when the jury is empaneled and sworn.

66 *State v. Bretz*, 185 Mont. 253, 259, 605 P.2d 974, 979 (1979).

67 *State v. Bretz*, 185 Mont. at 274-75, 605 P.2d at 987.

68 *State v. Bretz*, 185 Mont. at 259, 605 P.2d at 979.

69 Montana Dept. of Corrections Correctional Network Search, <https://app.mt.gov/conweb/Home/OffenderNumber/11594> (accessed August 4, 2015).

70 Order (Feb. 4, 1988), *In re Alback*, Case No. 87-518.

71 *Id.*

72 Clair Johnson, *Ex-lawyer get prison in fraud*, Billings Gazette (May 27, 2010).

73 Report of COP to the Supreme Court (filed Jan. 27, 1988) *In re Alback*, Case No. 87-518;

74 Order (Feb. 4, 1988), *In re Alback*, Case No. 87-518.

Disbarment, from previous page

to eight years in prison, all of which was suspended.⁷⁵

Alback consented to disbarment.⁷⁶ The Court reinstated Alback in 2000.⁷⁷

William R. Morse (1990)⁷⁸

Morse represented Robert Eaton in a federal lawsuit against Stran Steel.⁷⁹ Morse and Eaton had a 50/50 fee arrangement.⁸⁰ After a trial, a verdict was entered in Eaton's favor.⁸¹ The U.S. District Court granted a retrial on the grounds that the verdict was excessive.⁸² The parties then settled for \$225,000.⁸³

The settlement check was payable to Morse and Eaton.⁸⁴ Prior to the receipt of the check, Eaton told Morse that a more fair arrangement would be for Morse to receive only 25 percent.⁸⁵

Upon receipt of the settlement check, Morse and Eaton drove to Denver with their wives and then flew to New York where they cashed the check at the issuing bank.⁸⁶

They flew back to Denver with the cash—Morse had \$125,000 and Eaton \$100,000.⁸⁷ Morse gave Mrs. Eaton \$12,500, so both Morse and Eaton had \$112,500.⁸⁸ Morse and Eaton went to a Denver bank and purchased \$200,000 worth of certificates of deposit, \$100,000 each.⁸⁹

Morse and Eaton subsequently signed two documents drafted by Morse.⁹⁰ A document entitled "Receipt and Agreement" reduced Morse's fee to 25 percent.⁹¹ A document entitled "Agreement" indicated Morse was owed \$10,000 for matters not including the settlement.⁹²

Morse and Eaton then traveled back to Denver to redeem the CDs.⁹³ Morse redeemed his \$100,000 CD by getting a check payable to his trust account for \$56,250, another check payable to his trust account for \$10,000, which he cashed immediately, and took the remainder of \$35,126.71 (including interest of \$2,376.71) in cash.⁹⁴

Eaton subsequently demanded the \$56,250 retained by Morse, but Morse refused to give Eaton the money.⁹⁵ Eaton sued Morse and obtained a judgment against Morse.⁹⁶ Morse appealed, and the Montana Supreme Court affirmed the judgment.⁹⁷

Eaton submitted a complaint to the COP.⁹⁸ After a hearing, the COP concluded Morse comingled and misappropriated funds.⁹⁹ The COP recommended that Morse receive a public censure and be suspended indefinitely.¹⁰⁰ The court, however, disbarred Morse.¹⁰¹

McKinley Anderson (1991)¹⁰²

Anderson maintained one bank account for his practice and commingled his funds with his clients' funds.¹⁰³

Anderson was personal representative and attorney for an estate.¹⁰⁴ He deposited estate funds into his account, which was non-interest-bearing. Anderson failed to properly account for estate funds and paid himself excessive fees.¹⁰⁵ He also failed to notify a payor of a monthly annuity of the decedent's death and took \$4,700 of post-death payments for himself.¹⁰⁶

The residuary devisees of the estate obtained a judgment against Anderson in Gallatin County District Court for \$39,344.90.¹⁰⁷ He was also ordered to pay the \$4,700 to the payor of the annuity benefits.¹⁰⁸

Three members of the COP recommended that Anderson be disbarred and three other members recommended that he be suspended indefinitely.¹⁰⁹ The court disbarred Anderson.¹¹⁰

Ralph T. Rando (1992)¹¹¹

Two disciplinary cases against Rando were consolidated.¹¹² The first case concerned Rando's representation of Kathy Williams in a personal injury case.¹¹³

Rando settled Williams' case without her knowledge and consent for \$24,546.96.¹¹⁴ Rando paid Williams' health care providers \$4,546.96.¹¹⁵ Rando forged Williams' name to the settlement check for the remaining \$20,000 and the release.¹¹⁶ He deposited the \$20,000 into his operating account.¹¹⁷

Rando did not advise Williams about the settlement until months later when he was contacted by another attorney on Williams' behalf.¹¹⁸ He then tendered to Williams \$13,333.33 (\$20,000 less a one-third fee).¹¹⁹

The other case concerned an uninsured motorist claim Rando handled on behalf of Kurt Agre.¹²⁰ Rando, without Agre's knowledge and consent, settled the claim for \$7,000.¹²¹ Rando forged Agre's signature on the release and settlement draft.¹²² Rando deposited the funds into his operating account.¹²³ He did not have a trust account.¹²⁴

Agre learned of the settlement about two and a half years later from the insurance company.¹²⁵

In its order disbaring Rando, the court implicitly adopted the COP's findings of fact and conclusions of law.¹²⁶

75 *Id.*

76 *Id.*

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

78 *In re Morse*, 245 Mont. 49, 798 P.2d 75 (1990).

79 *In re Morse*, 245 Mont. at 50, 798 P.2d at 75.

80 *Id.*

81 *Id.*

82 *In re Morse*, 245 Mont. at 50, 798 P.2d at 75-76.

83 *Eaton v. National Steel Products Company*, 624 F.2d 863 (9th Cir. 1980).

84 *In re Morse*, 245 Mont. at 50, 798 P.2d at 76.

85 *In re Morse*, 245 Mont. at 50-51, 798 P.2d at 76.

86 *In re Morse*, 245 Mont. at 51, 798 P.2d at 76.

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 *In re Morse*, 245 Mont. at 51-52, 798 P.2d at 76.

96 *In re Morse*, 245 Mont. at 52, 798 P.2d at 76.

97 *Id.*

98 *In re Morse*, 245 Mont. at 52, 798 P.2d at 76-77.

99 *In re Morse*, 245 Mont. at 52-53, 798 P.2d at 77.

100 *In re Morse*, 245 Mont. at 49-50, 798 P.2d at 75.

101 *In re Morse*, 245 Mont. at 50, 55, 798 P.2d at 75, 79.

102 Order (filed August 29, 1991), *In re Anderson*, Case No. 91-017.

103 *Id.* at 2.

104 *Id.*

105 *Id.*

106 *Id.* at 2-3.

107 *Id.* at 3.

108 *Id.*

109 *Id.* at 4.

110 *Id.*

111 Order (filed March 4, 1992), *In re Rando*, Case Nos. 90-286 and 91-073.

112 COP's FOF, COL and Recommendation, p. 1, *In re Rando*, Case Nos. 90-286 and 91-073.

113 *Id.*, p. 2.

114 *Id.*

115 *Id.*

116 *Id.*, pp 2-3, 6-7.

117 *Id.*, p. 3.

118 *Id.*

119 *Id.*

120 *Id.*, p. 8.

121 *Id.*

122 *Id.*, pp. 8-9.

123 *Id.*, p. 9.

124 *Id.*

125 *Id.*, p. 10.

126 Order (filed March 4, 1992), *In re Rando*, Case Nos. 90-286 and 91-073.

William L. Romine (1994)¹²⁷

In its Findings of Fact, Conclusions of Law and Recommendations, the COP found the following.

Romine was the guardian for Harvey Beach.¹²⁸ After Beach died without a will, Romine file a Final Report and Accounting in Lewis and Clark County District Court.¹²⁹ The court approved the report and allowed Romine a fee of \$825.81.¹³⁰

When no one filed a probate for Beach's estate, the U.S. Veterans Administration requested Public Administrator Karen Bowers do so.¹³¹ Bowers did not accept Romine's accounting of Beach's assets.¹³² Bowers sued Romine and obtained a judgment against him.¹³³

The COP concluded that Romine misappropriated \$11,008.45 belonging to Beach's estate.¹³⁴

In its order disbaring Romine, the court adopted the COP's Findings of Fact, Conclusions of Law and Recommendations.¹³⁵

Craig W. Holt (2000)¹³⁶

The formal complaint against Holt contained six counts—Count VI concerned the Anderson informal complaint, Counts I-V involved the Dietz complaints.¹³⁷ The COP filed separate findings, conclusions and recommendations for the Anderson and Dietz complaints.¹³⁸ The COP recommended disbarment in both matters.¹³⁹ The Court approved and adopted the COP's findings and conclusions in both matters and disbarred Holt.¹⁴⁰

While the Anderson complaint involved commingling and failure to deliver

and account for funds,¹⁴¹ the Dietz complaints were more egregious.

Edward Dietz died with a will.¹⁴² Holt was retained to handle the probate.¹⁴³ An estate bank account was opened, and Holt controlled the account.¹⁴⁴ Holt transferred \$342,500 from the estate account to his trust account.¹⁴⁵ Holt transferred another \$28,000 from the estate account to his operating account.¹⁴⁶

Marie Dietz and Holt opened a money market account controlled by Holt.¹⁴⁷ The money in the account belonged to Marie.¹⁴⁸ Holt withdrew \$44,500 from the account and deposited it into his trust account.¹⁴⁹

Holt withdrew \$339,700 of Dietz's money from his trust account and deposited it into his trust account.¹⁵⁰

In a written agreement, Holt acknowledged that \$353,071 of estate funds were missing and unaccounted for.¹⁵¹ He agreed to reimburse the estate these funds and other funds totaling \$481,062.90; but did not.¹⁵²

Also by written agreement, Holt agreed to reimburse Marie \$82,481.48; but did not.¹⁵³

Holt refused to cooperate in the investigation and failed to honor subpoenas.¹⁵⁴ The COP stated: "Holt's defalcations and misuses of client funds are staggering."¹⁵⁵

Craig W. Holt (2001)¹⁵⁶

Although the court had already disbarred Holt on Oct. 12, 2000, it

nonetheless disbarred him again about four months later.¹⁵⁷ This is akin to executing a person twice.

The "new" disbarment concerned Holt's failure to refund \$10,000 belonging to a client.¹⁵⁸

The COP's findings of fact, conclusions of law, and recommendation, which the court approved and adopted, were filed on Oct. 20, 2000—eight days after he was disbarred.¹⁵⁹

The court acknowledged that it had already disbarred Holt, but stated: "Holt is disbarred from the practice of law in the State of Montana effective as of the date of this Order."¹⁶⁰

J. Dirk Beccari (2001)¹⁶¹

The proceedings in which Beccari was disbarred involved two formal complaints.¹⁶² Beccari admitted all the material allegations set forth in the complaints.¹⁶³ The court adopted the COP's findings of fact, conclusions of law and recommendations in their entirety.¹⁶⁴

In Case No. 01-164, the COP determined that Beccari violated the rule requiring attorneys to respond to the COP's inquiries.¹⁶⁵

In Case No. 01-165, Beccari admitted the following:

Beccari's law partner, Larry Mansch, was appointed temporary conservator of the Estate of R.O.¹⁶⁶ Beccari acted as attorney for R.O. in the sale of certain real property.¹⁶⁷ A checking account was set up in which the sale proceeds were deposited.¹⁶⁸ Beccari had access to the account.¹⁶⁹ Beccari stole \$86,547.18 from the

Disbarment, page 36

127 Order (filed January 13, 1994), *In re Romine*, Case No. 92-521.

128 COP's FOF, COL and Recommendations, FOF 2, *In re Romine*, Case No. 92-521.

129 *Id.*

130 *Id.*

131 COP's FOF, COL and Recommendations, FOF 3, *In re Romine*, Case No. 92-521.

132 COP's FOF, COL and Recommendations, FOF 4, *In re Romine*, Case No. 92-521.

133 *Id.*

134 COP's FOF, COL and Recommendations, FOF 5, COL 17, *In re Romine*, Case No. 92-521.

135 Order (filed January 13, 1994), p. 8, *In re Romine*, Case No. 92-521.

136 Order (filed October 12, 2000), *In re Holt*, Case No. 99-615.

137 *Id.* at 1-2.

138 *Id.*

139 *Id.*

140 *Id.* at 5, 7.

141 *Id.* at 1.

142 COP's FOF, COL and Recommendation, FOF 2, *In re Holt*, Case No. 99-615.

143 *Id.*

144 COP's FOF, COL and Recommendation, FOF 3, *In re Holt*, Case No. 99-615.

145 COP's FOF, COL and Recommendation, FOF 6, *In re Holt*, Case No. 99-615.

146 COP's FOF, COL and Recommendation, FOF 9, *In re Holt*, Case No. 99-615.

147 COP's FOF, COL and Recommendation, FOF 5, *In re Holt*, Case No. 99-615.

148 *Id.*

149 COP's FOF, COL and Recommendation, FOF 7, *In re Holt*, Case No. 99-615.

150 COP's FOF, COL and Recommendation, FOF 9, *In re Holt*, Case No. 99-615.

151 COP's FOF, COL and Recommendation, FOF 11, *In re Holt*, Case No. 99-615.

152 *Id.*

153 COP's FOF, COL and Recommendation, FOF 12, *In re Holt*, Case No. 99-615.

154 COP's FOF, COL and Recommendation, FOF 19, *In re Holt*, Case No. 99-615.

155 COP's FOF, COL and Recommendation, p. 6, *In re Holt*, Case No. 99-615.

156 Order (filed February 14, 2001), *In re Holt*, Case No. 00-296.

157 *Id.*

158 *Id.* at 2.

159 *Id.* at 1.

160 *Id.* at 2.

161 Order (filed Oct. 30, 2001), *In re Beccari*, Case Nos. 01-164 and 01-165.

162 *Id.*

163 COP's FOF, COL and Recommendations (filed July 16, 2001), FOF 3, 6, *In re Beccari*, Case Nos. 01-164 and 01-165.

164 Order (filed Oct. 30, 2001), p. 4, *In re Beccari*, Case Nos. 01-164 and 01-165.

165 COP's FOF, COL and Recommendations (filed July 16, 2001), p. 6, *In re Beccari*, Case Nos. 01-164 and 01-165.

166 COP's FOF, COL and Recommendations (filed July 16, 2001), FOF 6, *In re Beccari*, Case Nos. 01-164 and 01-165.

167 *Id.*

168 *Id.*

169 *Id.*

The 'duh' standard is the basic premise in Montana's rules of judicial notice

By Professor Cynthia Ford
Alexander Blewett III School of Law

Judicial notice is a shortcut to proof of a fact at trial. If the judge does "notice" a fact, the parties need not (and sometimes may not) put on evidence of that fact at trial. Instead, the judge instructs the jury that the particular fact is true for the purposes of the case. This process, obviously, is a huge time-and-money saver for the lawyers, their clients, juries and court personnel.

The basic premise of judicial notice is that facts that are so clearly true that no reasonable person would dispute them. Justice Laurie McKinnon, writing for the Montana Supreme Court in 2014, said the same thing, better: "One function of judicial notice is to avoid a waste [of] time litigating about undeniable matters." Edward J. Imwinkelried, *Courtroom Criminal Evidence* vol. 2, § 3002, 30–2 (5th ed., Bender 2011) (internal citation and quotation marks omitted).¹ *In re Marriage of Carter-Scanlon & Scanlon*, 2014 MT 97, ¶ 17, 374 Mont. 434, 439, 322 P.3d 1033, 1037. I have reformulated the test into more prosaic terms: the "Duh!" test: If, after the necessary witness(es) and/or exhibit(s) put on proof of a fact, the jurors would say to themselves "duh," the court should shortstop the process and take judicial notice of that fact. If, on the other hand, the jurors would say, "Who knew?" the matter is better left to the crucible of proof and the court should deny judicial notice.

Both the Montana and Federal Rules of Evidence provide for judicial notice. However, whereas most of the MRE are substantially the same as their federal counterparts, our state rules on judicial notice vary dramatically from the FRE. In my opinion, the Montana version is much the better of the two. Below, I do a brief comparison of the two sets of rules, and then focus on types of facts which the Montana Supreme Court has held are and are not suitable for judicial notice. I will treat the procedure for obtaining judicial notice, and its effect if granted, in Part II of this article, to be published in the next Evidence Corner column.

MRE v FRE judicial notice provisions

Article II of the Montana Rules of Evidence is entitled "Judicial Notice." It contains two rules: Rule 201, "Judicial Notice of Facts," and Rule 202, "Judicial Notice of Law." Article II of the Federal Rules of Evidence bears the same title. However, there is only one rule in the article: FRE 201, entitled "Judicial Notice of **Adjudicative** Facts." There is no specific rule for judicial notice of law in the federal courts. Helpfully, FRE 201(a) defines the scope of the rule: "(a) **Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact." Unhelpfully, the rule nowhere defines "adjudicative

fact" or "legislative fact." The rule also fails to discuss whether the federal courts may take judicial notice of a legislative fact or whether the exclusion of these facts from FRE 201 prohibits judicial notice of them. The cases discussing the application and effect of FRE 201 are in profound disarray.

As only one example, the federal circuits disagree on the classification of a relatively simple and frequently necessary type of jurisdictional fact: whether a particular piece of ground is "federal" within the meaning of [18 U.S.C. § 7\(3\)](#) for purposes of a criminal assault charge against a prisoner incarcerated in a federal prison. In an assault case stemming from an incident in Puerto Rico, the trial judge took judicial notice under Rule 201 of the fact that the prison where the assault occurred was "within the special maritime and territorial jurisdiction of the United States, characterizing this fact as "adjudicative." The 1st Circuit affirmed, but noted disagreement by other circuits:

Some other Courts of Appeals have held that Rule 201 is not applicable to judicial notice that a place is within the "special maritime and territorial jurisdiction of the United States," finding this to be a "legislative fact" beyond the scope of Rule 201. See *United States v. Hernandez-Fundora*, 58 F.3d 802, 811 (2d Cir.1995); *United States v. Bowers*, 660 F.2d 527, 531 (5th Cir.1981); see also II Kenneth Culp Davis & Richard J. Pierce, *Administrative Law Treatise*, § 10.6, at 155 (3d. ed.1994). But see Wright & Graham, *Federal Practice & Procedure* § 5103 n. 16 (1999 Supp.) ("One court has resolved the problem by a dubious holding that the fact that Fort Benning is under the jurisdiction of the United States is a legislative fact," citing *Bowers*).

United States v. Bello, 194 F.3d 18, 23 (1st Cir. 1999).¹

Mississippi, whose Judicial Notice rule is identical to the federal rule, made the following comment, which illustrates clearly why Montana did not (and should not) mirror the FRE treatment of judicial notice:

COMMENT

(a) *The entire codification of the law of judicial notice is in Rule 201. Professor Kenneth Davis, in*

¹ The federal split continues. In 2013, after it held that the prosecution had not adduced evidence of the jurisdictional element at trial, the 2nd Circuit itself took notice of this same jurisdictional fact on appeal, stating: "whether a particular plot of land falls within the special maritime and territorial jurisdiction of the United States is a 'legislative fact' that may be judicially noticed without being subject to the strictures of Rule 201." *United States v. Davis*, 726 F.3d 357, 367 (2d Cir. 2013).

his now famous article, “An Approach to Problems of Evidence in the Administrative Process”, 55 Harv.L.Rev. 364 (1942), divided judicial notice into two parts, adjudicative and legislative. Adjudicative facts are easily understood; they are specific to the litigation. Legislative facts, on the other hand, are more amorphous. To determine legislative facts one must look at the public policy or policies involved in judge-made law. Despite the existence of two types of judicial notice, Rule 201 only governs judicial notice of adjudicative facts. A court’s application of judicial notice of legislative facts is more an inherent part of the judicial process rather than an evidentiary matter.

Clear as mud? And most of the federal cases do use Professor Davis’ Administrative Law treatise and article to muddle through the uncertain divide between adjudicative fact (judicially noticeable per F.R.E. 201) and non-adjudicative fact (not mentioned in the rule at all², and renamed “legislative fact” by Professor Davis).

Montana’s Evidence Commission also observed the disarray in the federal system over judicial notice and wisely chose to sidestep it by providing clearer and more specific rules. The Commission Comment minces no words:

The Commission believes that use of the terms “adjudicative” and “legislative” facts as is done with Federal Rule 201 is confusing and that they cannot be readily or easily applied to all factual situations. The Commission rejects the approach under the Federal Rule 201 of limiting judicial notice to adjudicative facts because this is a basis which is totally new, not clearly defined, and contrary to existing Montana practice. The confusion and litigation bound to result are clearly contrary to a rule which is meant to save time and expense.

Bless their hearts. Because this column is devoted to Montana-specific evidence subjects, I will follow the lead of the Montana Commission Comment and leave the federal confusion to the federal commentators and courts. Thus, the rest of this article focuses exclusively on Montana state court use of judicial notice.

Montana cases

WestlawNext lists 201 cases in its annotations to M.R.E. 201. I have scanned that list, and found that the large majority of Montana judicial notice cases there predate the current version of M.R.E. 201. Because the Evidence Commission explicitly commented that it “intend[ed] to preserve existing law in Montana” in M.R.E. 201, the older cases are still valuable but I have chosen here to concentrate on more recent jurisprudence applying the M.R.E. rules. The subject is quite vibrant; there are five cases in just the first three months of 2016. I have organized

² It turns out that the omission of non-adjudicative fact from F.R.E. is construed to liberate the use of judicial notice of these facts (if you can figure out what they are) from the strictures of Rule 201, rather than indicating that no judicial notice of non-adjudicative facts should be allowed. See, U.S. v. Gould, 536 F.2d 216, 219 (8th Cir. 1976): “...rule 201 is not all-encompassing. ‘Rule 201 * * * was deliberately drafted to cover only a small fraction of material usually subsumed under the concept of ‘judicial notice.’” 1 J. Weinstein, Evidence P 201(01) (1975).”

them below in technical categories of “OK” and “not OK” both for Rule 201 (fact) and Rule 202 (law). Obviously, this list is illustrative but not exhaustive.

Judicial Notice OK per Montana cases under MRE 201 (Fact)

The Montana Supreme Court recently has approved the taking of judicial notice of facts under M.R.E. 201 in several contexts.

In a highly contentious dispute between feuding family members as to an elderly Alzheimer’s patient with significant assets, the court approved judicial notice of the fact of the competence of a particular attorney in a particular location to undertake the complex guardianship. *In re Guardianship of A.M.M.*, 2015 MT 250, §64.

The court has sanctioned use of judicial notice frequently in termination of parental rights proceedings. Its most explicit discussion of this tool in this context is in *In re A.S.W.*, decided in 2014. In that case in Flathead County in 2013, DPHHS filed a motion for judicial notice of the mother’s two previous terminations of parental rights from Cascade County in 2005. The 2005 order from Cascade County stated that the mother completed three parenting classes, but she had not completed her treatment plan. She objected to judicial notice, arguing that the previous terminations were not relevant to the present proceeding because she was denied due process at the 2005 proceedings because of alleged ineffective assistance of counsel. Nonetheless, the Flathead County court granted the motion for judicial notice, and issued its own order terminating the mother’s rights as to her third child, A.S.W. *In re A.S.W.*, 2014 MT 251N, ¶ 6, 376 Mont. 550, 347 P.3d 265.

The Supreme Court held that judicial notice of prior terminations is proper:

¶ 12 Mother next argues that the District Court should not have taken judicial notice of her prior 2005 terminations under the Montana Rules of Evidence. However, judicial notice may be taken of facts “capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” M.R. Evid. 201(b)(2). Judicial notice must be taken “if requested by a party and supplied with the necessary information.” M.R. Evid. 201(d). A district court may take judicial notice of “[r]ecords of any court of this state or of any court of record of the United States or any court of record of any state of the United States.” M.R. Evid. 202(b)(6). Applying these rules to termination of parental rights proceedings, we have held that “[a] district court, by necessity, must take judicial notice of prior terminations if it is to determine whether those terminations are relevant to the parents’ ability to care for the child currently at issue.” *In re T.S.B.*, ¶ 35. (Emphasis added.) In this case, the fact that the mother has prior terminations of parental rights is not clearly and reasonably disputed. To the extent that the District Court considered the circumstances of the prior termination as set forth in the Cascade County

District Court's Findings of Fact, we have previously held: "[A] **termination under § 41-3-609(1)(d), MCA, requires a court to take judicial notice of prior terminations and the facts and circumstances surrounding those orders.** See M.R. Evid. 201, 202." *In re T.S.B.* ¶ 35 (Emphasis added.)

¶ 14 In this case, the circumstances of the mother's prior terminations were very similar to the situation with *A.S.W.* Clinical psychologists in both the 2005 Cascade County case, and in the 2013 Flathead County case testified to the mother's inability to care for her children due to her permanent mental deficiencies. As the Cascade County Court did in 2005, the District Court in this case concluded that no services exist that would allow the mother to learn to care for her children within a reasonable time. Therefore, the District Court did not abuse its discretion by taking judicial notice of her prior terminations.

In re A.S.W., 2014 MT 251N, ¶¶ 12-14, 376 Mont. 550, 347 P.3d 265. See also, *In re J.S.*, 2015 MT 59N, ¶ 8, 378 Mont. 540, 348 P.3d 672.

In another case terminating parental rights, the trial judge took judicial notice of another type of fact — that the contesting father had several recent felony convictions and had been sentenced for them to 100 years at the Montana State Prison, with 60 years suspended. The Montana Supreme Court found several "harmless" procedural errors in the termination process, but did not include the taking of judicial notice among them. The result was affirmed. *In re N.B.*, 2015 MT 88N, ¶ 7, 378 Mont. 542, 348 P.3d 673. See also, *In re J.B., Jr.*, 2016 MT 68; *In re M.S.*, 376 Mont. 394, 336 P.3d 930, 2014 MT 265.

In *A.S.W.*, the court explicitly distinguished another 2014 case involving the use of judicial notice of CSED income determinations in a trial for child support. Joe, the dad, had two children with his ex-wife, Lona. At the time of their divorce, he was earning more than \$87,000 and the court set his monthly child support at \$1,381.00. Joe resigned from his job and invested in a real estate development company, from which he expected to make his living. He twice petitioned for a reduction in child support. He was successful the first time, achieving a substantial reduction in his obligation. Before the hearing on the second petition for reduction of support, however, Joe had another child with another woman, Joann. Joann opened a case with the Child Support Enforcement Division to determine support for that child. On appeal from the initial ruling, the ALJ found Joe's income to be less than \$25,000 and set his obligation for Joann's child at \$83 per month.

In Joe's District Court action for modification for the support of Lona's children, he moved for judicial notice of the CSED's income determination. Lona opposed the motion on the grounds she wasn't present at and had no notice of the CSED proceeding and should not be bound by it. The Court ruled on the motion cryptically:

"[T]he Court sees no problem with taking judicial

notice of the fact that CSED made a determination as to what Joe's income is." It continued, "This in no way binds this court and does not limit Lona's ability to introduce evidence to the contrary."

Citing the Commission Comments to Rule 201, the District Court stated that because the amount of Joe's income was in dispute, Lona was to be afforded the opportunity to contest the CSED income determination. The District Court concluded: "The Court will take judicial notice of CSED's determination of Joe's income, but does not intend to be bound by that determination. Lona will be given full opportunity at the hearing to present whatever evidence she has that might suggest that Joe is voluntarily underemployed."

In re Marriage of Carter-Scanlon & Scanlon, 2014 MT 97, ¶ 11, 374 Mont. 434, 437, 322 P.3d 1033, 1035.

Lona was allowed to present expert testimony about Joe's employability and imputed income. The judge did impute annual income of \$52,000 and denied any reduction in child support. (The Findings of Facts and Conclusions of Law confusingly indicated that the father had requested judicial notice, but that the court had denied the motion).

On appeal, the Supreme Court noted the apparent inconsistency in the trial judge's statements about judicial notice, and took the opportunity to discuss the purpose of judicial notice and the differences between Rule 201 and 202. Ultimately, it held:

[A]s Rule 201 clearly states, and a substantial body of federal case law holds, a court may not take judicial notice of fact from a prior proceeding when the fact is reasonably disputed, as it is here. M.R. Evid. 201(b); see *Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir.2001) ("[T]aking judicial notice of findings of fact from another case exceeds the limits of Rule 201."); *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir.2001) ["[W]hen a court takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity" (internal quotation marks and citation omitted)]; *Hennessy v. Penril Datacomm Networks*, 69 F.3d 1344, 1354 (7th Cir.1995) ("In order for a fact to be judicially noticed, indisputability is a prerequisite."). Thus, although Joe requested judicial notice of fact, and arguably supplied the necessary information pursuant to M.R. Evid. 201(d), judicial notice of fact was not mandatory because the fact was clearly and reasonably disputed.

¶ 24 We conclude that the District Court did not abuse its discretion by taking judicial notice of the existence of the CSED's administrative order, or by refusing to take judicial notice of the truth of its underlying facts.

In re Marriage of Carter-Scanlon & Scanlon, 2014 MT 97, ¶¶ 23-24, 374 Mont. 434, 441-42, 322 P.3d 1033, 1038. The Court took pains to distinguish this case from the parental termination

cases, and to reiterate that trial courts may continue to take judicial notice of the felony convictions and sentences of the parents in those cases.

Judicial Notice Not OK Under MRE 201 per Montana cases

Shortly before M.R.E. 201 went into effect, the Montana Supreme Court analyzed a Workers' 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 it 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. 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)³.

The plaintiffs in *Morrow v. Monfric*, a wage dispute, sought certification as a class of laborers on two construction projects in Kalispell. The district judge denied the class certification. On appeal, the Montana Supreme Court affirmed, observing that the "proposed class in this case includes 24 to 28 persons, seven of whom are named plaintiffs and class representatives. This is near the number below which class certification is likely to be considered inappropriate." *Morrow v. Monfric, Inc.*, 2015 MT 194, ¶ 11, 380 Mont. 58, 62, 354 P.3d 558, 562. The court allowed that geographic dispersion of the class members might tip the balance to certification, but held that the plaintiffs had the burden of proving this factor and that their judicial notice request did not carry that burden:

Plaintiffs argue that there is no evidence the proposed class members still reside in the Kalispell area, and ask the court to take judicial notice of the fact that many Montana laborers work in the oil fields of North Dakota. Plaintiffs have offered no evidence suggesting that the laborers who worked on the Monfric projects have left the Kalispell area. Indeed, at the hearing on Plaintiffs' motion for class certification, it was made clear that counsel had not attempted to locate the remaining proposed class members, and the idea that they may have left for North Dakota was based entirely on an off-the-cuff suggestion by the District Court. Plaintiffs have not produced facts in support of their argument that the geographical dispersion of the proposed class members makes their joinder in a single action impracticable. The District Court did not

abuse its discretion when it concluded that joinder was not impracticable because the proposed class members were in the same geographic area.

2015 MT 194, ¶ 13, 380 Mont. 58, 63-64, 354 P.3d 558, 562-63.

The court repeated the colloquy which occurred during the trial court's hearing:

The District Court asked counsel for Plaintiffs why the remaining 17 to 21 individuals could not simply be joined as parties. Counsel responded, "I can try to do that. I didn't have their names ... and I don't have all their addresses." The District Court observed that the proposed class was "a relatively small group of ... local employees, although I suppose if this work happened ... prior to 2008 anyway that they're probably all over in North Dakota now."

2015 MT 194, ¶ 5, 380 Mont. 58, 60, 354 P.3d 558, 560.

As I will discuss in more detail next month, this case illustrates a common attempted use of judicial notice: to fill in a gap the attorney could have, and should have, identified and filled with actual evidence. As here, this usually does not work.

Judicial Notice OK under MRE 202 (Law)

The Court's most recent use of judicial notice occurred on Feb. 25, 2016, in its decision in *Montana Cannabis Industry Association v. State*, 2016 MT 44, regarding the 2011 Montana Marijuana Act. Justice Baker, writing for the majority, stated:

After this case was argued, Plaintiffs called the Court's attention to a recent Congressional Appropriations Act that prohibits the Justice Department from spending funds that would prevent states — including Montana — from implementing their own laws authorizing the use, distribution, possession, or cultivation of medical marijuana. Consolidated Appropriations Act, 2016, Pub. L. 114-113, § 542 Div. B, tit. V, 223 (2015). **We take judicial notice of this action pursuant to M. R. Evid. 202(b).**

¶ 28. Oral argument occurred on Nov. 4, 2015. The plaintiffs (challenging the act) filed a Motion for Judicial Notice of recent enactment of the federal law which prohibited the DOJ from interfering with Montana law regarding medical marijuana⁴. The state had previously opposed judicial notice of the pending federal bill on the grounds that it had not become law; once it was enacted, the state did not oppose the motion for judicial notice. However, the judicially noticed softening of federal law on the cannabis issue did not sway the majority: "While the measure does evince developing attitudes in Congress, the substantive criminal prohibitions in federal law remain intact."

Almost as recently, the court clarified the distinction between Rules 201 and 202 when it approved the trial court's judicial

Evidence, next page

³ 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).

⁴ <https://supremecourtdocket.mt.gov/view/DA%2015-0055%20Other%20-%20Motion%20-%20Opposed?id=%7BC0446052-0000-C410-BBC7-2483FF9FF20D%7D>

Evidence, from previous page

notice of previous court proceedings in a long and complex dispute:

¶26 The Montana Rules of Evidence allow a District Court to take **judicial notice** of facts, M. R. Evid. 201, or **judicial notice** of law, M. R. Evid. 202. Under Rule 202, the District Court may take **judicial notice** of the “[r]ecords of any court of this state.” M. R. Evid. 202(b)(6). We have held that this rule “includes prior proceedings in other cases, *Farmers Plaintiff Aid v. Fedder*, 2000 MT 87, ¶¶ 26-27, 299 Mont. 206, 999 P.2d 315, and prior proceedings in the same case, *State v. Loh*, 275 Mont. 460, 477-78, 914 P.2d 592, 603 (1996).” *State v. Homer*, 2014 MT 57, ¶ 8, 374 Mont. 157, 321 P.3d 77. In this case, the District Court noted in its order granting the bank’s motion for summary judgment that the “factual and procedural backgrounds are based on the record in this case, as well as court records the Court is entitled to take **judicial notice** of under Rule 202.” The District Court then listed the opinions and records of which it was taking **judicial notice**, including our opinion in the Foreclosure Action, and the District Court records of the Interpleader Action and the Foreclosure Action. Rule 202 allows a District Court to take **judicial notice** of the prior proceedings in this case and in other cases, and the District Court did not abuse its discretion in so doing.

¶27 Further, in order to properly consider the bank’s argument that the estate’s claims were barred by the compulsory counterclaim rule or by claim preclusion, the District Court would have needed to review the record in the Foreclosure Action to determine if the issues presented in that action were the same as the issues presented in this action, and to determine if the facts alleged in the Estate’s complaint in this action were in existence during the pendency of the previous action. The District Court did just that: reviewed the discovery produced in the Foreclosure Action and determined that the facts central to the Estate’s present claims were in existence during the Foreclosure Action. The District Court did not take improper **judicial notice** of facts under Rule 201, but rather properly exercised its discretion under Rule 202 to take **judicial notice** of the record in previous actions. (Emphasis added.)

Estate of Kinnaman v. Mountain West Bank, 2016 MT 25.

The rendering of an order by the U.S. District Court for the District of Montana, dismissing a plaintiff’s federal case: “We take **judicial notice** of the United States District Court’s Order pursuant to M. R. Evid. 202(4), (6) (allowing a court, whether requested by a party or not, to take **judicial notice** of official acts of the judicial departments of the United States and of records of any court of record of the United States).” *Townsend v. Glick*, 2015 MT 329N, §4;

The Supreme Court noted, without criticism, the fact that

one district court had taken judicial notice of related proceedings already pending in another district court. The Court affirmed the noticing court’s dismissal of the declaratory judgment action:

¶ 7 On Sept. 22, 2014, the 18th Judicial District Court in Gallatin County dismissed Murray’s declaratory relief action for lack of a justiciable controversy and declined to rule on the COPP’s motion for summary judgment. Noting its authority under M.R. Evid. 202, the court took judicial notice of the pending proceedings in the 1st Judicial District Court and concluded that Murray already had “an adequate alternative remedy available to him in that he may assert—and may already have asserted—the issues sought to be declared here as a defense,” in the Enforcement Action. The court also concluded that any decision it might make would not bind the First Judicial District Court and would otherwise result in an advisory opinion.

Murray v. Motl, 2015 MT 216, ¶ 7, 380 Mont. 162, 164, 354 P.3d 197, 198.

Estate of Gopher raised the issue of Montana state court subject matter jurisdiction over cases involving Indian litigants. The decedent and heirs were all enrolled members of the Blackfeet Nations. The primary asset of the estate was a historic flag, which was located at the decedent’s house in Great Falls, off the reservation. In affirming the state judge’s decision to assume subject matter jurisdiction, the Court extended the use of Rule 202 to include tribal law, even though the phrase does not explicitly appear in the text of the rule:

¶ 13 At issue is whether the District Court’s assumption of subject matter jurisdiction infringed on tribal self-government. To resolve the issue, we look to the Blackfeet Tribal Court’s February 26, 2013, order. Judicial notice of laws may be taken at any stage of the proceedings. M.R.Evid. 202(f)(1), MCA. Our Rules of Evidence include a non-exhaustive list of the kinds of law appropriate for judicial notice and provide that a court may take judicial notice of “[r]ecords of any court of this state or of any court of record of the United States or any court of record of any state of the United States.” M.R.Evid. 202(b)(6), MCA. A tribal court order, though not expressly listed in the rule, is a record analogous to those listed in M.R.Evid. 202(b)(6), MCA, and is thus law of which we may take judicial notice. We note that the order was not filed until after the siblings had filed their opening brief. However, as the siblings do not take issue with the genuineness of the order, we take judicial notice of the tribal court order.

¶ 14 In its order, the Blackfeet Tribal Court unequivocally declined to assert subject matter jurisdiction with respect to the flag, the subject of this appeal.

In re Estate of Gopher, 2013 MT 264, ¶¶ 13-14, 372 Mont. 9, 12-13, 310 P.3d 521, 523.

In a long-contested dissolution proceeding, at this stage

centered on mutual child support arrearages, the Court held that Rule 202 authorized judicial notice of an Order of the federal Bankruptcy Court:

¶ 30 Finally, Luna claims that the marital debt owed to her by Steab “could not be released via bankruptcy.” Essentially, Luna is asking the District Court and this Court to overturn, or simply ignore, a federal bankruptcy court ruling. We are not authorized to do so.

¶ 31 M.R. Evid. 201(d) authorizes the District Court to take judicial notice of facts when “requested by a party and supplied with the necessary information.” Moreover, M.R. Evid. 202(b)(6) allows a court to take judicial notice of law, including, “[r]ecords of any court of this state or of any court of record of the United States or any court of record of any state of the United States.” See *Farmers Plant Aid, Inc. v. Fedder*, 2000 MT 87, ¶ 27, 299 Mont. 206, 999 P.2d 315. Steab requested that the court take notice of the bankruptcy action and supplied the District Court with the necessary information. Luna’s claim of error is against the U.S. Bankruptcy Court, not the District Court. The District Court did not abuse its discretion by taking judicial notice of the U.S. Bankruptcy Court order.

In *re Marriage of Steab and Luna*, 2013 MT 124, ¶¶ 30-31, 370 Mont. 125, 300 P. 3d 1168, 1173-1174.

Judicial notice not OK under 202

In *State v. Homer*, the defendant was charged with exploiting an older person, by inducing her elderly mother to enter into a reverse mortgage. The daughter used all of the proceeds, \$141,000, to pay off her own debts. Prior to trial, the judge held a hearing to determine whether the victim was competent to testify. The victim was sworn and testified briefly; both sides conducted limited questioning of her. After that hearing, the court found the witness competent. Unfortunately, between the hearing and trial, the victim deteriorated and was not available to testify at trial. At the bench trial, “Homer requested during her case-in-chief that the District Court **take judicial notice of the testimony of the victim**, given at the prior hearing held to determine whether the victim was competent to testify.” *State v. Homer*, 2014 MT 57, ¶ 7, 374 Mont. 157, 159, 321 P.3d 77, 80 (emphasis added). Huh? What rule? 201 or 202? It gets worse, straying even further from judicial notice:

The State objected because the prior proceeding had dealt only with the victim’s competency and that they would have examined the victim more thoroughly and on other issues if they had known that the testimony would be offered at trial. The District Court denied the request to include the competency hearing transcript as evidence in the trial on the merits of the charge, concluding that the testimony at the competency hearing “does not really go sufficiently to the issues that are before this Court.”

2014 MT 57, ¶ 7, 374 Mont. at 159, 321 P.3d at 80. Whatever the reasoning, the District Court was clear: the transcript was

not admitted, and the defendant was convicted. On appeal, the Supreme Court noted:

¶ 8 A court may take judicial notice of the records of any court of this state, M.R. Evid. 202(b)(6). That includes prior proceedings in other cases, *Farmers Plant Aid v. Fedder*, 2000 MT 87, ¶¶ 26-27, 299 Mont. 206, 999 P.2d 315, and prior proceedings in the same case, *State v. Loh*, 275 Mont. 460, 477-78, 914 P.2d 592, 603 (1996). In the *Loh* case, this Court upheld admission in a bench trial of the evidence from a prior suppression hearing in the same case. The State had “presented its case-in-chief at the suppression hearing,” and the defendant was present with counsel. *Loh*, 275 Mont. at 477-78, 914 P.2d at 603.

¶ 9 Both sides in the present case agree that the testimony at the prior competency hearing was hearsay under M.R. Evid 802....

2014 MT 57, ¶¶ 8-9, 374 Mont. at 159, 321 P.3d at 80.

The court went on to discuss the hearsay component of the testimony, ultimately concluding the trial judge correctly applied the hearsay rule and its exceptions. My conclusion is that the defense was on the ropes and “judicial notice” was a desperate but valiant last gasp. The hearsay issue was the real problem, and the real basis of the Supreme Court’s decision.

Unfortunately, the dicta the court used in its cursory discussion of judicial notice in *Homer* muddies, rather than clarifies, judicial notice of earlier court proceedings. *Homer* cites *Loh* for the proposition that judicial notice of testimony from an earlier suppression hearing in the same case is proper. In fact, *Loh* explicitly refused to rule on this issue:

On the basis of the record before us, and irrespective of the trial court’s taking judicial notice of the testimony in the suppression hearing, we conclude that the State presented sufficient evidence at trial on which the fact finder could conclude beyond a reasonable doubt that Loh was guilty of the offenses charged. What is apparent from the record is that **if the court was without authority to take judicial notice of the evidence at the suppression hearing for purposes of proof at trial, the error was harmless at most.**

...we decline to address the propriety of the trial court’s taking judicial notice at trial of the evidence and testimony from the suppression hearing. This opinion should not be read as either approving or disapproving of that procedure.

State v. Loh, 275 Mont. 460, 478-79, 914 P.2d 592, 603-04 (1996) (emphasis added).

Ouch! I have included both *Homer* and *Loh* in the “not OK” section to provide a warning that the use of Rule 202 to admit evidence from earlier proceedings is not clear in any way. For opponents facing such a request, be sure to include the actual language from *Loh* in your argument, and object both on the basis of improper judicial notice and on hearsay grounds.

For purposes of this analysis, only a few facts need to be emphasized.

First, a local perspective: In Montana, 90 percent of us have an adjusted gross family income of less than \$80,880.³ Even those in the top 10 percent have an average income of only \$141,653.⁴ Not many Montanans are going to be players in the game of winning political influence through the size of our campaign contributions.

Nationally, at the top end of the scale, the picture is different. A person in the top 1 percent, earns an average of \$394,000 while a member of the top 0.01 percent earns an average of \$10,250,000 a year.⁵ And even in a disappointing year, the nation's top 25 hedge fund managers were able to claim a total of \$11.62 billion of income, down from the \$21.5 billion that they earned the preceding year.⁶

Obviously the wealthiest have the ability to contribute huge amounts to the campaigns of their favored candidates. But their wealth is only a problem for our democracy if the wealthy do in fact make such contributions and if those contributions end up influencing on our elected officials as they develop our public policies.

The evidence suggests an answer in the affirmative to both questions.

Through June 30, 2015, 158 families had contributed \$176 million to the candidates running for president or to political action committees supporting those candidates, providing almost half of their funding.⁷ Just four families contributed more than \$36 million to campaign committees for Sen. Ted Cruz through the first half of 2015.⁸ While it is too early to evaluate whether these contributions would affect the actions of Sen. Cruz as

president, past experience suggests that it might. Over the last two decades, the tax rate imposed on the 400 wealthiest families in the nation decreased from 27 percent to 17 percent, saving those families billions of dollars over time, and reducing government revenue by an equivalent amount.⁹ Apparently, the wealthy are influencing public policy to their financial benefit.

There are numerous other examples that illustrate the connection between campaign contributions and public policies favorable to the donors. Space does not permit a more expansive listing. Suffice it to say, that no one can seriously deny the existence of the relationship any longer. Those who contribute substantially to a candidate's campaign get preferential treatment. The dependence upon the voters that Hamilton sought has been replaced by a dependence upon the financiers of campaigns, corrupting the ideals of our republic.

How did we find ourselves in this situation? There is plenty of blame to go around. Those responsible must include the Supreme Court, Congress, the Federal Election Commission, and the IRS. The Supreme Court is a good place to start.

The Supreme Court

Five cases have made a deep impact on the structure of campaign financing. The analysis begins with a case that is almost 100 years old, *Abrams v. United States*, 250 U.S. 616 (1919) and the "great dissent" of Oliver Wendell Holmes.¹⁰

At a time when the jurisprudence of freedom of speech was in its infancy, Holmes wrote a surprising defense of the freedom and introduced a concept that guides and haunts us to this day. Drawing an analogy to the economic marketplace from the work of Adam Smith, Holmes suggested that "the best test of truth is the power of the thought to get itself accepted in the competition of the market..."¹¹

Just as a competitive economic market produces the best prices and products for consumers, a competitive market in ideas would also produce a public benefit.

It would give an informed electorate a closer approximation of the truth on the important issues of the day. But, like the economic marketplace, the marketplace of ideas must be regulated so it remains competitive. If the economic marketplace is not competitive, then the benefits to the consumer are lost; so too in the marketplace of ideas. The power of an idea can only be truly judged if tested against all competing ideas. When circumstances prevent those ideas from entering the marketplace, or prevent them from being heard and evaluated, then the merit of an idea cannot be fairly judged.

Congress attempted to regulate the market in political ideas in the Federal Election Campaign Act of 1971. In *Buckley v. Valeo*, 424 U.S.1 (1976) the court ruled on the constitutionality of that regulation. The act restricted the amount an individual could give to a candidate and set an overall annual limitation by a contributor. In addition, it limited individual independent expenditures on behalf of a candidate and set a limit on the total amount that a candidate for federal office could spend for a given election.

The court upheld the restrictions on contributions to individual candidates and the aggregate contribution limits as important protections against the "actuality and appearance of corruption..."¹² As to the expenditure limitations the court reasoned that these imposed "direct and substantial restraints on the quantity of political speech..." and therefore violated the First Amendment.¹³

In dissent, Justice White urged deference to the judgment of Congress. "The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress."¹⁴ He applauded Congress' effort to dispel the notion that "federal races are bought and sold."¹⁵ These are themes that reappear in the court's decisions over the next four decades as bipartisan attempts to limit the influence of money on elections were thwarted by the court.

In 2010, the Supreme Court again

3 .Montana Department of Revenue Biennial Report, July 1, 2012- June 30, 2014, pg. 63

4 Id., pg 64.

5 Saez, Emmanuel, "Striking It Richer: The Evolution of Top Incomes in the United States," U.C. Berkeley, 9/3/13; <http://elsa.berkeley.edu/~saez/TabFig2012prel.xls>

6 Stevenson, Alexandra, "For the Top 25 Hedge Fund Managers, a Difficult 2014 Still Paid Well," New York Times, May 5, 2015.

7 Confessore, N.; Cohen, S.; Yourish, K, "The Families Funding the 2016 Presidential Election," The New York Times, October 10, 2015.

8 The New York Times, "Million Dollar Donors in the 2016 Presidential Race," updated August 25, 2015, relying on Federal Election Commission and Internal Revenue Service records.

9 Scheiber, N; Cohen, P; "For the Wealthiest, a Private Tax System that Saves Them Billions," New York Times, December 29, 2015.

10 Thomas Healy, *The Great Dissent* (2013), is a fascinating study of the evolution of Holmes' thinking on free speech.

11 *Abrams v. U.S.*, 250 U.S. 616 at 630 (1919).

12 *Buckley v. Valeo*, 424 U.S.1 at 18.

13 Id., at 39.

14 Id. at 258.

15 Id. at 265.

ignored the bipartisan judgment of Congress when it held that the First Amendment permits the regulation of independent electioneering speech only by disclosure and disclaimer but “may not suppress that speech altogether.”¹⁶ Much has been said about *Citizens United v. Federal Election Commission*. Here are some thoughts that merit consideration.

First: The court made no distinction between multi-shareholder, for-profit corporations and nonprofit advocacy corporations. *Citizens United* is a nonprofit advocacy corporation, similar in those respects to the Sierra Club and the National Rifle Association. The corporation only asked the court to carve out an exception from the law that would permit unlimited speech by such entities. The court declined, instead painting with a broad brush, and gave any and all corporations the right to make unlimited electioneering speech and to pay for it from general treasury funds.

Second: While the court asserted that it was protecting the “right of citizens to inquire, to hear, to speak...,”¹⁷ the court ignored the “drowning out” effect that is caused when speech of competing voices cannot be heard, much less given voice, because they cannot afford to purchase access to the media used by the wealthy. “More speech not less, is the governing rule,” was the guiding principle claimed by the court.¹⁸ But to the contrary it ignored one of the most important free speech values: the right to hear and consider the speech of a multitude of voices.¹⁹

Third: The court was completely dismissive of concerns about corrupting our government. If corporate speech on behalf of an office-holder gives the speaker influence or access over the official, so be it. It “does not mean that these officials are corrupt...the appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”²⁰ “Ingratiation and access” are not corruption.²¹ Only the possibility of *quid pro quo* bribery would give rise

to a sufficiently important governmental interest to justify suppression of the speech.²²

Justice Stevens’ passionate dissent is worth careful consideration. He found fault with the majority on both substantive and procedural grounds, pointedly asserting that “threatens to undermine the integrity of elected institutions across the Nation.”²³

A slight detour in our analysis brings us to *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011). This case explored the viability of public campaign financing and raised the following questions:

If, after *Buckley*, a privately funded candidate could spend without limit, and;

If, after *Citizens United*, an independent political committee could spend without limit; Could a state provide public funds to a candidate to match the expenditures of independent committees and a privately funded candidate?

On the face of it, the answer might seem obvious. Arizona was following the “governing rule,” enabling more speech by publicly funded candidates and not restricting anyone’s speech. But the court didn’t see it that way. It found that the matching funds provision burdened the free speech rights of the independent committee and the privately funded candidate and that the state’s anti-corruption interest was not compelling. The state’s interest in leveling the playing field between the well-funded interests and the candidate with limited funding was given short shrift.

Justice Kagan wrote a compelling dissent to no avail. She reminded us that “The First Amendment’s core purpose is to foster a healthy, vibrant political system full of robust discussion and debate” and that the Arizona act “promotes the values underlying both the First Amendment and our entire Constitution by enhancing the opportunity for free political discussion to the end that government may be responsive to the will of

the people.”²⁴

This brings us to the Supreme Court’s most recent ruling on the subject: *McCutcheon et al. v. Federal Election Commission*, 134 S. Ct. 1434(2014).

Recall that the court in *Buckley* concluded that an aggregate limit on campaign contributions was acceptable because the limit “entails only a marginal restriction upon the contributor’s ability to engage in free communication.”²⁵ In *McCutcheon* the court reversed itself and struck down the aggregate limit because under the newly restricted definition of corruption, it claimed that the limit did “little to address that concern, while seriously restricting participation in the democratic process.”²⁶

Justice Stephen Breyer’s dissent is a tour de force. The decision “understates the importance of protecting the political integrity of our governmental institutions. It creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate campaign...” and “eviscerates our Nation’s campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.”²⁷ Justice Breyer relies heavily on the record that was developed in the *McConnell v. FEC*, 540 U.S. 93(2003) parts of which he attaches as Appendix A to his dissent. One can only read Appendix A and shudder at the testimony by Republican and Democratic members of Congress alike as they describe the impact of campaign contributions upon their legislative decisions and legislative lives. Appendix B does the math, showing how the decision will allow one individual to contribute up to \$3,628,000 per election cycle to national and state party committees and 468 congressional candidates. If a spouse wishes to make a similar contribution, the amount per family is doubled.

Ellingson, next page

16 *Citizens United v. Federal Election Commission*, 558 U.S. 310 at 318 (2010).

17 *Id.* at 339.

18 *Id.* at 361.

19 *U.S. v. Associated Press*, 52 F. Supp. 362 at 372 (1943); (Justice Learned Hand)

20 *Citizens United*, at 359-360.

21 *Id.*, at 360.

22 *Id.* at 355-361.

23 *Id.* at 396.

24 *Arizona Free Enterprise Club’s Freedom Club Pac v. Bennett*, 131 S.Ct.2806, at 2831

25 *Buckley v. Valeo*, 424 US 1 at 20.

26 *McCutcheon v. Federal Election Commission*, 134 S. Ct.1434 at 1442.

27 *Id.* at 1465.

The other players: Congress, the IRS and the FEC

One can summarize the impact of these potential players with one phrase: missing in action.

The Supreme Court left the regulators of campaign financing with two options: disclosure and disclaimers. Congress together with the rule-makers at the IRS and the FEC, could have followed through in this area, but they have not. Instead at election time we see ads sponsored by entities whose names tell us nothing about funding sources for the advertisements. This is truly “Dark Money.” It states the obvious to note that the name and reputation of a speaker have an impact on the credibility of the speech. Since voters don’t get the names of the speakers, their ability evaluate the speech is hampered in a way that is deeply troubling.

While Congress deserves much of the blame, the IRS and FEC deserve it as well. For the IRS, the responsibility and blame arise from the rules regulating 501(c)(4) corporations. These corporations are nonprofit “social welfare” organizations that have become the primary conduits of dark money into electioneering speech. By rule, their “primary” function must be to secure the common good and general welfare. But these organizations may campaign in support or opposition to a political candidate as long as this overtly political activity does not constitute its “primary” activity.²⁸

Several problems present themselves with these corporations. First, by rule, and not by statute, the donors to these corporations do not have to be identified. This could be remedied by rule, or by statute, but has not been. Second, the “primary” function test is also a creation of rule. It is inexplicable that the statute creating these organizations requires social welfare to be their “exclusive” purpose, but the regulation dilutes that requirement to a mere “primary” purpose.²⁹ This too could be remedied by rule. But again, nothing has been done. Third, while the primary purpose of these corporations is supposed to be the

common good and general welfare, one may question whether the IRS is actually monitoring and auditing their activity to make certain that this requirement is met. With the reductions in budgeting and staff in recent years, it is doubtful that any effective auditing is taking place.

The Federal Election Commission is another discouraging part of the picture. This agency’s function is to police our elections.³⁰ Among other things it has the power to investigate whether independent campaign committees and corporations are truly independent of the campaigns. If they are not, then contributions to them could be construed as contributions to the campaign, subjecting them to the remaining contribution limits. But the agency created to safeguard the integrity of our elections is “worse than dysfunctional” according to Chairwoman Ann Ravel and the likelihood that the election laws will be enforced through the agency is “slim.”³¹

What is to be done?

If these circumstances raise concerns about the health and future of our Republic, one may ask whether anything can be done. There are a number of remedies that are possible, but none is elegant.

Replace the justices and reverse; *stare decisis* be damned!

Justice Ruth Bader Ginsburg is now in her 80s. Justices Breyer and Anthony Kennedy are in their late 70s. The death of Justice Antonin Scalia emphasizes the possibility that the next president will be able to nominate four justices, replacing two who have not been amenable to campaign finance reform. A reconstituted court could reverse *Citizens United*, et al. reasoning that real world developments establish that the factual assumptions underlying the holding of a case are incorrect. In such a case, *stare decisis* should not prevent the court from revisiting the issue and correcting a prior holding. But if the replacement justices adhere to the views of the five-vote majorities in *Citizens United* and the related cases, no benefit would come from a court with

new justices.³²

Constitutional Amendment

Retired Justice John Paul Stevens urges the adoption of a straightforward amendment to our Constitution :

“Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office, or their supporters may spend in election campaign.”³³

Given the extreme difficulty of amending our Constitution, one has to doubt the probability that proponents of any amendment will succeed. But, as a rallying and motivating cause, designed to keep the pressure on our lawmakers, and those who appoint our judges, this may be an effective strategy.

Public Financing and Matching Funds

Public matching grants to candidates that are not triggered in response to privately funded candidates or campaign committees remain a possibility. Given the flood of money that is going into these committees and candidates, one has to wonder if the voters would actually support a large enough match to allow a publicly funded candidate to run an effective campaign. Regardless a number of cities and states are experimenting with these public financing programs.³⁴

Developing Bases of Small Contributors

Both President Obama and Sen. Sanders developed large bases of small contributors allowing them to run effective campaigns. In the absence of comprehensive structural reforms to the system, this may be the only way to

Ellingson, page 36

28 26 C.F.R. §1.501(c)(4)

29 26 USC § 501 (c)(4)

30 52 USCA 30109

31 Associated Press, May 2, 2015, “FEC Chair All But Giving Up Hope to Rein in Money Abuses.”

32 Professor Neuborne suggests a compelling new approach: Consider the First Amendment and the entire Bill of Rights as Madison’s blueprint for our democracy. Read as a whole, the question that should be evaluated by the Court in these cases is whether a law strengthens or weakens our democracy. Neuborne, Burt, *Madison’s Music*, 2015.

33 Stevens, John Paul, *Six Amendments: How and Why We Should Change the Constitution*, 2014.

34 The National Conference of State Legislatures provides an overview of these programs.

envelopes full of corporate cash.

From the end of the 19th century through the first half of the 20th century, campaign finance reforms were enacted at the federal and state levels to root out these blatantly corrupt practices, most importantly: 1) adoption of the secret ballot; 2) banning of campaign contributions from corporations and unions; 3) ending the patronage system; 4) implementation of campaign contribution limits and disclosure requirements.⁴ These reforms still underlie our political system and were not affected by *Citizens United*.

As actual corruption receded, modern communications technology led to the next era of big money in politics, and to the latest rounds of campaign finance reform. The intersection of television and politics got its start with the 1952 Eisenhower campaign and its black-and-white animated “Everybody Likes Ike” television campaign ads.⁵ After that, television ads dominated politics, and the need for money to run such ads led to a huge increase in the amounts of money solicited and expended by politicians. Congress reacted with passage of the 1971 Federal Elections Campaign Act (“FECA”), which enacted limits on campaign contributions and expenditures, and also on independent expenditures related to political campaigns, but not controlled by them.

The Supreme Court addressed this new reality in its 1976 *Buckley v. Valeo* decision, the first battle in the modern campaign finance war.⁶ As it had done in the past with books, newspapers and other means of speech, the Court held that First Amendment rights of both speakers and listeners were implicated by government limits on who could speak and how effectively. *Id.* at 14. And the court stressed the critical nature of political speech, from the very founding of the Republic:

[T]here is practically universal

agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs, of course including discussions of candidates [which] reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. It can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Id. at 14-15.

Addressing expenditure of funds, the *Buckley* court explained the modern communications dilemma it faced:

[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today’s mass society requires the expenditure of money. ... The electorate’s increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 19.

Thus, understanding money as a facilitator of core political speech, the court concluded money used for political expression could only be limited for the

most compelling of government interests.⁷ The court held the only government interest so compelling to allow government to limit core political speech is the prevention of either actual corruption (which, as noted above, had become a rarity), or the *appearance* to the public that such corruption exists, with the attendant potential consequence of the erosion of public confidence in our “system of representative Government[.]” *Id.* at 27.

With these general, well-accepted First Amendment principles as a backdrop, the *Buckley* court upheld limitations on direct individual *contributions* to candidates. 424 U.S. at 27. These types of contributions to candidates themselves, which are most likely to result in actual corruption or its appearance, are often called “hard money,” while contributions made to entities other than campaigns are called “soft money.” Still today only individuals can make “hard money” contributions, and only for \$2,700 per candidate, per election. But the court rejected FECA’s limitations on *expenditures* by candidates, concluding that the suggested appearance of corruption from expenditure amounts via “candidate dependence on large contributions” was not persuasive because FECA’s limits on the “hard money” contributions that candidates pool to make their large expenditures were so small. *Id.* at 54-58.

The *Buckley* court also rejected FECA’s limits on *expenditures* by individuals supporting or opposing a candidate independently of a campaign. 424 U.S. at 45-51. The court concluded: “the reality or appearance of corruption in the electoral process” would not arise from independent expenditures regarding a candidate, explaining that true independence was assured because FECA required expenditures actually “controlled or coordinated” by a campaign to be treated as if they were direct contributions subject to FECA’s direct contribution limits. *Id.* at 46-47. This “independence” rationale would later be followed in *Citizens United* — there for corporate and union “soft money”

Gray, next page

4 See, e.g., <http://www.infoplease.com/us/history/campaign-finance-reform-timeline.html> <http://www.smithsonianmag.com/history/the-vote-that-failed-159427766/?no-ist> http://www.princeton.edu/csdp/online-community/historical-theoretical-pe/Stokes-Dunning-Nazareno-and-Brusco_Chapter-8.pdf

5 <https://www.youtube.com/watch?v=YmCDaXeDRI4>

6 424 U.S. 1 (1976).

7 Some commentators characterize *Buckley* as having held “money is speech,” even though the Court never used those words. See, e.g., http://www.huffingtonpost.com/geoffrey-r-stone/is-money-speech_b_1255787.html http://www.slate.com/articles/news_and_politics/jurisprudence/2010/01/money_isnt_speech_and_corporations_arent_people.html

Gray, from previous page

expenditures — and has been roundly criticized (and ridiculed) as naïve.⁸

After *Buckley*, in 1979 Congress amended FECA to allow unlimited “soft money” contributions by individuals, corporations and unions to parties and national committees for the support of “party-building” activities.⁹ Parties quickly began using such “soft money” contributions for political “issue ads” on television. In 2003, Congress enacted the Bipartisan Campaign Reform Act (“BCRA”) — more commonly known as McCain-Feingold. Essentially ignoring *Buckley*’s full-throated protection of independent political speech, BCRA banned, *inter alia*, “electioneering communications” paid for by corporations, unions or individuals within 30 days of a primary election, or 60 days of a general election, including such communications offered to the public via “any broadcast, cable, or satellite communication.” The various BCRA “soft money” limitations were declared unconstitutional in *Citizens United* and *McCutcheon v. FEC* based in large part on *Buckley*.¹⁰ The uproar from these decisions continues today, focused in large part on the fact that *Citizens United* was a corporation, and the *Citizens United* decision protected its right — and the right of all corporations, unions and advocacy groups (including, the Sierra Club, the NRA and the ACLU) — to free speech, noting that corporate and group speech rights had been recognized for decades in dozens of decisions. 130 S.Ct. at 897-900.

Explaining why a “media exemption” in BCRA could not save limitations on independent “electioneering” plainly unconstitutional under *Buckley*, the *Citizens United* majority looked to technology. The Court explained that the Internet had blurred the “line between the media and others who wish to comment on political and social issues,” and also noted that while “[t]oday, 30-second television ads may be the most effective way to convey a

political message,” the Internet was changing that dynamic. 130 S.Ct. at 905-906, 912-913.

Citizens United upheld extensive disclaimer and disclosure requirements, and refused to protect corporations from their shareholders, or politicians from the citizenry. Concluding that technology now allows near-instantaneous interactions between campaigns and voters, and shareholders and corporate boards, the court found no need for government to stand between these parties, holding instead: “The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.” *Id.* at 915-917.¹¹

The dissenters in *Citizens United* did not disagree with the basic premise of *Buckley* and the *Citizens United* majority that money facilitates speech, and its expenditure is protected from government regulation absent a compelling government interest. The dissenters expressed their belief that the majority should have exempted both media and nonprofit corporations from BCRA’s reach, and thus confined BCRA’s scope to for-profit corporate speech only. The dissenters explained: “media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public.” 130 S.Ct. at 976 (Stevens, J. dissenting). One can certainly argue this statement is easily as naïve as anything the majority said about lack of coordination between independent advocacy groups and campaigns.

The dissenters also were unconcerned about “closely held corporations” because “small-business owners may speak in their own names[.]” *Id.* at 973, n.73. Instead, the dissenters’ main fear was the potential for the “drowning out of non-corporate voices,” that “corporate domination of the airwaves prior to an election” funded from the “war chests” of large corporations could lead voters to “lose faith in their capacity, as citizens, to influence public

policy, and “diminish citizens’ willingness to participate in the democratic process.” *Id.* at 975-976.

That was 2010. With 20/20 hindsight, we now know that the feared corporate domination has not materialized. While Super PACs played some role on both sides in the 2012 election cycle, it was “hard money” raised over the Internet that ended up mattering the most. The Obama campaign raised and spent huge amounts of money from flesh-and-blood human citizens who donated (again and again) small amounts of money, in large part over the Internet, directly to their favored candidate’s campaign.¹² In short, as the *Citizens United* court had speculated might happen, 2012 became the first election where the Internet mattered as much as, or more than, television.

As for Super PACs, it is not really possible to say whether “soft money” spending even made a difference in 2012. Both sides were well-stocked with money to run ads, and run ads they did.¹³ The reported “biggest losers” of the 2012 election were two Super PACs managed by Karl Rove.¹⁴ They spent over \$400 million (mostly on television ads) run on behalf, *inter alia*, of Mitt Romney and 12 Senate candidates. Most of those candidates lost. *Id.*

And what about the feared domination of the airwaves by “soft money” donations from large, publicly traded corporations like Wal-Mart or General Electric? It did not happen in 2012 or 2014, and it is not happening in 2016, which begs the question: why not?¹⁵ The short answer seems to be that publicly traded corporations want to sell stuff — goods or services — to the public, and money from a Democrat is just as good as money from a Republican,

8 See, e.g., <http://www.csmonitor.com/USA/Elections/Vox-News/2012/0118/Will-Jon-Stewart-go-to-jail-for-running-Stsephen-Colbert-s-super-PAC>

9 <http://www.washingtonpost.com/wp-srv/politics/special/campfin/intro4.htm>

10 *McCutcheon*, 134 S.Ct. 1434 (2014).

11 The *Citizens United* majority signaled it would uphold most types of disclosure requirements. Congress, however, has not enacted the instantaneous disclosure requirements the Court envisioned. Instead, independent advocacy groups — so-called Super PACs — are only required to disclose their “soft money” expenditures on a quarterly basis. Moreover, if a Super PAC fits within the IRS’ 501(c)(3) definition of a nonprofit corporation, it can keep its donor list secret, thereby funding ads with “dark money.” See, e.g., https://ballotpedia.org/PACs_and_Super_PACs

12 The “Open Secrets” website tracks political spending by organizations (for-profit and nonprofit corporations and unions) and by individuals. See <https://www.opensecrets.org>

13 <http://elections.nytimes.com/2012/campaign-finance>

14 <http://www.bloomberg.com/news/articles/2012-11-08/rove-biggest-super-pac-loser-trump-says-waste-of-money>

15 See, e.g., <http://www.theatlantic.com/politics/archive/2012/05/the-truth-about-citizens-united-and-outside-campaign-cash/257439/> Donation lists are dominated by non-profit advocacy groups, unions, closely-held corporations and individuals, not by publicly-traded companies. See <http://www.opensecrets.org/orgs/list.php> This is not to suggest that for-profit corporations do not have political clout. They plainly do, but they exercise that clout mostly through lobbying, a different issue beyond the scope of this article.

or vice versa.¹⁶ Partisan contributions “can hurt corporate brands, as well as alienate potential customers and shareholders with different political views.” *Id.* Indeed, Land’s End recently provided a useful object lesson on why the “corporate domination” fear has proved unfounded.¹⁷

On the other hand, the individual business owners brushed aside by the *Citizens United* dissenters poured tons of money into politics in 2012 and 2014, and are doing so again in 2016.¹⁸ In conceding its stinging critiques of *Citizens United* may have missed the mark, the New York Times reported last year that “[i]f the political process is being purchased, the buyers are – mostly – real people. Very rich people, like Sheldon G. Adelson and Charles G. Koch on the right, Thomas F. Steyer and George Soros on the left. Unlike most American corporations, these people have clear ideological preferences. They have interests to protect, too. They are American democracy’s main risk.”¹⁹

But has even this individual independent spending spree mattered? As far as voter turnout goes, it was down in 2012 in the general election, but in part that may have been due to superstorm Sandy.²⁰ Moreover, in the so-called “swing or battleground states” that were blanketed with “saturation television advertising,” voter participation was at its highest. *Id.* In terms of getting elected, soft money spending continues to be fairly ineffective. For example, Super PACs supporting Jeb Bush in 2016 raised over \$120 million, and spent heavily on television ads supporting him and attacking his opponents.²¹ Despite megabucks and a famous name, Bush could never climb out of fourth place in the Republican primary, and has suspended his campaign.

Which brings us to the other 2016

candidates. On the Democratic side, both Hillary Clinton and Bernie Sanders have raised tons of “hard money” from their supporters, all limited to a maximum contribution of \$2,700, and much of this money raised online. As of the end of February, Clinton had raised \$130 million in hard money, and Sanders had raised \$96 million.²² A Super PAC supporting Clinton has raised another \$57 million, but it has spent very little in the primaries. In fact, so far it has been Sanders who has received the most “soft money” support, the majority coming from the National Nurses United union which, ironically enough, without *Citizens United* would have been rendered toothless in the primaries.²³

Despite Sanders outspending Clinton on television ads,²⁴ so far Clinton has won more pledged delegates and leads in the popular vote.²⁵ Has the speculation of the *Citizens United* majority that television ads might lose their predominance come true? Time will tell for certain, but ask yourself this: how many people do you know who use DVRs to “zap” commercials, or who do not even watch commercial television at all? In sum, the evidence from the Democratic Party primaries does not show anything resembling the feared “corporate domination of the airwaves.” Rather, what appears to be happening is that Internet-facilitated “crowd funding” of politics by actual flesh-and-blood humans far surpasses corporate “soft money” clout. Crowd funding may also help increase voter turnout because contributors, it seems, are voters.²⁶

For the Republicans, the story takes a different twist. Donald Trump claims to be self-funding his campaign, a method approved in *Buckley* as having no potential for even the appearance of corruption. 442 U.S. at 53.²⁷ But Trump has not been spending much of his own money. Instead he has been relying on his Twitter

feed,²⁸ and how that, and everything else about his campaign, receives a boatload of “free media” coverage: “Of all the ways Donald Trump has shocked the political system, one of the most significant is how he wins primary after primary with one of the smallest campaign budgets ... [has no] super PAC ... [and] spent less on television advertising — typically the single biggest expenditure for a campaign — than any other major candidate[.]”²⁹ In February alone, Trump “earned” \$400 million worth of free media, and over the course of the campaign has “earned” nearly \$2 billion. *Id.*

So far, this strategy has worked amazingly well for Trump. He leads the Republican field in delegates and the popular vote, despite boatloads of money spent on negative ads against him.³⁰ Rolling Stone’s Matt Taibbi suggests that Trump “found the flaw in our system;” he “figured out if he just makes the whole thing a circus, [the media] just can’t resist covering it.”³¹ CBS Chairman Les Moonves essentially concurs. Conceding that the Republican campaign has become “a circus,” Moonves explained: “It may not be good for America, but it’s damn good for CBS ... The money’s rolling in and this is fun. I’ve never seen anything like this, and this is going to be a very good year for us. Sorry. It’s a terrible thing to say. But, bring it on, Donald. Keep going.”³² So much for those selfless media companies envisioned by the dissent in *Citizens United*.

What does all this mean? Is American democracy in danger from out-of-control corporate money in politics? Should *Citizens United* be reversed? The evidence says no. In fact, crowd-funding of campaigns over the Internet appears to be on the way to fixing many of the problems addressed by FECA and BCRA, but with

Gray, page 36

16 http://www.nytimes.com/2015/06/10/business/corporations-open-up-about-political-spending.html?_r=0

17 See http://www.nytimes.com/2016/03/01/business/catalog-interview-with-gloria-steinem-has-lands-end-on-its-heels.html?_r=0 By including an interview with Gloria Steinem in its catalog, the company has infuriated customers on the right and the left, and stands to lose quite a lot of sales if promises of boycotts actually emerge.

18 See <http://www.opensecrets.org/outsidespending/summ.php?disp=D>

19 http://www.nytimes.com/2015/06/10/business/corporations-open-up-about-political-spending.html?_r=0

20 <http://bipartisanpolicy.org/press-release/2012-election-turnout-dips-below-2008-and-2004-levels-number-eligible/>

21 <https://www.opensecrets.org/pres16/candidate.php?id=N00037006>

22 See <http://www.nytimes.com/interactive/2016/us/elections/election-2016-campaign-money-race.html>

23 See http://www.nytimes.com/2016/01/29/us/politics/bernie-sanders-is-democrats-top-beneficiary-of-outside-spending-like-it-or-not.html?_r=0

24 See <http://www.usatoday.com/story/news/politics/onpolitics/2016/03/22/bernie-sanders-outspends-everyone/82131324/>

25 See <http://www.bloomberg.com/politics/graphics/2016-delegate-tracker/>

26 <https://twitter.com/mashable/status/254041600299249664>

27 <http://www.politifact.com/truth-o-meter/statements/2016/feb/10/donald-trump/donald-trump-self-funding-his-campaign-sort/>

28 <http://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html>

29 See <http://www.nytimes.com/2016/03/16/upshot/measuring-donald-trumps-mammoth-advantage-in-free-media.html>

30 <http://www.bloomberg.com/politics/graphics/2016-delegate-tracker/> <http://www.thegatewaypundit.com/2016/03/gop-elites-spent-67-million-ads-stop-donald-trump-got-nothing/>

31 See <http://crooksandliars.com/2016/02/rolling-stones-matt-taibbi-whether-media>

32 See <http://www.politico.com/blogs/on-media/2016/02/les-moonves-trump-cbs-220001>

Continuing Legal Education

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.

The Road Show and New Lawyers Workshop will be coming to Missoula on June 3.

The New Lawyers Workshop brings together newly admitted lawyers with experienced Montana practitioners and judges in small groups to discuss the practical aspects of the practice of law. Space is limited and by invitation only. There will be no “at-the-door” registrations.

Space is limited and by invitation only. The event will run from 7:45 a.m. to 1:30 p.m. at the Alexander Blewett III School of Law. Registration is free for the workshop, which qualifies for 5.0 CLE credits, a \$250 value.

The Road Show will run from 2 to 5 p.m. It will be held in the University Center Ballroom.

The Road Show is open to all attorneys, but an RSVP is required. It qualifies for 3.0 free Ethics CLE credits, a \$150 value.

New on-demand CLE available

Two new CLE have been added to the State Bar’s online recorded CLE catalog:

Demystifying Reference Based Pricing

— 1.5 self-study CLE credits. Referenced Based Pricing (RBP) is a hot topic in today’s health insurance market and one that is increasingly being considered-and adopted- by plans and employers as a

cost-containment mechanism. Despite its growing popularity, RBP generally is not fully understood. Speakers Jeff Cody and Denise Glass of Norton Rose Fulbright in Dallas, Texas, and Lauren Garraux of K&L Gates in Pittsburg, Pa., address these issues to demystify RBP and offer practical considerations for determining whether RBP can work for your clients.

From Distressed to De-Stressed: Navigating the Challenges of a Legal Career

— 1.0 self-study CLE credit. While daily stressors are a given, they don’t have to be obstacles to progress. Nor do they need to be the stepping stones to an ethics complaint. Presenter Nancy Stek of the New Jersey Lawyers and New Jersey Judges Assistance Programs will show you how to transform those obstacles into opportunities and become resilient in your work and day to day life.

You can access these and the rest of the State Bar’s recorded catalog by visiting montanabar.org and selecting “On-Demand CLE” under the menu item “STORE.”

Upcoming Live CLE

May 6 — Are the Rules Different When the Government is a Party? — Helena

May 13 — Missoula — Bench Bar Conference — Missoula

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, MTLA— 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

October 21 — Advance Family Law: Cutting Edge Issues — Missoula

October 28 — Road Show — Billings

November 19 (Cat-Griz weekend) — Montana Defense Trial Lawyers Association Fall CLE — Missoula

STATE BAR OF MONTANA

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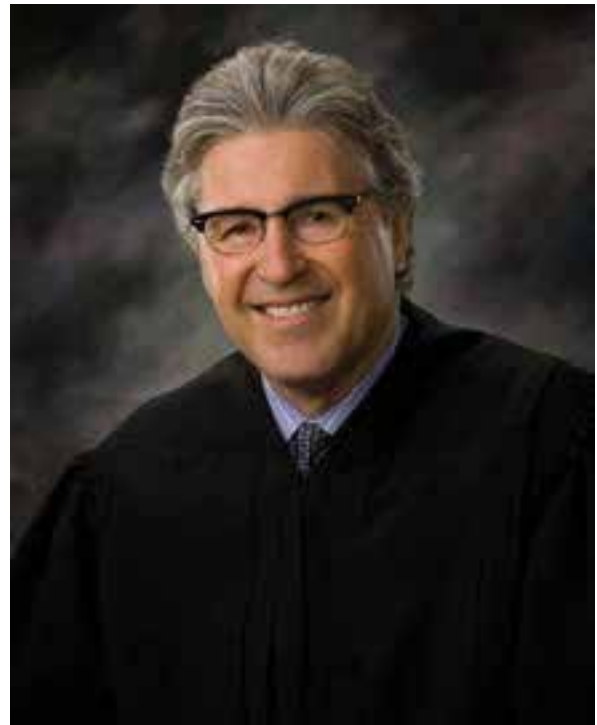
State Bar of Montana | 2016

NewLawyers' WORKSHOP

Featuring Keynote Speaker

The Honorable
Dana L. Christensen
U.S. District Court
District of Montana
Chief Judge

The New Lawyers' Workshop brings together newly admitted lawyers with experienced Montana practitioners and judges to discuss the practical aspects of the practice of law.



University of Montana's Alexander Blewett III School of Law
Friday, June 3 — 7:45 a.m. to 1:30 p.m.

By Invitation Only — Invitees may register at montanabar.org
No 'at-the-door' registrations

Rep. Hill Smith elected to national board of directors of university women's group

State Rep. Ellie Hill Smith has been elected to the National Board of Directors of the American Association of University Women.

AAUW is headquartered in Washington, D.C., where it takes positions in Congress and statewide on the — educational, social, economic and political issues. Hill Smith will assist with membership recruitment and AAUW's Legal Advocacy Fund, providing financial and organizational support for cases in the workplace and in academia that have the potential to provide significant protection for women, including topics like unfair pay, tenure or promotion denial, pregnancy discrimination, Title IX violations, and sexual harassment or sexual assault.

Since 1881, the American Association of University Women (AAUW), representing 170,000 members and 800 universities, including both University of Montana and Montana State University, serves as the nation's leading voice promoting equity and education for women and girls. Hill Smith has been elected to the organization's national board of directors,

Hill Smith graduated from the University of Idaho College of Law in 2001, and she is admitted to the bar in Idaho and Montana. Her law practice focuses on civil rights and discrimination, government and public policy, family law and mediation, and criminal defense.

She is serving in her third term of



Hill Smith

the Montana House of Representatives, where she was the minority chair of the House Health and Human Services Committee, overseeing medical marijuana and Medicaid expansion.

Rep. Hill Smith also serves as the regional director of the National Foundation of Women Legislators, National Board of American State Legislators Against Gun Violence Prevention, and Montana State Director of the Young Elected Officials Network.

You can reach her at Ellie Hill Smith, PLLC, 100 Ryman St., University Plaza, Missoula. 406-218-9608; EllieHillHD94@gmail.com and www.EllieHillSmith.com.

AAUW honors Bullock, Engstrom

The Missoula branch of the American Association of University Women has honored Gov. Steve Bullock with its Gender Equity Award.

The AAUW cited Bullock for his efforts to address gender pay differences in Montana, establishing the Equal Pay for Equal Work Task Force and dedicating two members of his cabinet,

Department of Labor & Industry Commissioner Pam Bucy and Department of Administration Director Sheila Hogan, to lead this effort.



Bullock

According to U.S. Census data, women's pay in Montana is 74 percent of men's, placing the state 43rd in the nation in gender pay equity. This spring, AAUW members and supporters held more than 200 events across the country to educate to



Engstrom

bring attention to the issue.

AAUW also honored University of Montana President Royce Engstrom with an award for what it calls his bold stance against the epidemic of campus sexual assault.

Fastcase co-founder running for Congress from New York

Phil Rosenthal, co-founder of Fastcase legal research, has announced he is running for Congress in New York's 10th

Congressional District.

Rosenthal, a Republican, is hoping to unseat incumbent Rep. Jerrold Nadler, D-N.Y.

In 1999, he co-founded Fastcase, a company that brings big data analytics to

legal research.

Fastcase partners with scores of bar associations, including the State Bar of Montana, as well as many of the largest law firms and most prominent law schools in the world.

ROADSHOW

Missoula

Friday, June 3
University Center
Ballroom, 2-5 p.m.

3 FREE ETHICS CLE!

- Spoliation,
ESI, Discovery
& Technology
Checklists
- Confidentiality
& Conflicts
- What to Do
When You Goof



REGISTER AT MONTANABAR.ORG
QUESTIONS? mcaprara@montanabar.org

MLSA holding access to justice public forums

In honor of Montana Legal Services' 50th Anniversary of providing civil legal services to Montana's most vulnerable citizens, MLSA is holding a series of community conversations on civil legal aid and access to justice.

Titled "Justice for Some? A Conversation on Securing Equal Justice for All," these conversations are chance for everyone to learn more about what civil legal aid is, how it works, and why it matters to your community. They are open to the public.



The events will take place at public libraries located in eight different communities across Montana. Each event will be one hour long and will include a presentation on civil legal aid followed by a Q&A session. Conversations scheduled so far are:

■ Great Falls Public Library – Thursday, May 12, at 7 p.m.

■ Billings Public Library – Wednesday, June 22, at 7 p.m.

Events have already been held in Missoula and Helena.

Lawyer Referral & Information Service

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

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

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

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

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

It's easy to join: Membership of the LRIS is open to any active member of the State Bar of Montana in good standing who maintains a lawyers' professional liability insurance policy. To join the service simply fill out the Membership Application at www.montanabar.org -> Need Legal Help-> Lawyer Referral and forward to the State Bar office. You pay the registration fee and the LRIS will handle the rest. **If you have questions or would like more information, call Robin Demaray at 406-447-2208 or email rdemaray@montanabar.org.**



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
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or call the State Bar at
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Trustee elections contested in Area B, Area G

There are contested races for two Trustee positions in this year's State Bar of Montana elections.

Meanwhile, the Honorable Leslie Halligan is the only candidate for President-Elect and Shane Vannatta is the only candidate for ABA Delegate.

In Area B (Lake, Mineral, Missoula, Ravalli and Sanders counties), five attorneys filed petitions for the three Trustee positions up for election. They are:

- Beth Brennan, Brennan Law & Mediation, Missoula (incumbent)
 - Laurence Ginnings, Confederated Salish and Kootenai Tribes, Pablo
 - Liesel Shoquist, Milodragovich, Dale & Steinbrenner PC, Missoula (incumbent)
 - Brian C. Smith, Smith Law PLLC, Missoula
 - David Steele, Geiszler Steele PC
- In Area G (Gallatin, Park and Sweet

Grass counties), five attorneys filed for the two trustee positions up for election. They are:

- Robert Baldwin, Goetz, Baldwin & Geddes PC, Bozeman
 - Mark Evans, Axilon Law Group PLLC, Bozeman
 - Christopher Gray, Gallatin County Attorney's Office, Bozeman
 - John Kauffman, Kasting, Kauffman & Mersen PC, Bozeman
 - Lynda White, Berg, Lilly & Tollefsen PC, Bozeman (incumbent)
- In Area D (Cascade, Glacier, Pondera, Teton & Toole counties), two attorneys are running for the two Trustee positions up for election:
- Shari Gianarelli, Gianarelli and Reno PLLC, Conrad (incumbent)
 - Paul Haffeman, Davis, Hatley, Haffeman & Tighe PC, Great Falls (incumbent)

Elections will be write-in for Area A, Area C Trustee positions

No candidates submitted nominating petitions for two Board of Trustee positions that are up for re-election in the State Bar of Montana elections this year.

The Trustee elections for those positions — Area A (Flathead and Lincoln counties) and Area C (Beaverhead, Deer Lodge, Granite, Jefferson, Madison, Powell and Silver Bow counties) — will be write-in only.

Election ballots were mailed out on May 2. Ballots must be postmarked or hand-delivered to the State Bar of Montana no later than May 23. Ballots will be counted on June 3.

News of Note

CSKT attorney honored by Native American Law Students Association

The Native American Law Students Association honored Confederated Salish and Kootenai Tribal attorney John Carter earlier this month with the Mi-Ha-Ka-Ta-kis award.

The award recognizes the lifelong contributions and impacts of a University of Montana Law School alumni of protecting, promoting and advancing Indian law issues important to Indian people and tribes, according to Maylinn Smith, University of Montana School of Law Associate Professor.

The Mi-Ha-Ta-Kis is named after former law professor Ray Cross.

Carter has worked for American Indian tribes since

graduating in 1983.

He is recognized for representing CSKT treaty rights, water rights and quality issues, jurisdictional disputes, environmental concerns, and governmental relations for decades.

The UM NALSA recognized Carter for his instrumental and monumental effort in successfully negotiating the CSKT/Montana Water Compact, according to UM Law Student Kathryn Sears Ore.

"He has devoted a significant amount of time to working with University of Montana law students interested in American Indian law and water law," Ore said.

MacIntyre tapped for personnel appeals board

Gov. Steve Bullock appointed East Helena attorney Anne MacIntyre to the Montana Board of Personnel Appeals.

MacIntyre is an attorney and arbitrator with labor management experience.

The governor also appointed Jim Soumas of Billings, business representative for the Teamsters Union Local 190 as a board member, and Jerry Rukavina of Great Falls, a field consultant for MEA-MFT, as an alternate member.

Several members of the Montana legal community were among 13 people who Bullock appointed to the Youth Justice Council in March.

Among those appointed were:

- The Honorable Mary Jane Knisley, 13th Judicial District judge, Billings;
- Peter Ohman, training coordinator for the Office of the State Public Defender, Bozeman; and
- Tara French, chief probation officer and director of Youth Court Services for the 13th Judicial District, Billings.

STATE BAR ELECTIONS

**BALLOTS MAILED MAY 2
MUST BE RETURNED BY MAY 23**



VOTE

Gray, from page 27

no need for government limits on core political speech. The media corporations *exempted* from regulation by BCRA, however, have emerged as problematic in this 24-hour news cycle world, choosing who to gift with free media, and who to ignore, based on what is best for their ratings. Nevertheless, any attempt by Congress to regulate this latest reality would require a rewrite of the First Amendment's "Freedom of the Press" language.

The current darling of the campaign reform movement is a constitutional amendment proposed by former Supreme Court Justice John Paul Stevens – the author of the *Citizens United* dissent – which reads as follows: Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount

of money that candidates for public office or their supporters may spend in election campaigns.³³

This suggested amendment is quite troubling, and as is true with most reform efforts, is aimed at yesterday's problems, not today's (much less whatever tomorrow's might be). Do we really want to let government limit political speech on blog posts, Twitter exchanges, Facebook walls, or whatever new methods of political communication next come down the technology pike? Is it wise to let the party currently in power decide what is "reasonable" for the party out of power to be able to spend in its attempt to get back into power? Should we let media conglomerates hand out free media to boost their ratings, with opportunities for candidates to counter with paid media curtailed by Congress? Do we want to give incumbents the power

33 <http://joshblackman.com/blog/2014/03/04/what-are-justice-stevens-proposed-six-amendments/>

to limit crowd-funded expenditures aimed at unseating them? My take is "no" on all of these questions. History should be our guide here. The censor is generally friendly to the rich and powerful, not to the 99 percent. Just ask Socrates.³⁴

Back to the opening question: is campaign finance reform needed? The latest evidence seems to show that the ACLU has this exactly right: Disclosure rules should be tightened to cover dark money; the speed of disclosure of contributors and contributions should be increased; and laws against "coordination" should be better enforced.³⁵ At this point, anything more would be overkill in a war, which thanks to improving technology, we may no longer even need to fight.

34 http://www.beaconforfreedom.org/liste.html?tid=415&art_id=475

35 <https://www.aclu.org/aclu-and-citizens-united> and <http://www.aclu.org/issues/free-speech/campaign-finance-reform>

Ellingson, from page 24

match the power of big money in our elections today.

Afterthoughts

As this article was being written, the nominating campaigns for the presidency were proceeding. Has the recent experience with these campaigns demonstrated that fears created by *Citizens United*, et

al. are unfounded? Super PACs and their 501(c)(4)s have been impotent despite spending tens of millions in support of Jeb Bush and against Donald Trump. Bernie Sanders has shunned Super PACs and has raised tens of millions without them. We cannot yet draw lessons from the 2016 campaign.

On a positive local note, Montana's new Disclose Act takes full advantage of the one regulatory avenue that remains after *Citizens United*. Once again,

Montana is taking the lead.

Conclusion

Some may doubt the existence of a problem. Governing by an elite, be it intellectual or economic, has long appealed to some. But this is not the ideal that animates the exceptionalism of our Republic. We must find a path back to that ideal, and to a government "of, by and for the people."

Evidence, from page 21

I would like to end this column on a positive note, and a recent Missoula case serves the purpose perfectly. Michael Claude Urziceanu was convicted in Missoula Municipal Court of misdemeanor possession of marijuana. The District Court affirmed. On appeal, the defendant

argued that the District Court erred in refusing his request to take judicial notice of the marijuana laws and court decisions in California and Nevada in support of his contention that he was entitled to use marijuana in Montana as a matter of medical necessity. *City of Missoula v. Urziceanu*, 2015 MT 79N, ¶ 4, 378 Mont. 541, 348 P.3d 673. The Supreme Court affirmed the conviction, apparently on the

ground not that the law of California and Nevada was an inappropriate subject for judicial notice but on the ground that it was irrelevant to the question of marijuana use in Montana. Perhaps the better lesson from this case (and life?) is that "There is no fundamental right to possess and use marijuana." 2015 MT 79N, ¶10.

See you next month.

Disbarment, from page 15

account.¹⁷⁰

In mitigation, Beccari was diagnosed with "adjustment disorder with mixed

disturbance of emotions and conduct."¹⁷¹ Nonetheless, the COP unanimously recommended disbarment.¹⁷²

171 COP's FOF, COL and Recommendations (filed July 16, 2001), FOF 7, *In re Beccari*, Case Nos. 01-164 and 01-165.

172 COP's FOF, COL and Recommendations (filed July 16, 2001), p. 6, *In re Beccari*, Case Nos. 01-164 and 01-165

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."

170 *Id.*

Carol Elaine Schmidt

Carol Schmidt passed away surrounded by family on March 26, 2016, after a courageous battle with cancer. She was 59 years old.

Carol was born in the town of Mendota in La Salle County, Illinois, on Nov. 2, 1956. She was the second daughter to Ira and Hirrel Schmidt and sister to Anita Schmidt.



Schmidt

After high school she began her education at the University of Iowa, where her dad would sometimes fly up on his plane to take her home for breaks. However, a spur of the moment train and bus ride to Missoula after her second year of college brought her to the state where she would spend most of the rest of her life.

She earned a wildlife biology degree from the University of Montana. After

graduating, she worked at a marine biology lab in South Carolina. In South Carolina she also fought to improve the voting rights of black individuals.

She decided to pursue a law degree, but not before taking a nine-month trip cycling and backpacking through Europe with her boyfriend, Gerald "Jerry" McCarthy. She enrolled at the University of Montana where she won national awards for her work. Following graduation and acceptance of her law degree, she married Jerry in Missoula on Oct. 3, 1987.

She clerked for Montana Supreme Court Justice William Hunt and later worked as a Montana special assistant attorney general. In December 1990 they welcomed their first daughter Morgan Schmidt McCarthy. In February 1995 they welcomed their second daughter Madison Schmidt McCarthy.

The following years were filled with many school activities, extracurricular activities, and family adventures. Carol

was involved in every aspect of her daughters' lives, whether it was completing the middle school yearbook when no one else would, sewing historically accurate renditions for Halloween costumes, or editing school essays.

She also was a pillar of her community. She was heavily involved in the Helena School District, spending much of her time volunteering and fundraising. When her daughters became dancers, she threw herself into the ballet world and fought to cultivate the ballet scene in Helena.

Later in her law career she moved to the Department of Environmental Quality where she worked to protect the public water supply. This job and her co-workers provided her immense joy.

Carol is preceded in death by parents. Surviving are her husband, Gerald McCarthy, her two daughters Madison and Morgan Schmidt McCarthy, and numerous other family members and friends.

Steve Strekall

With his big grin and his robust laugh, Steve went to meet God and the angels on April 8, 2016. He was born June 3, 1924, to Steve and Agnes Sodja Strekall in Helena, Montana. Steve grew up in East Helena and graduated from Helena High School in 1942. He



Strekall

received a degree in business and accounting from the University of Montana and graduated with a law

degree from the UM law school in March of 1948.

Steve married Helen Ries on Aug. 26, 1946. They resided in Missoula until March 1948, then moved to New York City where he worked for Price Waterhouse as an attorney and a tax accountant. In 1949, after relocating to Montana, he worked for Arkwright Construction Co. in Billings as an accountant. He started Empire Sand & Gravel; after five years, he was employed by Abstract Guarantee Company. In 1972, Steve established American Title

& Escrow and was the general manager until his retirement.

Steve was a member of the Knights of Columbus Fourth Degree, The Elks Club, Billings Breakfast Optimist Club, the Billings Petroleum Club, and the Barristers.

Steve is survived by his wife of 69 years, Helen, and his children Patty Westerman (Sonny), and Mike Strekall M.D. (Brenda).

Condolences may be sent to the family at www.michelottisawyers.com.

406-683-6525

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

TIMOTHY J. MCKITTRICK: More than 30 years of arbitration and mediation experience. Certified member of the American Arbitration Association. Contact information: Timothy J. McKittrick, P.O. Box 1184, Great Falls, MT 59403; Phone: (406) 727-4041; Email: kitty@strainbld.com.

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