

# MONTANA LAWYER

State Bar  
— of —  
Montana

November 2016 | Vol. 42, No. 2

## Major MLSA Milestone

Civil legal aid organization  
celebrates past successes,  
looks to future challenges  
as it marks 50th anniversary



**IOLTA reporting begins November 14 — Page 8**

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### Also in this edition:

- > State Law Library in Helena welcomes new director, reference librarian
- > Ries, Turner honored for leadership on domestic violence, sexual assault

- > Risk Management: Don't let yourself be punished for your good deeds
- > Expert Advice on Expert Witnesses
- > Montana Supreme Court case summaries
- > FLSA overtime rules take effect soon

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E-mail: [jmenden@montanabar.org](mailto: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](mailto:jmenden@montanabar.org)

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# MONTANA DEFENSE TRIAL LAWYERS

## ANNUAL CLE SEMINAR • NOVEMBER 18, 2016

**6-6.5 CLE credits requested (3 ETHICS CREDITS REQUESTED)**

**Doubletree by Hilton Missoula Edgewater**  
Missoula, Montana

A limited block of rooms has been reserved for MDTL program participants. Call 406.542.4611 and ask for the MDTL room block rate. For full schedule and additional information, visit [www.mdtl.net](http://www.mdtl.net).



### ► Caging Reptile Lawyers

*Matthew Moffett, Esq.; Gray, Rust, St. Amand, Moffett & Brieske, LLP (GRSMB), Atlanta, GA*

The Reptile tactics of certain plaintiff attorneys can be countered by the defense bar with effective discovery, pretrial and trial strategy. In fact, certain recommended Reptile strategy can be used in the defense of the case, in the right situations. As one insurance claims manager put it: better know about this Reptile strategy; better know how to counter it; or better update resume!



### ► Email and Smartphones and Clients, Oh My! Communication and the Practice of Law in the 21st Century

*Mark Bassingthwaite, Esq., Risk Manager, ALPS Corporation, Missoula*

This program will address ethical, malpractice, and risk management issues associated with email and the use of mobile devices by both attorneys and their clients during the course of representation. Topics covered will include setting boundaries, file documentation, responsible use, maintaining confidentiality, and cyber security. If you're living in the Land of Oz and have no idea what the "Don't Do Stupid" warning is all about, this program's for you.



### ► Changes to Federal Rules

*Chief Judge Dana L. Christensen of the United States District Court for the District of Montana; and Jeanne Loftis, Esq., Bullivant Houser Bailey, PC, Portland, OR; Moderator, Jordan Crosby, Esq., Ugrin, Alexander, Zadick & Higgins, PC, Great Falls*

The discussion will include the history of Rule 26 amendments, proportionality in the scope of discovery, cost allocation, preservation/sanctions, and other rule amendments.

### ► In Re Rules Revisited—Panel Discussion

*Gary Zadick, Esq. and Bob James, Esq., Ugrin, Alexander, Zadick & Higgins, PC, Great Falls; and Ward "Mick" Taleff, Esq., Taleff Law Offices, PC, Great Falls; Moderator, Carey Matovich, Esq., Matovich Keller Murphy, PC, Billings*

Revisiting the *In Re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures* decision 16 years later. Learn the history behind the petition that brought about *In Re Rules*, engage in a conversation on counsel's responsibilities under the Rules of Professional Conduct as it relates to the defense of their client, how to handle prior-approval requirements, billing guidelines, and third party audits; and participate in a discussion on the ethics of flat fees and the right of insureds to select their own counsel.

## ALSO FEATURING...

### ► "New" View from the Bench—Tentative

### ► Reception: Hosted by the Alexander Blewett III School of Law at the University of Montana

### Fees:

	On or Before Nov. 1	After Nov. 1
MDTL Member	\$260	\$325
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#### Registration Policies:

The registration fee includes all sessions and course material. Payment must accompany registration form to receive early registration discount. **Cancellations received in writing by November 1 will be subject to a \$25 service charge. No refunds will be made after November 1.** Course materials will be mailed to pre-paid registrants who were not able to attend the conference. Registration substitutions may be made at any time without incurring a service charge.

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### Starnes joins Great Falls law firm

Heather M. Starnes has joined the Great Falls law firm of Scott, Tokerud & McCarty, P.C., as an associate.



Starnes

Starnes graduated with honors from Baylor University with a B.A. in Economics, French, and German. She obtained her Juris Doctor and M.B.A. from St. Mary's University in 2008. She practiced law in Texas for a year, before living in England, Arizona, Japan, and Utah. She recently moved to Montana, passed the Montana Bar exam, and is now licensed to practice law in both Texas and Montana.

Starnes will practice in the firm's primary focus areas: estate planning and administration, business exit planning, elder law, and business and corporate organizations.

### Simon opens Elder Law firm in Bozeman

Owner Peter Simon has announced the official opening of his solo law firm located on the north side of Bozeman. The firm will primarily specialize in Elder Law, including planning for incapacity, disability, health care, and long-term care, Medicare and Medicaid guidance, conservatorships & guardianships, elder abuse & fraud, and veterans benefits claims and appeals. Basic estate planning services will also be offered, such as wills, trusts, and powers of attorney.



Simon

Simon grew up in the Gallatin Valley, and graduated from Ophir School in Big Sky and Bozeman High School. He continued his education at Montana State University, where he graduated with a Bachelor of Arts in Philosophy. After spending his twenties in various trades and office management,

Simon decided to continue his education at the University of Montana School of Law. There he interned in the Elder Law Clinic and the University of Montana Office of Legal Counsel, and earned his Juris Doctorate with honors in 2015. Simon returned to Bozeman, and decided the best way he could help others in these specific areas was to open his own practice.

Contact information: Gallatin Elder Law & Estate Planning PLLC, 1800 N. Rouse Ave, Building C, Unit 4, Bozeman, MT

59715. Phone: 406-577-2292; fax: 406-577-2291; email: ptsimon.law@gmail.com.

### Rogers joins Worden Thane law firm

Martin Rogers has joined the Worden Thane law firm in Missoula.



Rogers

Rogers' practice consists of civil litigation, appeals, and business transactions with a fondness for business litigation and intellectual property.

He received his law degree from in 2016 from the Alexander Blewett III School of Law at the University of Montana.

Rogers attended Carroll College in Helena and graduated with a biology degree.

You may contact him at 406-721-3400; or mrogers@wordenthane.com; or by mail at 111 N. Higgins, Suite 600, Missoula, MT 59802.

### Kris A. McLean Law Firm PLLC opens in Florence

Kris McLean announces that after over 30 years as a federal prosecutor in Montana's US Attorney's office, he has opened the Kris A. McLean Law Firm, PLLC in Florence, Montana.



McLean

As an Assistant U.S. Attorney, McLean litigated many civil and literally hundreds of criminal cases through trial in federal court on behalf of the United States.

Civil cases included defense and prosecution of claims under the Federal Tort Claims Act, CERCLA, RCRA, bankruptcy statutes, and FLPMA litigation. Criminal cases included prosecution of complex banking and securities fraud, money laundering, wire fraud, and environmental crimes. In connection with this District Court work, McLean represented the United States before the Ninth Circuit Court of Appeals in approximately 60 oral arguments.

In private practice, McLean will focus on trial work in federal and state courts.

Contact the Kris A. McLean Law Firm, PLLC, at kris@krismcleanlaw.com; P.O. Box 1136, Florence, MT 59833; or 406-214-1965.

### Have Member News to Submit?

Member and Montana news and photos are free to submit. If you or your firm have news you would like to let the Montana legal community know about, email Montana Lawyer Editor Joe Menden at [jmenden@montanabar.org](mailto:jmenden@montanabar.org). Email or call 406-447-2200 with any questions about submissions.



### O'Reilly joins James Brown Law Office in Helena

Carrie A. O'Reilly has joined the James Brown Law Office, PLLC of Helena as the firm's new associate attorney. O'Reilly comes to Montana by way of Michigan and Colorado where she specialized in bankruptcy, family law and estate planning.



O'Reilly

O'Reilly graduated from the University of Michigan in 2000 and attended San Diego's California Western School of Law in 2003.

Before moving to Montana, she spent the last year working in Denver.

She can be reached at 449-7444 or [thunderdomelaw1@gmail.com](mailto:thunderdomelaw1@gmail.com).

### AWI Journal seeks submissions

The AWI Journal is seeking proposals for articles to be published in the quarterly publication of the Association of Workplace Investigators. AWI Journal articles focus on the many different aspects of workplace investigations, such as legal issues (how the law applies to the work of investigators), practical matters, similarities and differences between workplace investigations and other fields of endeavor, and developments in the law.

The publication so no articles on local issues unless they have larger implications on workplace investigations.

Articles include:

- substantive feature articles (3,000 to 5,000 words) usually authored by an attorney or a human resource professional;
- articles that examine past employment laws or court decisions that affect workplace investigations today (900 to 2,000 words); and

■ case notes (900 words), shorter articles focusing on recent legal decisions or laws and their potential impact.

The AWI JOURNAL is read by all members of the Association of Workplace Investigators, a professional membership association for attorneys, human resource professionals, private investigators, and many others who conduct, manage, or have a professional interest in workplace investigations. Some of our members are internal workplace investigators who work inside a company, and some are external investigators. AWI's mission is to promote and enhance the quality of impartial workplace investigations. For more information, please visit [awi.org](http://awi.org).

If you would like to write an article, please send a brief one- or two-paragraph description to editor Susan Woolley at [awijournal@awi.org](mailto:awijournal@awi.org). If you have URLs to previously published articles that are relevant to your pitch, please include them in your email. Please do not send unsolicited manuscripts.

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# Harassment, discrimination would be misconduct under proposed professional conduct provision

## Court taking comment until Dec. 9 on proposed Rule 8.4(g) of MRPC

The Montana Supreme Court is considering adopting a new paragraph to Rule 8.4 of the Montana Rules of Professional Conduct to add an anti-harassment and anti-discrimination provision.

The court ordered a 45-day comment period on the new paragraph. Comments must be filed in writing with the Clerk of the Supreme Court by **5 p.m. on Friday, Dec. 9.**

The court is considering the provision at the suggestion of the Center for Professional Responsibility Policy Implementation Committee of the American Bar Association.

New paragraph 8.4(g) would provide that it is professional misconduct for a lawyer to

engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

The ABA House of Delegates in August passed a resolution incorporating this paragraph into the ABA Model Rules of Professional Conduct.

## Court extends comment period until Nov. 25 on proposed MRPC Rule 4.4(c)

The Montana Supreme Court has extended the comment period until Nov. 25 on a proposed new Rule 4.4(c) of the Montana Rules of Professional Conduct as they relate to lawyers' respect for rights of third persons regarding electronically stored

information.

The proposed subsection would read as follows:

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

The Supreme Court in September approved changes to the MRPC regarding lawyers ethical responsibilities in the use of technology related to confidentiality and respect for rights of third persons. The proposed subsection 4.4(c) was originally proposed by the State Bar of Montana's Ethics Committee as part of those proposed changes, but the language was removed by the Board of Trustees before the proposal was presented to the Supreme Court.

The court in September directed the bar's Ethics and Technology committees to confer and submit additional comment on the proposal. Other members of the bar may also submit comment.

Comment must be made in writing to the Clerk of the Montana Supreme Court.

Read the petitions, the Supreme Court's orders and public comment in the case at the court website.

## APPOINTMENTS

### 3 reappointed to Commission on CLE

The Montana Supreme Court in October reappointed three members of the Commission on Continuing Legal Education to new terms.

Courtney Mathieson, Lisa Mecklenberg Jackson and Cynthia Thiel, whose previous terms expired on Sept. 30, were appointed to new terms expiring on Sept. 30, 2019.

## Oral Argument Schedule

**Wednesday, Dec. 7: *State v. Eskew*,** Criminal. 9:30 a.m. in the Courtroom of the Supreme Court in the Joseph P. Mazurek Justice Building in Helena. The Honorable Heidi Ulbricht will sit in place of Justice Patricia Cotter, who is retiring Dec. 30.

Jasmine Nicole Eskew was convicted of

assault on a minor but acquitted of felony murder for the 2012 death of her daughter.

Eskew argues that officers downplayed their Miranda warning, rendering her waiver involuntary; that officers' used interrogation techniques that coerced a confession; and that the district court erred in not

allowing expert testimony regarding false confessions.

The state argues that Eskew was properly informed of her Miranda rights, that the district court was correct to deny her motion to suppress, and that excluding false confession testimony was within its discretion.

### Commission forwards 4 names for 17th Judicial District judge

The Judicial Nomination Commission has submitted the following names to Gov. Steve Bullock for consideration for appointment to the upcoming vacant judicial seat in the 17th Judicial District (Blaine, Phillips, and Valley Counties):

- Peter L. Helland, Glasgow
- Yvonne Gaye Laird, Chinook
- Dan Raymond O'Brien, Malta
- Randy Homer Randolph, Havre

The four were among six who applied for the position.

The commission's action followed a 30-day public comment period. Before recommending the nominees to the governor, commission members interviewed the nominees. The governor must fill the position within 30 days of receipt of the nominees from the commission. The person appointed by the governor is subject to Senate confirmation during the 2017 legislative session. If confirmed, the appointee will serve until January 2019.

### Commission to interview 6 for 18th Judicial District judge

The Judicial Nomination Commission on Nov. 14 will interview six applicants for district court judge for the 18th Judicial District (Gallatin County). They are:

- Andrew J. Breuner, Gallatin Gateway
  - Martin David Lambert, Bozeman
  - Rienne Hartman McElyea, Bozeman
  - James Donald McKenna, Bozeman
  - Daniel J. Roth, Bozeman
  - David Langdon Weaver, Bozeman
- The six were among 10 applicants.

Interviews will begin at 8:30 a.m. in the Law and Justice Center, Department 1 Courtroom (Room 301), 615 S.16th Ave. in Bozeman. The interviews and deliberations are open to the public.

### 12 apply for Fifth Judicial District judgeship vacancy

Twelve attorneys have applied for

a judicial vacancy in the Fifth Judicial District (Beaverhead, Jefferson, and Madison counties). They are:

- Luke Berger, Helena
- Victor Bunitsky, Virginia City
- William A. Chambers, Helena
- Matthew Lowery Erekson, Missoula
- Jed Clayton Fitch, Dillon
- Lori Ann Harshbarger, Whitehall
- Mathew James Johnson, Helena
- Alice Suzanne Nellen, Bozeman
- Edmund F. Sheehy, Jr., Butte
- Peter Mark Tomaryn, Dillon
- Valerie D. Wilson, Helena
- Roberta R. Zenker, Helena

The Judicial Nomination Commission is now soliciting public comment on the applicants. You can view the applications at [http://courts.mt.gov/supreme/boards/jud\\_nomination](http://courts.mt.gov/supreme/boards/jud_nomination). The commission will accept comment until 5 p.m. on Dec. 1.

Submit comments to:

Judicial Nomination Commission,  
c/o Lois Menzies, Office of Court  
Administrator, P.O. Box 203005, Helena,  
MT 59620-3005; or [mtsupremecourt@mt.gov](mailto:mtsupremecourt@mt.gov).

## Worden Thane P.C. Welcomes Martin Rogers to the Team

We are happy to announce the addition of Martin Rogers to the law firm of Worden Thane P.C.

Raised in Joliet, Montana, Martin garnered an eclectic set of interests – from storytelling to biology and finally the law. As a lawyer, Martin is both advisor and counselor, priding himself in hard work and providing value to his clients. His practice consists of civil litigation, appeals, and business transactions with a fondness for business litigation and intellectual property. Above all else Martin wants to help clients during times of crisis. He takes the time to understand their problems and goals and they benefit from his complex problem solving skills, leashed tenacity, and attention to detail.



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# **IOLTA/Trust Account & Pro Bono Reporting Due Jan. 9, 2017**

**Reporting period begins Nov. 14, 2016**



Report online by going to **[www.montanabar.org](http://www.montanabar.org)**  
and clicking on the IOLTA Reporting graphic

Every attorney with an active license to practice law in Montana  
must complete an IOLTA Compliance Certification process.

If you are not an active attorney in Montana you do not need to complete the process.

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at [www.montanabar.org](http://www.montanabar.org)**

Sign in using your State Bar of Montana credentials.  
If you don't remember your password or it is your first time signing in  
at the website, click "**Forgot your password?**"



# Longtime law professor Patterson was a 'founding father' of clinical training program, leader in the bar

This past February, the citizens of Montana, and especially the lawyering community, lost a favorite son: Professor David J. Patterson. During his many years at the University of Montana School of Law, Professor Patterson touched the lives, and often the hearts, of literally thousands of lawyers, both in Montana and elsewhere. With a profound sense of gratitude, we offer this small tribute to his memory.

Most of Montana's practicing lawyers received their first introduction to lawyer ethics from Professor Patterson. His teaching career spanned nearly five decades. Among his courses were Professional Responsibility, Municipal Law, Legal Aid, Legislation, Social Legislation, Workers Compensation and Family Law.

Dave J, as many law students referred to him, was a "founding father" in the Law School's unique clinical training program, one of the first practical lawyering skills programs in the country. His supervision and coordination of the Legal Aid course included field placements for students in County Attorney offices, Legal Aid offices, and others. Through his work and effort, the Law School's practice-ready clinical program remains a cornerstone of the Alexander

Blewett III School of Law curriculum.

Professor Patterson was revered not only by his students but by Montana courts and the State Bar of Montana as well. Dave served 20 years on the State Bar's Ethics Committee, along with the Supreme Court's Commission on Practice. Professor Patterson remains one of a handful of law professors nationwide who served on a state bar ethics committee and one of a select few to chair such a committee. He served as general counsel to the Montana Association of Counties for many years.

Throughout his busy career, he continued to serve the community through his advocacy of pro bono work, particularly adoption cases. Catholic Social Services presented Prof. Patterson the Stock Award in 2007. He was one of the first members of the Montana Legal Services Association Board of Trustees on which he served more than 30 years.

We will remember Professor Patterson as an unpretentious man, with a wry wit and unassuming demeanor. Dave was always available to his students, his former students and the State Bar, consistently willing to share his time. Dave and his wife, Jeanne, were longtime active members of the Holy Spirit Episcopal Church in Missoula.

## Montana Lawyer letter to the editor policies

The Montana Lawyer editor will make every effort to print letters submitted by the members of the State Bar of Montana. Letters longer than 250 words require prior approval of the editor.

Letters may be submitted by email to [jmenden@montanabar.org](mailto:jmenden@montanabar.org) or mailed to Montana Lawyer Editor, P.O. Box 577, Helena, MT 59624.

Jeanne, who obtained a paralegal certificate, assisted Dave in his teaching and consulting roles. They were very engaged in the law school community. Jeanne predeceased Dave in Missoula.

Becoming a friend of Dave's was easy and, once a friend, his loyalty was unwavering for life. Both Dave and Jeanne will be missed.

*Professor Klaus Sitte  
Professor Greg Munro  
Retired Faculty, Alexander Blewett III  
School of Law*

## Law School News

### Mills, Williams speak at Clinical Law Conference

Margery Hunter Brown Indian Law Clinic Co-Director Professor Monte Mills' and Land Use & Natural Resources Clinic Co-Director Professor Martha Williams' gave a presentation on "place-based" legal education at the Northwest Clinical Law Conference held at Warm Springs, Oregon, in early October.

Mills and Williams' presentation, "Place as Community: Fostering a 'Sense of Place' in Clinic," challenged participants to foster an understanding of the

meaning of place and to incorporate the value of a sense of place in their clinics and in their teaching.

"We work with students in clinic who seek to forge a legal career in natural resources, environmental, or American Indian law," Professor Mills said. "To be an effective advocate and attorney in each of these fields, a lawyer must at least understand, if not appreciate, the role that place plays in informing both law and policy, as well as the values, beliefs, and culture of his or her client."

Professor Williams added that "such an understanding is particularly

important to effective conservation work and when working with and for Indian tribes and their members, for whom a connection to place is often central to existence. At a broader level, the ability of our students, as future legal leaders, to craft solutions from our common sense of place or at least a common respect for our individual sense of a shared place may ultimately determine their success."

Themed "Clinics and Community," the conference drew two dozen attendees from the Northwest region. The Blewett School of Law will host the 2017 gathering.



# **50 YEARS OF CIVIL LEGAL AID IN MONTANA**

As it marks a major milestone, MLSA looks back at its past successes and challenges, looks ahead to plans for the future



Photo provided

MLSA Board Member Andy Patten, Lt. Gov. Mike Cooney, and Chief Justice Mike McGrath stop to talk at MLSA's 50th Anniversary Celebration Oct. 6 at the Holter Museum of Art in Helena.

## LBJ's 'War on Poverty' gave birth to civil aid model

By Emma O'Neil  
Montana Legal Services Association

On Oct. 6, 2016, Montana Legal Services Association staff members and community supporters came together in Helena to celebrate 50 years of providing civil legal services to low-income Montanans. It was a chance to recognize the hard work and dedication of MLSA's staff members, pro bono attorneys, and supporters as well as to remember why we do what we do. Each year, MLSA provides civil legal services to almost 3,000 people, and those numbers add up. In 50 years, MLSA has made a difference in the lives of hundreds of thousands of Montanans living all across the state. But it has not been without its challenges. So as MLSA's 50th anniversary year draws to a close, let's take a moment to remember both the challenges and the successes of civil legal aid in Montana.

### The Beginnings: LBJ's 'War on Poverty'

On Jan. 8, 1964, President Lyndon B. Johnson announced a lofty goal: to wage war on poverty. Through legislative reforms and policy proposals that aimed at addressing unemployment, increasing access to housing and health care, and reducing economic instability, he sought

"not only to relieve the symptom of poverty, but to cure it and, above all, to prevent it."

It was an ambitious goal. But in 1964, poverty was at the forefront of the nation's mind. With the national poverty rate at 26 percent and close to 40 million people living on less than \$3,000 per year, President Johnson believed that the United States needed to change how it thought about and dealt with issues of poverty.<sup>1</sup> Nothing short of a concentrated, systemic effort would be able to effectively address the root causes of poverty and result in a decrease in the federal poverty rate, he believed.

One part of the War on Poverty was civil legal aid. Added on almost as an afterthought to President Johnson's proposed legislation, civil legal aid funding sought to address the civil legal problems that prevented

**MLSA, next page**

<sup>1</sup> U.S. Bureau of the Census, "Table 6: People Below 125 Percent of Poverty Level and the Near Poor, 1959-2015," Current Population Survey, Annual Social and Economic Supplements, available at [www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-people.html](http://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-people.html) (last revised September 1, 2016); Maurice Isserman, "50 Years Later: Poverty and *The Other America*," *Dissent Magazine* (2012), available at [www.dissent-magazine.org/article/50-years-later-poverty-and-the-other-america](http://www.dissent-magazine.org/article/50-years-later-poverty-and-the-other-america).

MLSA, from previous page

low-income Americans from achieving economic and financial stability. Montana was no exception, and on May 5, 1966, MLSA was founded to provide free civil legal aid to Montanans living in poverty. MLSA quickly opened field offices in Butte, Great Falls, Missoula, Helena, and Billings. By the 1970s, MLSA had opened field offices throughout rural Montana and provided services to clients with 39 attorneys.

In these early years of civil legal aid, relatively high levels of funding with fewer restrictions meant that MLSA attorneys were able to tackle larger legal reforms while also addressing individual civil legal problems. The civil legal aid model in place during the 1960s and 1970s was in large part based on the “law reform” efforts of other organizations such as the NAACP and the ACLU, both of which had had success using litigation to produce changes in existing law. In 1970, the Office of Economic Opportunity, which then oversaw legal aid funding, established a “commitment to redress historic inadequacies in the enforcement of legal rights of poor people caused by lack of access to those institutions that were intended to protect those rights.”<sup>2</sup> This decision placed the idea of “law reform” at the center of legal aid programs across the country.

Legal aid programs throughout the United States began taking on cases that allowed them to make headway in changing laws and policies that negatively impacted the lives of low-income Americans. In this “golden age” of class-action lawsuits and broad-based advocacy, legal aid attorneys won major cases in state and federal courts that helped protect the legal rights of Americans living in poverty. One such case, *Shapiro v. Thompson* (1969), ensured that legal welfare recipients were not arbitrarily denied benefits; another, *Goldberg v. Kelly* (1970), required the government to follow due process when seeking to terminate benefits.<sup>3</sup> In Montana, MLSA pursued a series of cases protecting the

2 Alan W. Houseman and Linda E. Perle, “Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States,” Center for Law and Social Policy (2007), 4; *Id.* at 12.

3 *Id.* at 20; , *Shapiro v. Thompson*, 394 U.S. 638 (1969); *Goldberg v. Kelly*, 397 U.S. 254 (1970).



Photo provided

### Supreme Court Chief Justice Mike McGrath addresses guests at MLSA's 50th Anniversary Celebration.

due process rights of Montanans involuntarily committed to a state mental hospital.<sup>4</sup> Civil legal aid attorneys also appeared before legislatures and administrative agencies to try to pass legislation and make policy changes that recognized the issues faced by people living in poverty, all of which had an impact in increasing the legal protections available to low-income Americans.

Civil legal aid in Montana received a boost in 1974, when Congress established the Legal Services Corporation (LSC), a private organization intended to promote equal access to justice by funding high-quality civil legal aid to low-income Americans. The creation of LSC did not result in any major changes in the day-to-day operations of legal aid programs like MLSA, but it did result in one important change: funding. In 1975 LSC's total budget, with which it funded legal aid programs across the country, was \$71.5 million per year; by 1981, that number had grown to \$321.3 million.<sup>5</sup> Much of this increase in funding went directly toward expanding legal aid programs in previously underserved areas like Montana, where the increase in funding

helped build the capacity of MLSA to serve clients.

Still, there were challenges to MLSA's efforts to expand access to civil legal services and advocate for change for low-income Montanans. In 1971, for instance, MLSA Executive Director Barney Reagan was summoned to District Court to defend against allegations that MLSA solicited clients for contrived litigation. The allegations were later found not to be true. Another bump in the road came in 1972 when MLSA's efforts to develop self-help legal education programs were challenged before ultimately being found ethical in *In re: PROFESSIONAL ETHICS*, 503 P.2d 531 (1972) so long as the education program was "...dignified in tone, does not promote or advertise individual attorneys, does not in and of itself stir up or promote litigation either in individual cases or to promote a cause..."<sup>6</sup> The Montana Supreme Court stated that the indigent need education as to their legal rights to ensure equal protection of the law. MLSA could continue its work to advocate for and educate low-income Montanans, but the message was clear: MLSA's efforts would be closely monitored.

4 *In the Matter of N.B.*, 620 P.2d 1228 (1980); *In the Matter of Ernest Simons*, 698 P.2d 850 (1985).

5 Houseman and Perle, *supra* 2 at 24.

6 *In re: PROFESSIONAL ETHICS*, 503 P.2d 531 (1972).



## Funding cuts create challenges

In the early 1980s, a new challenge came in the form of cuts in LSC funding. Congress cut LSC funding by 25 percent, forcing MLSA to close many of its field offices. Although funding would later increase slightly in the late 1980s and early 1990s, it would never return to its previous levels. In 1996, Congress once again cut LSC funding by 30 percent and imposed a significant number of new restrictions on LSC grantees, including MLSA. These restrictions, which prohibited challenges to welfare law, class-action lawsuits, and requesting or collecting attorney's fees, limited the kinds of advocacy MLSA could take part in. The funding cuts and restrictions also resulted in a 48 percent loss of funding in MLSA's revenue, forcing MLSA to once again close field offices and lay off staff. By 2000, the only MLSA field offices offering walk-in services were in Helena, Butte, Billings, and Missoula.

Despite these difficulties, MLSA attorneys continued to work to help increase access to justice for low-income Montanans. In 1983, for example, MLSA helped protect the constitutional rights of an American Indian client and other similarly situated American Indians in *Kennerly v. US* (1983), where the U.S. Ninth Circuit Court of Appeals reversed a judgment holding that the payment of the client's trust money to the tribe without any hearing violated his due process rights and indicated a breach of the federal government's fiduciary responsibilities.<sup>7</sup> In 1994, MLSA also helped establish the right of a pro bono volunteer attorney or MLSA to seek and accept an award of attorney fees from an adverse party in *In re: Marriage of Malquist* (1994).<sup>8</sup>

Some of MLSA's cases, particularly those that were presented in front of the United States Supreme Court, ultimately had an even larger impact. In 1997, MLSA helped protect the constitutional rights of all American Indians by representing a client in *Babbitt v. Youpee* (1997), a case that resulted in the U.S. Supreme Court striking down a statute allowing American Indian-owned land to revert to tribal ownership without compensation.<sup>9</sup> The case was part of a

<sup>7</sup> *Kennerly v. US*, 721 F.2d 1252 (1983).

<sup>8</sup> *In re: Marriage of Malquist*, 266 Mont. 447 (1994).

<sup>9</sup> *Babbitt v. Youpee*, 519 U.S. 234 (1997).

## MLSA by the numbers



People who contacted MLSA  
for help in 2015



Cases MLSA could take in 2015



Source: Montana Legal Services Association

Montana Lawyer graphic

larger effort to define American Indian sovereignty and land rights, issues which are still being discussed today.

## Innovation in the face of shrinking funds

But resource limitations made it difficult for MLSA to provide services to everyone who needed them. Even at the height of LSC's funding, MLSA had to make choices about who would receive

services and who would not. That challenge only grew as funding for legal services shrank. In an effort to mitigate the impact of these limitations, MLSA began to develop new and innovative ways to reach Montanans in need of legal help.

Many of those new ideas about how to reach clients revolved around technology. In 2001, MLSA was among the first civil

# Supreme Court case summaries from June and July 2016

By Beth Brennan  
Brennan Law & Mediation

## **MARTINELL V. BD. OF COUNTY COMM'RS OF CARBON COUNTY**

2016 MT 136 (June 7, 2016) (Rice, J.; Cotter, J., dissenting) (4-1, affirmed)

**Issue:** (1) Whether the district court erred by holding that the Carbon County commissioners acted arbitrarily in waiving compliance with county resolution zoning requirements; (2) whether the protest provision in the Part 1 zoning statute, § 76-2-101(5), MCA, is unconstitutional; and (3) whether the Carbon County commissioners' reliance on the Part 1 protest provision render their decision unlawful.

**Short Answer:** (1) No; (2) the Court declines to reach this issue; and (3) the Court declines to reach this issue. *Affirmed*

**Facts:** Appellants are a group of private landowners ("Landowners") in Carbon County who initiated a petition to establish a Part 1 zoning district pursuant to § 76-2-101, MCA. Appellees are the board of county commissioners of Carbon County and a group of private landowners who opposed the proposed zoning district ("Neighbors"). Landowners submitted a Part 1 zoning petition to the commission in November 2014. The commission held a public meeting in December 2014, and took public comment. At the meeting, Neighbor Steven Thuesen told the commission that he and other landowners holding more than 50 percent of the acreage in the proposed district intended to protest if the district were established. At the end of the meeting, the commission voted to adopt a resolution of intent to grant the petition based on a finding that the district would serve the public interest and convenience. They determined to reconvene on Jan. 15, 2015, to address protests and take further action.

At the beginning of the January 2015 meeting, the commissioners noted that none of the parties had complied with Resolution 2009-16, which established the approved process for certifying Part 1 zoning petitions in Carbon County. The commission then stated that none of the parties had been prejudiced by the oversight, and both parties benefited from the easier standards applied. The commission found that it would be unduly burdensome to require compliance with the process required by the resolution.

Later in the meeting, the commission reported that landowners holding 60.7% of the total acreage in the proposed district had protested. The commission rescinded its resolution of intent and voted to deny creation of the zoning district based

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

on the formal protests.

Landowners filed an action against the commission, alleging three causes of action: (1) reliance on an unconstitutional provision; (2) arbitrary and capricious reversal of the commission's own finding of public interest; and (3) unconstitutional deprivation of the Landowners' right to a clean and healthful environment. The Commission and Neighbors each moved to dismiss for failure to state a claim.

**Procedural Posture and Holding:** The district court granted the Neighbors' motion to dismiss and dismissed the complaint without prejudice. The district court concluded the commission's waiver of compliance with Resolution 2209-16 was arbitrary. It declined to address the constitutional issues raised in light of the legal insufficiency of the petition and the commission's unwarranted waiver of the requirements of Resolution 2009-16, and stated landowners had the option of filing another petition with the commission in compliance with the resolution. Landowners appeal, and the Supreme Court affirms.

**Reasoning:** (1) Resolution 2009-16 provides the specific procedural and substantive requirements for a valid zoning petition. Neither the county nor Landowners complied with those requirements. "The powers of a self-government unit, unless otherwise specifically provided, are vested in the local government legislative body and may be exercised only by ordinance or resolution." § 7-1-104, MCA. Resolution 2009-16 provides the standards for "Part 1" zoning petitions in Carbon County, and to waive some requirements for one petition may insert uncertainty into the process for future petitioners, future protesters, and the public, and raise due process concerns. The Court affirms the dismissal of the complaint without prejudice, and the district court's determination to not reach constitutional issues until they are properly before it.

**Justice Cotter's Dissent:** While it is true that county officials must comply with governing statutes in making zoning decisions, no parallel authority requires local officials to comply with their own ordinances. Neighbors suffered no prejudice, as shown by the fact they were able to collect protests from landowners holding 60.7 percent of the total affected acreage. More egregiously is the district court and majority's refusal

to resolve the constitutional issues raised by Landowners. The constitutionality of the protest provision was fully briefed in the district court and in this Court. The issue is properly presented and ripe for decision. It is a waste of the parties' and the courts' resources not to resolve this issue now.

### **STATE V. WEBER**

2016 MT 138 (June 7, 2016) (Wheat, J.) (5-0, reversed)

**Issues:** (1) Whether the district court abused its discretion by refusing to admit the inventory list offered by defense counsel; (2) whether the district court abused its discretion by limiting defense counsel's examination of defense a investigator; and (3) whether defense counsel rendered ineffective assistance of counsel by failing to admit the evidence.

**Short Answer:** (1) No; (2) no; and (3) yes. *Reversed and remanded for a new trial*

**Facts:** Weber was a janitor at Sidney High School. He was working the night a tool used to cut metal and steel went missing from the high school shop classroom. The principal later identified Weber on surveillance video in the shop the night the plasma cutter disappeared. After an investigation, the state charged Weber with theft in excess of \$1,500.

Weber's trial counsel had two goals in trial: to deny that Weber took the plasma cutter, and to show the plasma cutter was worth less than \$1,500, which would reduce a conviction to a misdemeanor.

On cross-examination of the shop teacher, Weber's counsel attempted to introduce an inventory spreadsheet as evidence. The state objected for lack of foundation, as the shop teacher had not created the spreadsheet and could not verify that the plasma cutter on the spreadsheet was the same one stolen from the school. Weber's counsel attempted to lay proper foundation, but was unable to get the spreadsheet into evidence. Similarly, he had difficulty getting in evidence that the cutter was worth less than \$1,500 through his investigator.

**Procedural Posture and Holding:** The jury found Weber guilty of felony theft, determining the plasma cutter was worth more than \$1,500. Weber moved for a new trial, the district court denied the motion and Weber was sentenced to four years in prison, all deferred. Weber appeals from the order denying the motion for a new trial and the evidentiary rulings, and also raises claims of ineffective assistance. The Supreme Court reverses and remands for a new trial.

**Reasoning:** (1) The spreadsheet was likely admissible under multiple hearsay exceptions and was clearly admissible as a business record. Weber's counsel was not properly prepared and the district court did not abuse its discretion in denying admission of the list. Counsel failed to lay foundation for the admission of the list before he began asking questions about its content.

(2) Similar to the mistakes made regarding the spreadsheet, counsel's questions jumped directly to the content and final conclusion on value. The district court properly sustained the objections to the investigator's testimony because Weber's counsel failed to establish a foundation for the investigator's conclusions.

(3) The Court concludes for two reasons that there is "no plausible justification" for Weber's counsel's mistakes. First

it concludes trial counsel's failure to gain admission of the inventory list falls outside of the "wide range of reasonable professional assistance" provided for under *Strickland* because he arrived at trial unprepared and uninformed regarding the inventory list and the manner in which to lay foundation for its admission. It next concludes there is no plausible justification for counsel's failure to establish a key element of Weber's defense, the market value of the plasma cutter, when the evidence was available. The first prong of *Strickland* is met. The second *Strickland* prong, prejudice, is also met. Trial counsel's failures prejudiced Weber's right to a fair trial. Weber has demonstrated a reasonable probability that, but for trial counsel's deficient performance, the outcome would have been different.

### **IN THE MATTER OF CC**

2016 MT 174 (July 19, 2016) (Cotter, J.) (5-0, reversed)

**Issue:** Whether the district court erred in failing to provide a detailed statement of facts justifying CC's involuntary commitment.

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

**Facts:** In September 2014, the Lincoln County Attorney petitioned the district court for an order of involuntary commitment, alleging CC suffered from a mental disorder requiring commitment. A mental health professional from the Western Montana Mental Health Center requested the petition be filed, asserting that CC posed an imminent danger to herself and others. The district court issued an order finding probable cause and appointing an attorney, a statutory friend, and a professional person. Upon request by her attorney, CC was examined by a professional person of her own choosing. In October 2014, the district court concluded CC did not suffer from a mental disease and dismissed the petition.

Two weeks later, a police officer was dispatched to CC's home at about 5 a.m. via a 911 call. The officer spoke with CC for several minutes, and while her behavior was unusual and she had a loaded shotgun, the officer concluded no further action was necessary.

Several days later, the officer responded to a call from CC's neighbor, who reported that CC was on her front porch at 4:45 a.m. and that she felt threatened by CC's odd behavior and threatening statements. The officer arrested CC for disorderly conduct. While transporting CC to detention, the officer heard her having a conversation with Satan, in which CC was saying that some unidentified male, presumably the officer, must be killed before CC arrived at the jail. CC was booked, and the officer found ammunition in her pockets but no weapons. The jail staff transported her to the ER for a mental health evaluation, which occurred several hours later. Nancy Huus, who evaluated CC, found CC calm and functional when she examined her.

The next day, the Lincoln County Attorney filed a second petition seeking involuntary commitment due to mental disorder. The district court held a hearing and both the officer and Huus testified. Huus testified that CC displayed symptoms of paranoid schizophrenia, and recommended that CC be committed to the state hospital for observation, assessment, and treatment.

# Employers have limited options to comply with coming FLSA overtime regulations

By Erin MacLean  
Freeman and MacLean, P.C.

In 2014, President Barack Obama directed the Secretary of Labor to update overtime regulations in a presidential memorandum, entitled “Updating and Modernizing Overtime Regulations (memorandum).”<sup>2</sup> That directive culminated in a final rule issued by the United States Department of Labor (DOL) and announced on May 18, 2016 (Final Rule). The memorandum states that the Final Rule is to have the purpose and outcome of “updating the overtime regulations, which will automatically extend overtime pay protections to over 4 million workers within the first year of implementation.”<sup>3</sup> The DOL gave us a heads up that this rulemaking was coming over a year ago, on July 6, 2015, when it issued its Notice of Proposed Rule

Making. At that time, the DOL informed us of what it intended, but many people believed that Congress would take action to stop the implementation of the proposed rule. No such action has occurred to stop or delay the implementation of the Final Rule, which contains a directive that compliance be met for all applicable employees by Dec. 1, 2016.

For those not familiar with the FLSA, it “establishes the minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in

the private sector and in federal, state and local governments.”<sup>4</sup> The Final Rule increases the minimum amount that salaried or exempt workers must be paid and automatically updates the salary threshold every three years, based on wage growth over time.<sup>5</sup> Specifically, beginning Dec. 1, the exempt employee threshold will go from \$455/week to \$913/week (\$47,476 per year).<sup>6</sup> The Final Rule does not make any changes to the duties test for executive, administrative and professional employees.<sup>7</sup> Neither does it address non-exempt employment or overtime pay for non-exempt employees. The DOL has issued a “fact

## About this article

This article was initiated by the Health Care Law Section of the State Bar of Montana. It is intended to provide to bar members Fair Labor Standards Act (FLSA)<sup>1</sup> updates and information related to overtime pay for exempt employees that will affect law firms and their business clients, in addition to affecting many Montana-based health care providers. The Section’s Council meets monthly to keep Section members apprised of developments in laws and policy decisions that affect health care providers. The Section also develops and hosts CLE events on health care law-related subjects and initiates potential Montana Lawyer articles written by Section members.

sheet” to assist with compliance with the Final Rule, entitled “Fact Sheet: Final Rule to Update the Regulations Defining and Delimiting the Exemption for Executive, Administrative, and Professional Employees.”<sup>8</sup> Attorneys may find it helpful to refer to this “fact sheet” when discussing the Final Rule and its implementation with clients.

The Montana Department of Labor and Industry (DOLI) enforces the FLSA, along with applicable Montana specific wage and hour laws, through its Employment Relations Division, Wage and Hour Unit.<sup>9</sup> According to the DOL, implementation of the Final Rule will affect 11,000 Montana employees.<sup>10</sup> Due to the significant number of individuals expected to be affected by the Final Rule, Montana employers should be aware that noncompliance with the Final Rule could result in complaints filed with the DOLI and could result in fines levied against employers by the DOLI.

Employers who are aware of the Final Rule are currently trying to determine the best way for their businesses to address the required changes for affected exempt employees, prior to December’s implementation date. Truth be told, their options are limited. However, in its “Labor Blog” entry, from May 18, 2016, the DOL addresses a nationwide “misperception” that the only way to comply with the Final Rule for white-collar employees who earn less than \$47,476 is to “change them from salaried to hourly employees.”<sup>11</sup> In the blog, Dr. David Weil, the administrator of DOL’s Wage and Hour Division, asserts that employers have a “wide range of options” in responding to the changes implemented in the Final Rule by the Dec. 1, implementation date.<sup>12</sup> Those options are specified by Dr. Weil as follows:



## Working Overtime

Barring any last-minute congressional action, a U.S. Department of Labor update of overtime regulations will take effect Dec. 1. According to the DOL, the Final Rule will affect 11,000 Montana employees, and noncompliance could result in fines against employers.



■ **Raise salary and keep the employee exempt from overtime:** Employers may choose to raise the salaries of employees to at or above the salary level to maintain their exempt status, if those employees meet the duties test (that is, the duties are truly those of an executive, administrative or professional employee). This option works for employees who have salaries close to the new salary level and regularly work overtime.

■ **Pay overtime in addition to the employee's current salary when necessary:** Employers also can continue to pay their newly overtime-eligible employees the same salary, and pay them overtime whenever they work more than 40 hours in a week. This approach works for employees who work 40 hours or fewer in a typical workweek, but have occasional spikes that require overtime for which employers can plan and budget the extra pay during those periods. Remember that there is no requirement to convert employees from salaried to hourly in order to calculate their overtime pay!

■ **Evaluate and realign hours and staff workload:** Employers can ensure that workload distribution, time and staffing levels are all managed appropriately for their white-collar workers who earn below the salary threshold. For example, employers may hire additional workers.<sup>13</sup>

Dr. Weil also notes that the Final Rule broadens the definition of salary basis to allow non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary test requirement.<sup>14</sup> He also reminds employers that the FLSA does not affect flexible work arrangements or the way in which employee related documentation is kept, and he asserts that the Final Rule “renews an important promise of the Fair Labor Standards Act for millions of white-collar workers: A long day’s work should lead to a fair day’s pay.”<sup>15</sup> Although the options referenced by Dr. Weil do not appear to be as wide in range as he asserts, these are the options for employers suggested by the DOL.<sup>16</sup>

Many business organizations are opposed to the changes contained in the Final Rule, but, some entities, including the Economic Policy Institute, support the changes, asserting that the update will work to help members of the middle class and lower-income families who will be affected by the changes.<sup>17</sup> The only exemption for the implementation date that the DOL issued is “a limited non-enforcement policy for providers of Medicaid-funded services for individuals with intellectual or developmental disabilities in residential homes and facilities with 15 or fewer beds.”<sup>18</sup> The DOL has clarified that the applicable non-enforcement period for this limited group of businesses will last from Dec. 1, 2016, to March 17, 2019.<sup>19</sup> For all other business entities in the United States, they are required to comply with the Final Rule by Dec. 1, 2016.

Some action has been taken toward the goal delaying the implementation of the Final Rule and challenging its legality. In September 2016, the United States House Rules Committee debated a Republican-supported bill intended to delay the implementation of the changes contained in the Final Rule by six months. Proponents of the bill argued that businesses were not given enough time to adjust those changes. Also, over 50 business groups, including the U.S. and Texas Chambers of Commerce,<sup>20</sup> and a coalition of 21 states have filed legal

complaints challenging the rule. The lawsuits challenge the legality of the Obama administration’s promulgation of the Final Rule under the current statutory scheme, and the U.S. Chamber of Commerce argues that the DOL exceeded its statutory authority in issuing the regulation by violating the Administrative Procedure Act.<sup>21</sup> However, none of these actions has resulted, as of the date of the submission of this article, in delaying the implementation of the Final Rule. Without further congressional or court action, businesses will have no way to avoid the requirement that they comply with the Final Rule as of Dec. 1.

**Erin MacLean of Freeman and MacLean, P.C., in Helena is chair of the State Bar of Montana’s Health Care Law Section.**

## Endnotes

- 1 Pub.L. 75–718, ch. 676, 52 Stat. 1060, June 25, 1938, 29 U.S.C. ch. 8
- 2 See “Presidential Memorandum – Updating and Modernizing Overtime Regulations”, March 13, 2014, Memorandum For the Secretary of Labor (<https://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations>)
- 3 See Final Rule, entitled “Overtime”, from the United States Department of Labor, Wage and Hour Division (WHD), <https://www.dol.gov/whd/overtime/final2016/>
- 4 See “Compliance Assistance – Wages and the Fair Labor Standards Act (FLSA)” (<https://www.dol.gov/whd/flsa/>)
- 5 See Final Rule, entitled “Overtime”, from the United States Department of Labor, Wage and Hour Division (WHD), <https://www.dol.gov/whd/overtime/final2016/>
- 6 Id.
- 7 See and overview of FLSA exemptions in “Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA),” revised July 2008, ([https://www.dol.gov/whd/overtime/fs17a\\_overview.pdf](https://www.dol.gov/whd/overtime/fs17a_overview.pdf))
- 8 See “Fact Sheet: Final Rule to Update the Regulations Defining and Delimiting the Exemption For Executive, Administrative, and Professional Employees (<https://www.dol.gov/whd/overtime/final2016/overtime-factsheet.htm>)
- 9 See the Montana Department of Labor and Standards website for wage and hour law information at: <http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act>
- 10 See <https://www.dol.gov/featured/overtime/>
- 11 See “Plenty of Options with the New Overtime Rule,” May 18, 2016, by David Weil, Filed in the U.S. Department of Labor Blog, Promoting and Protecting Opportunity (<https://blog.dol.gov/2016/05/18/plenty-of-options-with-new-overtime-rule/>)
- 12 Id.
- 13 Id.
- 14 Id.
- 15 Id.
- 16 Id.
- 17 See “The New Overtime Rule Will Directly Benefit 12.5 Million Working People, Who They Are and Where they Live,” Report by Ross Eisenbrey and Will Kimball, May 17, 2016 (<http://www.epi.org/publication/who-benefits-from-new-overtime-threshold/>)
- 18 See “Time Limited Non-Enforcement Policy for a Subset of Medicaid-Funded Providers,” 1.Q., (<https://www.dol.gov/whd/overtime/final2016/nonenforcement-faq.htm>)
- 19 Id.
- 20 See <http://www.chamberlitigation.com/content/plano-chamber-commerce-texas-association-business-us-chamber-commerce-et-al-v-us-department-for-information-on-the-complaints-filed-on-the-Final-Rule>
- 21 Id.

# What lawyers should know about constructive receipt, structured fees

By Robert W. Wood

Constructive receipt is a fundamental tax concept that can have a broad and frightening impact. According to the IRS, you have income for tax purposes when you have an unqualified, vested right to receive it. Asking for payment later doesn't change that.<sup>1</sup> The idea is to prevent taxpayers from deliberately manipulating their income.

The classic example is a bonus check available in December, but which the employee asks to hold until Jan. 1. Normal cash accounting suggests that the bonus is not income until paid. But the employer *tried* to pay in December, and made the check available. That makes it income in December, even though it is not collected until January.

Constructive receipt is an issue only for cash method taxpayers like individuals. Accrual basis taxpayers (like most large corporations) have constructive receipt built into the accrual method. The accrual method says you have income when all events occur that fix your right, if the amount can be determined with reasonable accuracy.<sup>2</sup>

Thus, in accrual accounting, you book income when you send out an invoice, not when you collect it.<sup>3</sup> But for cash method taxpayers, the IRS worries about "pay me later" shenanigans. The tax regulations say that a taxpayer has constructive receipt when income is credited to the taxpayer's account, set apart, or otherwise made available to be drawn upon.<sup>4</sup>

On the other hand, there is no constructive receipt if your control is subject to substantial limitations or restrictions. There is considerable discussion of what substantial limitations or restrictions prevent constructive receipt. For example, what if the employer cuts the check on Dec. 31 but tells the employee he can either drive 60 miles to pick it up, or he'll mail it?

The employer may book this as a December payment (and issue a Form W-2 or 1099 that way). But the recipient may have a legitimate position that it isn't income until received. Such mismatches occur frequently, and there's little to suggest there's manipulation going on.

## Legal Rights

Whether they know it or not, lawyers deal with constructive receipt issues all the time. Suppose a client agrees orally to settle a case in December, but specifies that the money is to be paid in January. In which year is the amount taxable? The mere fact that

the client could have agreed to take the settlement in Year 1 does not mean the client has constructive receipt.

The client is free to condition his agreement (and the execution of a settlement agreement) on the payment in Year 2. The key will be what the settlement says before it is signed. If you sign the settlement agreement and condition the settlement on payment next year, there is no constructive receipt.

In much the same way, you are free to sell your house, but to insist on receiving installment payments, even though the buyer is willing to pay cash. However, if your purchase agreement specifies you are to receive cash, it is then too late to change the deal and say you want payments over time. The legal rights in the documents are important.

If a case settles and funds are paid to the plaintiff's lawyer trust account, it is usually too late to structure the plaintiff's payments. Even though the plaintiff may not have *actually* received the money, his lawyer has. For tax purposes, a lawyer is the agent of his client, so there is constructive (if not actual) receipt.

Suppose that Larry Lawyer and Claudia Client have a contingent fee agreement calling for Larry to represent Claudia in a contract dispute. If Larry succeeds and collects, the fee agreement provides that Claudia receives two-thirds and Larry retains one-third as his fee. Before effecting the one-third/two-thirds split, however, costs are to be deducted from the gross recovery.

Suppose that Larry and Claudia succeed in recovering \$1 million in September 2016. Before receiving that money, however, Larry and Claudia become embroiled in a dispute over the costs (\$50,000) and the appropriate fee. Larry and Claudia agree that \$25,000 of costs should first be deducted. However, Claudia claims that the other \$25,000 in costs is unreasonable and should be borne solely by Larry.

Furthermore, Claudia asserts that a one-third fee is unreasonable, and that the most she is willing to pay is 20 percent as a legal fee. Larry and Claudia try to resolve their differences but cannot do so by the end of 2016. In January 2017, the \$1 million remains in Larry's law firm trust account. What income must Larry and Claudia report in 2016?

## Undisputed amounts

Arguably, there is a great deal that is *not* disputed. Larry and Claudia appear to have agreed that \$25,000 in costs can be recouped, and that Larry is entitled to at least a 20 percent fee. Of course, it is not yet clear if that 20 percent fee should be computed on \$950,000, or on \$975,000.

However, Larry is entitled to at least \$25,000 in costs and to at least a \$190,000 fee, for total income of \$215,000. Perhaps that is undisputed. Looking at Claudia, it is not yet clear how much she

1 *Childs v. Comm'r*, 103 T.C. 634, 654 (1994), *aff'd*, 89 F.3d 856 (11th Cir. 1996).

2 Treas. Reg. §§ 1.446-1(c)(1)(ii), 1.451-1(a).

3 Rev. Rul. 84-31, 1984-1 C.B. 127.

4 See Treas. Reg. § 1.451-2.

will net from the case. Yet the minimum Claudia will get would be by applying the provisions in the fee agreement.

Thus, taking the \$50,000 as costs, Claudia should receive two-thirds of \$950,000, or \$633,270. Even under Larry's reading of the fee agreement, this is the amount to which Claudia is entitled. She might receive more if her arguments prevail.

How much should Larry and Claudia report as income? You might say that you don't have enough information to make that decision, and you would probably be right. After all, you don't really know whether Larry and Claudia have agreed that partial distributions can be made, or if they are taking the position that they won't agree to *anything* unless the entire matter is resolved.

However, that does not appear to be so. Indeed, the positions of the parties seem clear that each is already entitled to *some* money. That gives rise to income, regardless of whether they actually receive the cash. If they have a legal right to the money and could withdraw it, that is constructive receipt, if not actual receipt.

Any talk of withdrawal should invite discussion of restrictions and partial agreements. For example, what if you add to the fact pattern that, while these are the negotiating positions of Larry and Claudia, neither of them will agree to *any* distributions, treating the entire amount as disputed. Does that mean neither has any income in 2016? Does it matter what documents are prepared?

The answer to the latter question is surely yes. Good documentation always goes a long way to helping to achieve tax goals. For example, an escrow agreement acknowledging that all of the money is in dispute and prohibiting any withdrawal until the parties agree, might contraindicate income.

If there is a document each party signs agreeing that they disagree and that no party can withdraw any amount until they both agree in writing, that should be pretty convincing. Even so, I am not sure it is *dispositive* to the IRS. It may be hard to argue with the fact that the parties' positions speak for themselves, and that some portions of the funds are undisputed.

Besides, there is a strong sentiment that a lawyer is merely the client's agent. Presumptively, settlement monies in the hands of the lawyer are already received by the client for tax purposes. Let's also consider the defendant in this example.

The defendant paid the \$1 million in 2016. Depending on the nature of the payment, it seems reasonable to assume that the defendant will deduct it in 2016. It will likely issue one or more IRS Forms 1099 too, probably to both Larry and Claudia in the full amount of \$1 million each. How will Larry and Claudia treat those Forms 1099?

There may be a variety of possibilities. Assuming both Larry and Claudia argue the *entire* amount is in dispute, one approach might be to footnote Form 1040, line 21 (the "other income" line), showing the \$1 million payment. Then, they might subtract the \$1 million payment as disputed and in escrow and therefore not income, netting zero on line 21. There is probably no perfect way to do this.

## Escrows and qualified settlement funds

This also may invite questions about the nature of the escrow itself. Is it an escrow, or could it be a qualified settlement fund (sometimes called a QSF or a 468B trust)? If the fund is a QSF,

the defendant would be entitled to its tax deduction, and yet neither Larry nor Claudia would be taxed on the fund's earnings. The fund itself would be taxed, but only on the earnings on the \$1 million, not the \$1 million itself.

A QSF is typically established by a court order and remains subject to the court's continuing jurisdiction.<sup>5</sup> In our example, there is no court supervision, so it seems unlikely that the escrow could be a QSF. If the fund is merely an escrow, either Larry or Claudia should be taxable on the earnings in the fund, but not on the principal until the dispute is resolved and the disputed amount is distributed.

Unlike a QSF, escrow accounts are typically not separately taxable, so one of the parties must be taxable on the earnings.<sup>6</sup> Normally, the escrow's earnings would be taxable to the *beneficial owner* of the funds held in escrow.<sup>7</sup> Either Larry or Claudia (or both) could be viewed as beneficial owners. Therefore, an agreement specifying who will be taxed on the disputed funds while held in escrow can be wise.

## Structured legal fees too

Contingent fee lawyers who are about to receive a contingent fee are allowed to "structure" their fees over time. But if they receive the funds in their trust account it is too late to structure. In fact, it is too late to structure fees if the settlement agreement is signed and the fees are payable.

A lawyer who wants to structure legal fees must put the documents in place before the settlement agreement is signed. Just as in the case of the plaintiff discussed above, legal rights are at stake. In general, a contingent fee lawyer is entitled to condition his or her agreement on a payment over time.

In reality, of course, it is the client of the plaintiff's lawyer that has the legal rights and is signing the settlement agreement. That is why a lawyer wanting to structure fees must build that concept into the settlement agreement. Usually, legal fee structures are not installment payments by the defendant.

Rather, the settlement agreement will specify the stream of payments, and call for the contingent fee to be paid to a third party that makes those arrangements. As you might expect, it is important for each element of the legal fee structure to be done carefully, to avoid the lawyer being taxed before he or she receives installments. But the entire concept of structured legal fees must begin with being mindful of the constructive receipt doctrine.

Understandably, cash basis taxpayers do not want to be taxed on monies before they actually receive them. However, the constructive receipt doctrine can upset this expectation. Constructive receipt can often be avoided through careful planning, and proper documentation.

## Qualified settlement funds

The rules of constructive receipt seem to be thrown out the window when using this important and innovative settlement device. A QSF is typically set up as a case is being resolved. The

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<sup>5</sup> Treas. Reg. § 1.468B-1(c)(1).

<sup>6</sup> See Treas. Reg. §§ 1.468B-6, 1.468B-7.

<sup>7</sup> Rev. Rul. 77-85, 1977-1 C.B. 12 (IRB 1977), *modified on other grounds*, IRS Announcement 77-102 (1977).



Attorneys Brandi Ries, left, and Robin Turner, center, are shown receiving the Montana Board of Crime Control's 2016 Innovative Community Improvement Award from Deb Matteucci, executive director of the Montana Board of Crime Control.

## Ries, Turner honored for leadership on domestic violence, sexual assault issues

**By Montana Lawyer Staff**

In September, Brandi Ries and Robin Turner were honored with the Montana Board of Crime Control's 2016 Community Improvement Award.

Ries and Turner, who are co-chairs of the State Bar's Justice Initiatives Committee, received the award for their leadership on domestic violence and sexual assault issues.

This included a series of articles on domestic violence in the Montana Lawyer, to which Ries and Turner each contributed articles, and developing a statewide, daylong continuing legal education program.

Patty Fain, the Montana Supreme Court statewide pro bono coordinator, nominated Ries and Turner for the award.

"Brandi and Robin spent countless hours leading our

Committee, preparing materials, arranging speakers and offering their own expertise and passion for the rights of victims all across Montana and at every opportunity," Fain said in her nomination.

Turner and Ries have both been advocates on domestic violence and sexual assault issues throughout their careers.

Ries' Missoula practice areas include family law, orders of protection, estates, and probate. She has also been an adjunct professor at the Alexander Blewett III School of Law at the University of Montana since 2015, teaching domestic violence theory and legal practices. She won the 2014 Pro Bono Attorney of the Year Award from the Missoula Family Violence Council.

Turner is the public policy and legal director of the Montana Coalition Against Domestic and Sexual Violence in Helena, where

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# Expert advice on using expert witnesses

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

In the summer of 2016, author Simek had the pleasure of joining a Pennsylvania Bar Association panel made up of both testifying experts and judges to explore how to find and effectively use a good expert.

It seemed to author Nelson, sitting in the audience, that she was hearing a series of rapid-fire tips so she endeavored to jot them down, in no particular order, to offer the collective wisdom of the panel. Here are some of the many valuable tips she heard:

- It's important to find an expert who will be cool under fire, as they must survive cross-examination with their credibility intact – this is the most dangerous moment in litigation.

- It can be helpful to watch a video deposition of the expert (if available) to see how cool under the fire the expert is – or is not.

- It is important that the expert's testimony be concise and to the point.

- The expert should avoid technical or obtuse language.

- Body language is always significant – no smirking or looking sarcastic.

- A great trait for an expert to have is to use analogies that summon up pictures for a jury, e.g. "It was the size of a soccer ball" or "It weighed as much as a 5 pound bag of sugar."

- Lawyers need to train their experts – many don't testify all the time.

- Lawyers should comprehensively know their expert's CV.

- Make sure the expert knows it is OK to say "I don't know."

- Make sure the expert knows it ok to pause after a question is asked to collect his/her thoughts.

- Encourage the expert to tell a story and encourage the expert to think of his/her role as a teacher.

- Urge the expert to use TV and sports analogies likely to be familiar to a jury.

- If you want your expert to treat you with respect, you must do the same – make sure the expert is promptly advised of case developments, especially those that impact the expert's calendar.

- Don't assume the expert is always available to you – the expert has other clients to manage too.

- Don't write the expert's affidavit or report – a good expert will not sign an affidavit or report that does not reflect the expert's opinion. You don't want "an expert for hire" – that always shows and hurts your case.

- It is OK to ask if your expert could phrase something differently. But if the expert is uncomfortable with the change, try to understand why – a good expert is probably right and being careful to stick to the strict truth.

- Research your experts on social media to avoid surprises. There are some who are quite unprofessional on social media – and the other side will find anything that reflects badly on the expert.

- Be familiar with their writings (books and articles and, if



they are speakers, what they speak on – the other side may well cite the expert's own words in a cross-examination).

- Watch out for experts who just want the business and will tell you anything – make sure the expert's CV matches your need for testimony. Mismatches are common – and never turn out well.

- Clearly establish your expert's credentials in court.

- Be familiar with your expert's prior testimony in cases.

- Make sure the expert is properly attired – professional and not casual.

- Make sure you rehearse with your expert. Make questions easy to understand – there have been cases where there were so many double negatives that the expert had no idea what to answer.

- Follow the wise advice of your expert: e.g. if your expert has said "avoid asking about whether a computer virus could have resulted in child pornography being downloaded" – then avoid it – your expert is trying to keep you away from a cesspool, so try not to jump in with both feet.

- Provide all the relevant information you have to the expert – it won't go well if the expert is confronted on the stand with information you had and didn't share – happens all the time.

- If your case involves technology, don't assume you know how technology works – knowing a little bit can be more dangerous than knowing nothing

Understand that this is a mish-mosh of tips, colorfully presented by judges and experts who had been on the front lines and had the stories to prove it. The tips are by no means comprehensive, but they sure offered a lot of practical and often overlooked advice!

***The authors are the president and vice president of Sensei Enterprises, Inc., a legal technology, information security and digital forensics firm based in Fairfax, Va. Contact information: 703-359-0700; [www.senseient.com](http://www.senseient.com)***



The State Law Library in Helena recently welcomed Director Sarah McClain and Reference Librarian Damon Martin.

## **New director, reference librarian join State Law Library**

**By Joe Menden**

The State Law Library of Montana in Helena recently welcomed two new faces: Sarah McClain began work as the Director of the Law Library in late September. Damon Martin began as Reference Librarian in late July.

Before starting at the law library, McClain practiced in the Portland, Oregon, area, most recently as an attorney at the Lake Oswego firm Marandas Sinlapasai, P.C. Before that, she was an attorney and program manager at Catholic Charities Immigration Legal Services. She earned her law degree from Willamette University College of Law in Salem, Oregon, in 2007.

The job is a homecoming for McClain, a native Montanan who grew up in Missoula and Helena. Her sister now lives in Helena, and her parents are planning to move back, reuniting her entire immediate family.

She was drawn to the director job because of its emphasis on complex research and analysis. She also appreciated the library's mission to increase outreach and accessibility to rural areas, saying she gained a love for rural areas during her time working for

Catholic Charities.

She said that as library director she will work with the Supreme Court's Access to Justice Commission evaluating forms for self-represented litigants. She also hopes to improve the library's contact senior citizens, schools and the state's incarcerated population.

McClain replaces Lisa Mecklenberg Jackson, who left earlier this year to become executive director of the Montana Innocence Project.

Martin replaces longtime reference librarian Susan Lupton, who retired in late 2015.

Martin practiced in Lake County prior to joining the Law Library. He said his previous experience working in psychiatric group homes sparked an interest in family law and led him to pursue a law degree.

Martin said the library has a wide variety of resources that many attorneys find helpful. The library has Westlaw access, which is appealing to attorneys who prefer that legal research service but don't have access to it in their practice, and a number of secondary resources that are great for newer attorneys.





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# Exercise caution to prevent your good deeds from being punished

**By Mark Bassingthwaite**  
**ALPS Risk Manager**

As a risk manager, I have had numerous opportunities to ask attorneys who have been sued for malpractice “What was the learning?” One common response has been this. “There is a bit of truth in the old saying that no good deed goes unpunished.” While the stories behind such responses vary, there are common insights I felt were worth passing along.

Often the experience ended up being a reminder that even if you simply agree to do a favor for or share a little free legal advice with someone, whether you want it to be the case or not, that person is a client. Never forget that the creation of an attorney/client relationship isn’t about what your intent was. It’s more about how the individual interacting with you responded and was their response reasonable or foreseeable under the circumstances. There is little middle ground here. If you agree to do a little legal work as a favor or agree to answer a brief legal question, understand that you may very well be held accountable for the eventual outcome even if you didn’t have all the facts. If this doesn’t work for you, then either say no, clearly document in writing the nature of your limited role, or document that the advice shared was based upon a limited amount of information and as such should not be relied upon. Just who are the types of people to be concerned about with this? From my discussions with attorneys over the years the list certainly includes friends, a friend or family member of a good client, neighbors, extended family members, a member of the congregation of the church you attend, a stranger down on their luck, and the list goes on.

Another comment frequently shared is this: “I knew I shouldn’t have agreed to take that client on.” I am repeatedly told that if your gut (or a staff member) tells you caution is in order, listen to that and say no. The good news is that there is no rule that says you must agree to accept every client who walks in the door or that you must answer every caller’s question. If a prospective client behaves irrationally, has an agenda, is confrontational, has needs (or deadlines) that you are unable to meet, or can’t afford your fee, politely decline the matter. The alternative of agreeing to take the matter on often results in a horrible headache. It isn’t worth it because time after time I am told that these situations not only evolved into a collection problem, but also resulted in the filing of a disciplinary complaint and/or a malpractice claim solely because the desired outcome never materialized.

The above missteps are often compounded with a related misstep that is perhaps best described as the unintentional

pushing of one’s comfort zone. Out of a genuine desire to help someone, the attorney agreed to provide assistance in an area of law not regularly practiced. The attorneys who have shared these kinds of stories often state that they started these “good deed” but problematic representations with the best of intentions. Then they’ll finally admit that procrastination and “real client” matters eventually got in the way of their coming up to speed or following through. Here’s how I see it. Don’t dabble if you are not prepared to follow through in providing competent representation. Giving advice in a vacuum or viewing the request as a favor, as opposed to real legal work, can be a serious mistake. The standard of care isn’t lower because it’s a favor or you’re not getting paid. And never forget this: Friends and family do sue. If you wouldn’t be comfortable handling the work for a stranger, you are not qualified to do it for a friend or family member.

This “comfort zone” problem doesn’t just apply to an attorney’s legal skill set. Interpersonal skills can come into play as well. For example, if an attorney accepts a confrontational individual as a client but at the same time lacks the skill set to effectively work with such clients, this attorney is walking into a problem of his own creation. Understand that no one gets along well with everyone. Sometimes two individuals simply are not going to be able to work well together. When thinking about accepting a new matter, consider the individual in addition to their matter and accept the fact that there are going to be certain types of individuals with whom you will not work well. That’s OK. Learn to identify potential problem situations and develop a respectful way to say no when these situations arise.

In spite of a recognition that perhaps a “no” is called for, from time to time attorneys will continue to make the decision to accept a problem client and they will try to justify the decision by expressing a desire to help someone out, to do a good deed. Given this reality, the final advice that I can share if you do find yourself feeling similarly is this: Document everything. For example, based upon faith and trust in personal relationships with family friends or extended family members, it is easy to assume everyone is on the same page. Don’t get overly comfortable here. Again, friends and family do sue. While the normal course of documentation, such as fee agreements, may not be deemed necessary, thorough documentation of the decision-making process certainly is. Similarly, confrontational or demanding clients are not to be avoided just because they are difficult to interact with. Here one must be extra diligent in keeping these clients apprised of the status of their matter

The district court held an adjudicatory hearing a few days later. Huus, the officer, the neighbor, the neighbor's sister, and CC testified.

**Procedural Posture and Holding:** At the conclusion of the hearing, the district court orally concluded that CC should be involuntarily committed to the Montana State Hospital for 90 days. The state presented the court with a prepared order, which the court signed, and which included findings and conclusions. After the hearing, CC moved to amend the written order to conform to the oral pronouncement, noting the oral pronouncement did not include a finding of need nor a hospital authorization for involuntary medication. The district court denied the motion. CC appeals, and the Supreme Court reverses.

**Reasoning:** Section 53-21-127(8)(a) requires a district court to make a detailed statement of facts to support an involuntary commitment order. The state urges the court to apply the doctrine of implied findings, which the Court has occasionally done in involuntary commitment cases. It declines to do so here, as that would require expanding the doctrine to affirm a commitment order "that is beyond 'bare-bones' and 'spartan.'" ¶ 23.

### REINLASODER V. CITY OF COLSTRIP

2016 MT 175 (July 19, 2016) (Rice, J.) (5-0, reversed)

**Issue:** Whether the district court erred in denying Colstrip's motion for judgment as a matter of law when Reinlasoder did not dispute that he had sexually harassed an employee.

**Short Answer:** Yes. *Reversed and remanded for entry of judgment for Colstrip*

**Facts:** Colstrip discharged Reinlasoder from his position as Colstrip's chief of police in May 2012, a position he had held since May 2004. Reinlasoder sued Colstrip for wrongful discharge, and Colstrip answered that it had fired him for good cause. Colstrip alleged numerous instances of misconduct, including pornographic emails, lying on his job application, insubordinate conduct, intimidating a female dispatcher, and sexually harassing a female dispatcher.

At trial, Reinlasoder introduced a letter from a female Colstrip dispatcher to the mayor, complaining about sexually inappropriate statements Reinlasoder had made to her. Kroll testified to the incident as stated in the letter, although on cross she admitted it happened a week earlier than the date she gave in the letter. According to her testimony, Reinlasoder invited her to view pornography with him because he thought she looked like a "freaky kind of girl that would like porn." Reinlasoder introduced a witness statement corroborating the incident as described by the dispatcher, and the witness testified. Finally, a video deposition of an officer who witnessed the incident was also introduced, and was consistent with the other testimony. Reinlasoder did not dispute that the incident occurred, saying only that he could not recall it.

**Procedural Posture and Holding:** Colstrip moved for judgment as a matter of law at the close of Reinlasoder's case, arguing his undisputed sexual harassment constituted good cause for termination as a matter of law. The district court denied the motion, and the jury returned a verdict for Reinlasoder, awarding him \$300,000 in damages. Colstrip renewed its motion for

JMOL, and the district court again denied it. Colstrip appeals, and the Supreme Court reverses.

**Reasoning:** An employer has good cause to terminate an employee when it has a legitimate business reason for the termination. An employer is given substantial discretion when the discharged employee is in a managerial position, as Reinlasoder was. The female dispatcher's testimony at trial, corroborated by two officers in the department, established that she was sexually harassed. His testimony that he could not recall the event is insufficient to create a genuine issue of material fact. Nor is the dispatcher's incorrect statement of the exact date sufficient to create an issue of material fact. The crucial material fact was whether Reinlasoder made the comments to the dispatcher. He did not dispute that he did.

### IN RE THE MARRIAGE OF WAGENMAN

2016 MT 176 (July 19, 2016) (Wheat, J.) (5-0, reversed)

**Issue:** (1) Whether the district court erred in denying Tammy's Rule 60(b) motion to amend the final decree of dissolution, and (2) whether the district court erred in awarding attorney's fees to Matt.

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

**Facts:** Matt and Tammy Wagenman married in 1996, and jointly petitioned for dissolution in 2012, each appearing pro se. They have no children, and used the self-help dissolution forms approved by the Court. In the "real property" section of the petition, they indicated they own their marital home in Shepherd. In another section of the petition, they stated the real property should be distributed as described in a property settlement agreement, signed and dated Sept. 1, 2011, which details the distribution of the marital assets and debts. The real property division allowed Matt to stay in the marital home as long as he made timely mortgage payments, and required him to refinance the home within one year and remove Tammy from the mortgage or the property would be sold. Upon sale or refinancing, each party would receive 50 percent of the equity. The petition stated the home was valued at \$250,000 with a loan balance of \$112,000.

Matt and Tammy appeared for a hearing, and the district court granted the dissolution after a two-minute hearing. The final decree did not enter the property and debt distribution from Exhibit A and did not incorporate Exhibit A. Instead, the court distributed the marital home to Matt and entered a mortgage debt of \$180,000 to Matt, an amount unsubstantiated by the record.

Over the next two years, the parties disentangled their assets. Because Matt had neither sold the house nor paid Tammy any equity two years after the dissolution, Tammy hired an attorney in May 2014, who sent a letter to Matt stating she was going to proceed with the property distribution under the decree. Matt hired an attorney in August 2014, at which time both parties discovered the district court had failed to incorporate Exhibit A into the decree.

At that point, Matt asked Tammy to file a quitclaim deed pursuant to the decree. In September 2014, Matt moved to compel the quitclaim deed from Tammy, and requested attorney fees incurred in bringing the motion. Tammy responded by

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by thoroughly documenting all interactions and decisions to include keeping all substantive email that has been exchanged. Why? Because if at some later point you become involved in the classic attorney's word versus client's word battle, absent supporting documentation, you will likely lose that one. Now think about it, if any client is going to start the "he said, she said" battle, it's going to be the confrontational or demanding client. Don't get caught off guard.

My intention in writing this article is not to try to convince you to never do a good deed for someone else. I will readily acknowledge that many, if not most, good deeds turn out just

fine. Someone who really needed the assistance of an attorney received that valuable help and that's a good thing; but as the above demonstrates, sometimes things do spin out of control in unanticipated ways and perhaps the insights shared may help prevent something similar from happening to you. I have no problem with you making a decision to go ahead and do a good deed as long as you remember to be intentional and smart about it.

***ALPS Risk Manager Mark Bassingthwaite, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology.***

## **Summaries**, from previous page

filing a Rule 60(b)(6) motion to amend to incorporate Exhibit A as originally requested.

**Procedural Posture and Holding:** The district court held a hearing in October 2014. Matt testified that Tammy had forged his name on the dissolution documents, and he had not signed them. After supplemental briefing, the district court denied Tammy's motion and granted Matt's, and awarded Matt his attorney fees. Tammy appeals and the Supreme Court reverses.

**Reasoning:** (1) The district court applied the Essex test to determine whether Tammy had alleged circumstances extraordinary enough to support a Rule 60(b)(6) motion, and found she had not. The court reasoned that Tammy was aware of the court's decree and that waiting two and a half years was not reasonable, concluding she was not blameless.

The terms of a separation agreement are binding on a district court unless the court finds the agreement unconscionable. Here, the district court found in the final decree that the petitioners' proposed division of property and debt was equitable.

In filling out the final decree form, the district court left most of the form blank, lending support to Tammy's argument that the court was relying on Exhibit A to equitably distribute the marital estate.

Without Exhibit A, the final decree fails to comply with § 40-4-201(4)(a) and (b), which require the decree to include the terms for settlement of property and debt. A district court cannot substitute its property division in lieu of the parties' division unless it finds the parties' agreement unconscionable. Thus, under the first Essex factor, the district court's legal error created extraordinary circumstances sufficient to support Tammy's 60(b)(6) motion.

The second Essex factor requires the movant to have acted within a reasonable time. Tammy filed her motion within eight days of discovering the error, which the Court concludes is reasonable.

Finally, the Court concludes Tammy is blameless for failing to discover the issue, and the error was not due to her actions. Therefore, the district court abused its discretion in denying Tammy's motion to amend and is reversed.

## **Upcoming CLE of Interest**

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The Montana Society of CPAs is offering a course on Advanced Business Law for CPAs on Monday, Nov. 14, in Bozeman.

The 8-hour course will provide instruction on complex legal issues that come up every day for CPAs and how to respond

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Call if you or a judge or attorney you know needs help with stress and depression issues or drug or alcohol addiction .

legal aid organizations nationwide to launch a legal self help website: MontanaLawHelp.org. Containing free legal information and legal forms that could be used by people to address their legal problems on their own, MontanaLawHelp.org was a way for MLSA to provide people with the legal information they needed.

At the same time, MLSA recognized that it needed to expand its funding base. In 2002, MLSA sought new funding for domestic violence services and became among the first civil legal aid organizations in the nation to apply for and receive a Violence Against Women Act (VAWA) grant. Other grants soon followed, and in 2002 MLSA was also among the first recipients of LSC's Technology Initiative Grants (TIG), grants that have enabled MLSA to pursue multiple technology innovations in order to increase access to civil legal aid for more Montanans.

MLSA also worked to develop its AmeriCorps Volunteer program in order to expand services to low-income Montanans across the state. From 2002 to 2014, MLSA sponsored an AmeriCorps VISTA project that placed 25-30 AmeriCorps VISTA members each year around Montana in order to build capacity for access to justice and economic security for non-profit organizations. In 2009, MLSA partnered with the Office of Consumer Protection and Victim Services, and the Montana Supreme Court's Office of the Court Administrator to establish the Justice for Montanans AmeriCorps Project, which placed 13 members at Court Self Help Centers, the Attorney General's Office of Consumer Protection, and MLSA. The program expanded to include the State Bar of Montana in 2012 and now places 18 members at partner organizations and MLSA, playing a central role in increasing access to justice for low income Montanans.

## MLSA at 50 – and looking ahead

Today, MLSA operates out of three central offices in Helena, Missoula, and Billings, and provides services with 13 attorneys and two Tribal Advocates. Satellite offices on the Blackfeet and Rocky Boy's Reservations and in Bozeman help further MLSA's reach. Significant cuts to congressional LSC funding in 2009 and 2011 resulted in further office closures and staff layoffs, including the closure of MLSA's Butte office in 2011, but MLSA worked to mitigate the impact of these cuts by expanding its self-help legal programs and technologies, which continue to reach people in need across the state.

In 2015, more than 68,000 people visited MontanaLawHelp.org for legal information, while nearly 2,100 pro se documents were finalized using LawHelp Interactive forms. MLSA's work to build a robust pro bono attorney program has further helped to fill in the gaps, with more than 405 pro bono attorneys volunteering their time and expertise in 2015 to provide legal help to low-income Montanans. MLSA directly helped 7,300 clients and family members address their civil legal problems in 2015.

Civil legal aid services make a huge difference in the lives of individual clients. When Jason, for example, first began to consider filing for a dissolution of his marriage, he knew he needed

## WANT TO HELP?

If you are interested in learning more about MLSA or in signing up as a volunteer for MLSA's pro bono program, please visit [www.mtlsa.org](http://www.mtlsa.org), or contact pro bono coordinator Angie Wagenhals at 406-543-8343 ext.207; or [awagenha@mtlsa.org](mailto:awagenha@mtlsa.org).

legal help. His wife was abusive towards him, and although pro se dissolution forms existed, he found filling out the forms to be overwhelming. He contacted MLSA for help, where MLSA staff attorney Ed Higgins agreed help him as a pro bono attorney. Higgins helped Jason fill out the dissolution forms and Jason was soon able to separate from his wife and move out on his own. Later, when expressing his thanks to Higgins, Jason said, "Ed is my Superman, he saved me from my Kryptonite... There aren't enough words in the dictionary to tell him how grateful I am."

Having access to a civil legal program like MLSA had a major impact on Jason, but, as Higgins pointed out, he almost fell through the cracks. "In theory, the way that the system has been set up, he's supposed to go and do this himself. There aren't resources available, generally, for an attorney to represent him." Gaps continue to exist between the number of people to whom MLSA can provide services and the number of people who need legal aid. More than 6,345 people contacted MLSA for help in 2015, but MLSA could take only 3,114 cases. With just one attorney available for every 12,133 people living in poverty (compared to one attorney available for every 274 Montanans not living in poverty), MLSA needs the help of pro bono attorneys and increased resources to make sure obtaining justice isn't like winning the lottery.

As MLSA looks back on the last 50 years of service to the people of Montana, it is clear that together we have accomplished a lot. In the 50 years since MLSA was founded, and in the face of funding cuts and policy changes, MLSA has worked hard to continue to provide civil legal aid to those who need it most. Every year, thousands of people who would otherwise have no access to an attorney or fair access to the justice system were able to present their cases in a court of law and have their voices heard. None of this would have been accomplished without the support of community members or the help of pro bono attorneys, who allow MLSA to bridge the gap between those we serve and those we cannot. So as MLSA celebrates its 50th Anniversary and looks toward the next 50 years of civil legal aid in Montana, we just want to say: Thank you. Together, we have made great strides in increasing access to justice for all Montanans, and we can all be proud of the work we do.

If you are interested in learning more about MLSA or in signing up as a volunteer for MLSA's pro bono program, please visit [www.mtlsa.org](http://www.mtlsa.org), or contact pro bono coordinator Angie Wagenhals at 406-543-8343 ext.207; or [awagenha@mtlsa.org](mailto:awagenha@mtlsa.org).

**Emma O'Neil is Development Associate at Montana Legal Services in Helena.**

IRS provides that a fund is a “qualified settlement fund” if it satisfies each of the following:

It is established pursuant to an order of, or is approved by, specified governmental entities (including courts) and is subject to the continuing jurisdiction of that entity;

It is established to resolve or satisfy one or more claims that have resulted or may result from an event that has occurred and that has given rise to at least one claim asserting certain liabilities; and

The fund, account, or trust must be a trust under applicable state law, or its assets must otherwise be segregated from other assets of the transferor.<sup>8</sup>

Section 468B trusts allow defendants to pay money into the trust and be entirely released from liability in a case. Yet the plaintiffs and their counsel do not have income until the money comes out. Normally, tax law is reciprocal. The 468B trust is a kind of holding pattern, where no one is (yet) taxed on the principal or corpus of the trust.

Even so, the defendant can deduct the payment. Any interest earned on the monies in the trust are taxed to the trust itself.

In some cases, even after receipt of settlement proceeds, one can still invoke QSF treatment. If you meet the rules, you can elect after the fact to have QSF treatment.

This extraordinary rule allows you to retroactively designate a bank account as a QSF if you meet two tests:

This relation-back election gives everyone more time to determine if a structure is a better alternative than cash. In many (if not most) cases, a structure will be preferable as a means of achieving tax savings, retirement goals, investment returns and

even asset protection.

Although the requirements for a relation-back election are not too tough, obtaining the defendant’s signature can be difficult. After all, the defendant may not be thrilled about losing the litigation. However, many defendants can be won over to sign (signing on one or more documents after settlement can be innocuous) by a good explanation of the plaintiff’s tax planning opportunities. Moreover, sometimes a judge may be helpful in persuading the defendant to help.

## Conclusion

Increasingly, plaintiffs, defendants and their counsel are finding that QSFs can provide tax efficiency and allow the time needed to evaluate structured settlement alternatives. This is on top of their most classic purpose, helping co-plaintiffs to resolve their own disputes about who gets what following a defendant’s settlement. A 468B trust allows the defendant to pay its money and obtain a court approved release, so the defendant is entirely out of the litigation even if the trust holds the money for months or years before distributing it to the plaintiffs and their counsel. Not coincidentally, the defendant also is entitled to a tax deduction when the money first goes into the trust.

Ideally, a QSF should be set up before the settlement agreement is signed and before the money is paid. A week or two is usually enough time to do everything. Sometimes, though, for whatever reason, the plaintiff’s attorney will end up with a signed settlement agreement and money in the bank, only then realizing that the clients want to structure their recoveries, and/or that an attorneys’ fee structure for the lawyers would be advantageous.

**Robert W. Wood is a tax lawyer with [www.WoodLLP.com](http://www.WoodLLP.com), and the author of numerous tax books including *Taxation of Damage Awards & Settlement Payments* ([www.TaxInstitute.com](http://www.TaxInstitute.com)). This discussion is not intended as legal advice.**

<sup>8</sup> Treas. Reg. § 1.468B-1(c).

## Award, from page 20

she represents the interests of Montana’s victims and community-based domestic and sexual violence service providers before the Montana Legislature, and represents survivors of sexual assault in civil legal matters. She also is a frequent lecturer on domestic violence and sexual assault issues.

Turner said that in some circles, domestic violence is not seen as a legal topic. But she pointed out that the issue arises for so many attorneys in so many types of cases — divorce and family law, criminal law, and immigration to name a few — that recognizing the signs and knowing how to deal with the dangers without doing more harm are concrete skills that attorneys should learn.

“Not all of us went to law school to deal with those risks,” she said.

“To fully assist violence survivors, we need more volunteer

## Webinar Series Coming

The State Bar’s Justice Initiatives Committee will present a series of CLE webinars on domestic violence in 2017.

attorneys to stand with survivors whose abusive partners use the court system as a weapon instead of a shield to abuse a survivor yet again. Brandi and Robin have made great strides in constructing a platform on which we continue to build to do just that,” Fain said. “At every turn and with every opportunity, Brandi and Robin lead the legal community toward the opportunity to be a life-changing force for survivors across the state.”



## Job Postings and Classified Advertisements

**CLASSIFIEDS Contact** | Email Joe Menden at [jmenden@montanabar.org](mailto:jmenden@montanabar.org) or call 406-447-2200. To see more job listings, post a resume, and find job search resources, visit the State Bar of Montana's online Career Center at [jobs.montanabar.org](http://jobs.montanabar.org).

### ATTORNEYS

**ADMINISTRATIVE LAW JUDGE:** The Montana Department of Labor and Industry seeks an Administrative Law Judge in the Office of Administrative Hearings. Go to <http://dli.mt.gov/jobopenings> for a full listing, including job overview, qualifications, and instructions on how to apply. **Closes Nov. 18.**

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**STAFF ATTORNEY:** SAFE Harbor, a nonprofit domestic and sexual violence prevention and intervention agency located in Polson, Montana seeks a full-time staff attorney to provide holistic civil legal services to victims of domestic violence, sexual assault, and stalking in Lake County and on the Flathead Reservation. Applicants must be admitted to practice in Montana. Please

send cover letter, resume, two references, and writing sample to [deeann@safehabormt.org](mailto:deeann@safehabormt.org). Visit [jobs.montanabar.org](http://jobs.montanabar.org) to see full listing.

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**PARALEGAL:** Busy, 4-lawyer litigation firm in Great Falls seeks paralegal with minimum of 2 years of litigation experience. Must have worked in personal injury litigation, and have basic familiarity with medical records and billing, discovery processes, and internet research/investigation. Must be able to adapt to processes, and be able to get work done on time. The job offers a great deal of autonomy, and we expect diligence in case

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