MONTANA LAWYER
State Bar of Montana
October 2016 | Vol. 42, No. 1

Prescription Drug Problem in America: What Attorneys Should Know

Also in this edition

Court Approves Ethical Rules on Technology
Changes in IOLTA on tap for 2016
Recap of 2016 State Bar Annual Meeting
Clio & MyCase Added as Member Benefits
Supreme Court Case Summaries
Uniform Law Commission Updates for 2016
Tribute to Jeremy Thane: 1927 to 2016

MONTANA LAWYER

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

Advertising rates are available upon request. Statements and expressions of opinion appearing herein are those of the advertisers or authors and do not necessarily reflect the views of the State Bar of Montana.

Postmaster: Send address changes to Montana Lawyer, P.O. Box 577, Helena MT 59624.

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Correction

Due to an editing error, the Department of Environmental Quality program that controls wastewater discharge was misidentified in an article in the September issue of the Montana Lawyer. The program is the Montana Pollutant Discharge Elimination System..

What did you think of your law school experience?

I could not help but notice what Republican Vice Presidential Candidate Mike Pence said about law school: "I wouldn't wish it on a dog I didn't like." This got me to thinking: What do lawyers think of their law school experience?

I personally had a great time. After four years in Missoula I needed to get out of town or get arrested. So I toddled off to that conservative mecca Eugene, Oregon, and the University of Oregon School of Law. Even for someone schooled for four years in Missoula, Eugene was an eye-opener. It was (and perhaps still is) like waking up in 1967. Tie-dyed everything, flower girls, protest marches, and posters of every imaginable kind greeted me on my arrival. I ingratiated myself one semester when I stood up at an all-class meeting and announced that the administration had set a limit on protests to one, so one had better pick one's cause early and pick it well. Despite my big mouth, I had a great time at law school. (Not good enough however to even consider donating money until the student loans were paid, and to get back for that C in contracts.)

I was still in my 20s and my liver still worked, so naturally it was my civic duty to support Oregon's burgeoning craft beer scene. I can still taste that first McMenamins Brew Pub IPA and the Captain Neon blue cheese bacon burger, and the fries . . . oh, law school.

I remember being in awe of the intellect of my fellow students. So many great minds in one place — what the heck was I doing there?! One woman in particular was brilliant. She, of course, transferred to Bolt Hall after our first year. But the intellectual diversity was fun and challenging. What happened to enjoying that in the practice of law?

On Fridays we would have a pick-up soccer game after classes and then, of course, had to sample more craft beer. Saturdays were the Eugene Farmer's Market, the first place I had pad Thai, and bought tie-dye.

The school part? Yep that was OK too. I had good instructors and found the classes interesting an engaging for the most part. Makes me wonder how badly the Indiana University law school treated Mr. Pence. I hope that our local Alexander Blewett III School of Law at the University of Montana (gasp) students enjoy their time in law school. I would hate to think any of them coming into the practice of law with the attitude of Mr. Pence toward the experience.

One of the perks of being president of the State Bar is that I am an ex officio member of the Board of Visitors of the Montana law school. As such I feel safe in saying that I believe the law school staff and administration do all they can to make it a worthwhile experience and would take no pleasure in harming unpleasant dogs.

So, forget those student loans, and lousy grades. Donate to your law school today, or at least Montana's if you can't forgive and forget.

State Bar of Montana President Bruce Spencer is a solo practitioner based in Helena. His practice areas emphasize, governmental relations, creditors' rights, commercial law, automotive law, insurance law, and health care law.

"I feel safe in saying that I believe the law school staff and administration do all they can to make it a worthwhile experience.

Donate to your law school today,

or at least to Montana's if you can't forgive and forget."

Missoula firm formally changes name to Tipp Coburn Schandelson P.C.

On Oct. 1, the longstanding Missoula litigation firm of Tipp & Buley, P.C. formally changed its name to Tipp Coburn Schandelson P.C.

The firm has been in constant operation since 1959, when founder Raymond P. Tipp launched the firm on a stairwell landing in a downtown Missoula office building. Following the retirement of shareholder Richard Buley in 2014, the firm has restructured and is looking forward to 50 more years of serving Montanans.


Bryan C. Tipp


Coburn

Currently there are three principal shareholders: Bryan C. Tipp, Torrance L. Coburn, and Brett D. Schandelson.


Schandelson


Lockwood

Bryan Tipp has been with the firm since selling his private practice in the Seattle area and returning to Missoula in 1994. He handles primarily personal injury cases.

Coburn has been with the firm since 2005 and has been a shareholder since 2011. He handles a mix of employment law and personal injury cases.


Raymond P. Tipp

Schandelson has been with the firm since 2008 and has been a shareholder since Jan. 1, 2015. He currently focuses his practice on criminal defense and civil rights.

The firm employs one associate attorney, Sarah M. Lockwood, who has been with the firm since 2014, and has a true general practice, handling a wide variety of civil and criminal litigation.

Raymond P. Tipp remains as "Of Counsel" with the firm and continues to handle a variety of cases as well as pursue his passion for inventions.

Juras inducted into American College of Real Estate Law

Kristen G. Juras has been inducted into the American College of Real Estate Lawyers (ACREL). ACREL members are selected based upon their skill, experience, and high standards of professional and ethical conduct in the practice of real estate law.


Juras

Juras was chosen based upon her 34 years of practice in a wide variety of property matters and her 16 years as a professor at the Alexander Blewett III School of Law at the University of Montana, where she has taught property, contracts, business, agricultural, and international law.

Based upon her prior research and writing on the impact of state and federal regulation of drones on the rights of property owners in the airspace over their properties, ACREL has invited Juras to make a presentation on drones at its 2017 national meeting in Austin, Texas.

Juras is currently a candidate for the Montana Supreme Court. She can be reached at kristenjuras@gmail.com or 406-868-9531.

Harby Joins St. Peter Law Offices.

St. Peter Law Offices, P.C., located in Missoula, welcomes Jason C. Harby as an associate attorney.

Harby's practice emphasizes general estate planning as well as federal estate tax, gift tax, and generation skipping transfer tax planning, estate and trust administration, entity formation and taxation, business planning, corporate and commercial transactions, employee benefits, general tax planning, and tax controversies and procedure. He is admitted to practice before the Montana Supreme Court, the U.S. District Court for the State of Montana, and the United States Tax Court.


Harby

He is a 2015 graduate of the University of Montana School of Law. He obtained a Master's of Law in Taxation (LL.M) with honors from the University of Washington School of Law in 2016. He graduated with high honors from the University of Montana in 2010 with a degree in economics. During law school he interned at both Datsopoulos MacDonald & Lind P.C. and the Rocky Mountain Elk Foundation where he took part in a variety of transactional and tax compliance projects.

You can contact him at St. Peter Law Offices, P.C., 2620 Radio Way, Missoula, MT 59808; 406-728-8282; or jason@stplawoffices.com.

O'Brien a shareholder at St. Peter Law Offices

St. Peter Law Offices, P.C., located in Missoula, welcomes Michael O'Brien as shareholder to the practice.

O'Brien serves clients in all facets of litigation, including contract disputes, estate proceedings, and probate litigation. Prior to joining St. Peter Law Offices in 2014, he oversaw the Business Services Division in the Montana Secretary of State's Office and has expertise in small business legal issues, including corporate, limited liability company, and business entity formation, UCC filings, and business regulation. Mike is admitted to practice before the Montana Supreme Court, the United States District Court for the State of Montana, the Blackfeet Tribal Court and Salish Kootenai Tribal Court.


O'Brien

O'Brien grew up in Missoula and earned his Juris Doctorate from the University of Montana School of Law in 2013 and received his Political Science and Public Administration degrees from Carroll College in 2002. He served the Hon. Robert G. Olson as a law clerk in Glacier, Toole, Pondera, and Teton Counties in Montana from 2013-2014. In the summer of 2014, he returned home to Missoula to join St. Peter Law Offices, P.C.

St. Peter Law Offices' practice emphasizes estate planning,

trusts, probate, low income housing tax credit projects, corporate and commercial transactions, general litigation, business law, adoptions, conservatorships and guardianship proceedings.

You can contact O'Brien at St. Peter Law Offices, P.C., 2620 Radio Way, Missoula, MT 59808; 406-728-8282; or mike@stplawoffices.com.

Towe named Montana Trial Lawyer of the Year

James "Jamie" T. Towe, a partner with Towe & Fitzpatrick, PLLC, received the 2015-2016 Montana Trial Lawyer of the Year award for his outstanding trial skills, relentless pursuit of justice, and successful representation of personal injury clients across Montana.


Towe

Towe is a 1994 graduate of the University of Montana School of Law and practices law in Missoula.

Aikin joins AG Office's Appellate Services Bureau

The Legal Services Division at the Montana Department of Justice recently welcomed Ryan Aikin as an Assistant Attorney General in its Appellate Services Bureau.

Aikin attended Purdue University in Indiana. In 2005, he earned a B.A. in philosophy with minors in political science, management, and German.


Aikin

After college, he worked for two years in the United States Peace Corps in Ukraine, teaching English as a foreign language.

Aikin is a 2011 graduate of the George Washington University Law School in Washington, D.C., and is a member of the Pennsylvania bar. He was formerly a lieutenant in the Navy serving as an appellate defense counsel with the Judge Advocate General's Corps.

Sarabia joins Guthals, Hunnes & Reuss

Michael P. Sarabia has recently joined the law firm of Guthals, Hunnes & Reuss, P.C. as an associate attorney.


Sarabia

Sarabia received a Bachelor of Arts from Montana State University-Billings in 2004, his J.D. from the University of Iowa in 2008, his Master of Arts from the University of Iowa in 2012, and his Ph.D from the University of Iowa in 2015.

Prior to joining Guthals, Hunnes & Reuss, Sarabia worked as a law clerk for the Hon. Michael G. Moses of the 13th Judicial District of Montana.

The focus of his practice will be in the areas of commercial and contract law, corporate law, bankruptcy, family law, and employment law, and litigation in those areas

Court adopts rules on ethics related to use of technology

The Montana Supreme Court has adopted revisions to the Montana Rules of Professional Conduct to provide guidance regarding lawyers' ethical responsibilities in the use of technology.

The revisions, which were proposed by the State Bar of Montana Board of Trustees , affect the MRPC's Preamble; terminology defining "writing"; and Rule 1.6 on Confidentiality.

The changes incorporate aspects of American Bar Association Model Rules. They follow the Model Rules for the most part, but include significant departures. For example, instead of adopting the ABA's Comments to the Model Rules, the petition calls for incorporating language from the Comments into the preamble of the Montana Rules.

The revisions are intended to address the challenges lawyers face from the fast-paced development and increasing complexity of technology and the potential consequences those changes bring to lawyers, the profession and the public.

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

■ The word "email" is changed to "electronic communication" in Rule 1.0(p), the subsection on the definition of "writing."

■ The following language is added to paragraph 5 of the Preamble, regarding competence: "Competence implies an obligation to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology."

■ A new subsection was added to the rule regarding confidentiality of information, Rule 1.6(c): "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

The court also voted to accept public comment on a new subsection to Rule 4.4, Respect for Rights of Third Persons. Comments must be submitted by **Monday, Oct. 31**.The new subsection 4.4(c), which was proposed by the State Bar's Ethics Committee, 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.

Court taking comment on proposed penalty for IOLTA/trust reporting noncompliance

The Montana Supreme Court is asking for public comment on a proposal to change the rules on annual trust account and IOLTA reporting requirements to add a provision allowing for discipline by suspension for attorneys who fail to comply.

The State Bar of Montana Board of Trustees and the Montana Justice Foundation jointly petitioned the court to revise Rule 1.18(e)(1) of the Montana Rules of Professional Conduct to provide for the punishment.

The new rule would be similar to the rules regarding failure to submit proof of CLE compliance. The proposed revision would give the State Bar the authority to suspend attorneys from the practice of law if they fail to file annual IOLTA certification as reflected in the sentence underlined below:

> Filings . . . Failure to provide the certification may result in suspension from the practice of law in this state until the lawyer complies with the requirements of this rule. Such suspension will be effected pursuant to the Rules of the State Bar of Montana.

The suspension would be lifted once an attorney files IOLTA certification and pays any associated fee.

The court has ordered a 45-day comment period on the proposal. Comments must be submitted by **Monday, Oct. 31**.

Changes coming to Interest on Lawyer Trust Account reporting for 2016

There are changes in the Interest on Lawyers Trust Accounts (IOLTA) reporting system for 2016.

Don't remember your login information from last year's IOLTA reporting? That's OK!

In an effort to address issues encountered by attorneys during last year's reporting, the State Bar of Montana and the Montana Justice Foundation have taken steps to make responding to your IOLTA report even easier. This year, attorneys will log in using their credentials for the State Bar website (**www.montanabar.org**).

If you have any trouble logging in, contact the State Bar at 406-442-7660.

New compliance dates

The compliance period of this year's IOLTA reporting will run between Nov. 14, the date all Active Attorneys will receive official notice, and Jan. 9, 2017.

Applicants sought for 5th Judicial District judge; process continues in 18th, 17th judicial districts

Chief Justice Mike McGrath has notified the Judicial Nomination Commission that the Hon. Loren Tucker, district judge for the Fifth Judicial District (Beaverhead, Jefferson, and Madison Counties) will resign his position effective Jan. 27, 2017.

The Commission is now accepting applications from any lawyer in good standing who has the qualifications set forth by law for holding the position of district court judge. The application form is available electronically at the Judicial Nomination Commission website. Applications must be submitted electronically as well as in hard copy. The deadline for submitting applications is 5 p.m., Monday, Oct. 31. The commission will announce the names of the applicants thereafter.

More online

Applications, public comment, schedules and more are on the Judicial Nomination Commission's website: http://courts.mt.gov/supreme/boards/jud_nomination.

The public is encouraged to contact commission members regarding the applicants during the public comment period, which will begin Tuesday, Nov. 1, and close Thursday, Dec. 1.

The commission will forward the names of three to five nominees to the governor for appointment after reviewing the applications, receiving public comment, and interviewing the applicants if necessary. The person appointed by the governor is subject to Senate confirmation during the 2017 legislative session. The position is subject to election in 2018. The successful candidate will serve for a six-year term. The annual salary for the position is $126,132.

10 apply for Gallatin County District Court judge

Ten attorneys have applied with the Judicial Nomination Commission for an 18th Judicial District Court judge opening in Gallatin County. They are:

- Daniel B. Bidegaray
- Magdalena Cain Bowen
- Andrew J. Breuner
- Christopher B. Gray
- Jenny Colleen Herrington
- Martin David Lambert
- Rienne Hartman McElyea
- James Donald McKenna
- Daniel J. Roth
- David Langdon Weaver

The commission began accepting applications for the position in August, following District Court Judge Mike Salvagni's announcement that he will retire effective Dec. 31.

The commission is now soliciting public comment on the applicants. Comments will be accepted until 5 p.m. on Monday, Oct. 24.

The commission welcomes public comment, in writing or via phone. Written comment may be submitted to:

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

The commission will forward the names of three to five nominees to Gov. Steve Bullock for appointment after reviewing the applications and public comment and interviewing the applicants, if necessary. The appointee is subject to Senate confirmation in 2017 and to election in 2018. The successful candidate will serve for the remainder of Judge Salvagni's term, which expires January 2021.

Supreme Court releases court users survey

Montana Supreme Court Chief Justice Mike McGrath on Oct. 3 released the Supreme Court's fifth court users' survey.

Chief Justice McGrath said the results of the survey, part of the court's ongoing performance measurement system, show that, 88 percent of responding court users have an overall positive perception of the court. The biennial survey asks appellate lawyers, District Court judges and University of Montana Alexander Blewett III School of Law faculty to rate their satisfaction with the court in 10 areas.

The survey is among performance measures that have been in place since 2008. The court also conducts quarterly and yearly case-processing reports. The emphasis on performance measures has resulted in the Court making changes to significantly reduce case processing time and provide more information to the public about the court.

The survey and other performance measures are based on the National Center for State Courts' CourTools project, which is a set of effective performance measurements for courts. Montana is one of only a handful of states conducting a user survey as part of its project.

The court users and employee survey results are available at https://goo.gl/K3gli3.

Comment period ends for 17th Judicial District

The Judicial Nomination Commission has received applications from six attorneys for 17th Judicial District Court judge.

The four who will be interviewed are:

- Peter Helland
- Yvonne Gaye Laird
- Dan Raymond O'Brien
- Randy Randolph

Interviews will be at the Phillips County Courthouse in Malta **Monday, Oct. 17,** starting at 8:30 a.m.

The commission will forward the names of three to five nominees to the governor. The person appointed by the governor is subject to Senate confirmation during the 2017 legislative session. If confirmed, the appointee will serve for the remainder of Judge John McKeon's term, which expires January 2019.

Timothy J. Cavan selected to serve as new US magistrate judge in Billings District

Timothy J. Cavan of Billings has been selected to serve as the next United States magistrate judge in the Billings Division.

The U.S. District Court for the District of Montana announced Cavan's selection On Sept. 29.

Cavan was selected from among a group of finalists compiled by a court-appointed merit selection panel. He is currently an assistant United States Attorney in Billings.

A lifelong Montanan, Cavan earned a bachelor's degree from Montana State University-Billings in 1981, and graduated with honors from the University of Montana School of Law in 1984. He began his legal career practicing civil trial law with the Billings firm of Sandall, Cavan & Smith, where he became a partner in 1988. From 1996 to 2002, he served as assistant federal defender with the Federal Defenders of Montana, representing indigent defendants charged with federal crimes.

Cavan has worked in his current position in the United States Attorney's Office since 2002, serving as defense counsel in cases involving civil claims against federal defendants. He has been active in various community organizations and is a member of the Yellowstone County Bar Association, the Billings YMCA, Zoo Montana, Yellowstone Art Museum, and Yellowstone Public Radio. He and his wife, Michelle, have three children.

The District of Montana has three full-time magistrate judge positions, located in Missoula, Billings, and Great Falls.

Cavan will become the fourth magistrate judge to serve on a full-time basis in the Billings Division. His appointment takes effect on Dec. 2. He will succeed current United States Magistrate Judge Carolyn S. Ostby, who has announced plans to resign on Dec. 1.

2 law clerks sought for new magistrate judge

The United States District Court, District of Montana is seeking two law clerks to work in the chambers of the next U.S. magistrate judge in Billings, Timothy J. Cavan.

The position is listed in the classified section on page 38 of this magazine. A full listing appears in the State Bar of Montana's Career Center, **jobs.montanabar.org**.

Law school announces $2.5M anonymous bequest

The Alexander Blewett III School of Law at the University of Montana has announced Thursday that it has received an anonymous $2.5 million bequest.

The law school says the bequest is its largest-ever planned gift and the second largest gift in the history of the school. The bequest will ultimately be used for merit scholarships, the school said.

"This is tremendous news for future generations of law students," Paul Kirgis, dean of the law school, said in a news release. "Scholarships are essential to attract the best and most diverse student body and that translates into outstanding lawyers practicing in Montana and around the country. We are truly humbled by this gift and by the donor's belief in what we are doing at the school."

The anonymous donor is still living and the bequest is not realized, said John Mudd, the law school's director of development and alumni relations.

The gift comes on the heels of the $10 million gift from Zander and Andy Blewett and news today that the school already has raised over $400,000 toward the $1.5 million scholarship matching challenge that was part of the naming gift (see below). The anonymous donor wishes to continue the Blewett matching challenge and, therefore, the bequest will remain uncounted toward that effort.

With the $2.5 million bequest, the school says it is now on pace to exceed its original centennial year goal of adding $5 million in new scholarship money over 10 years. The school says that to date it has raised well over $4 million.

"We are extremely grateful for this remarkable gift and the continued generosity of our alumni and friends" added Kirgis. "This type of philanthropy will place our school on a secure footing for decades to come."

The law school also announced in September that a $1.5 million scholarship matching challenge included in the Blewett naming gift has raised over $400,000 in the first 15 months, putting it well on pace to meet the match.

As part of the 2015 Blewett naming gift, a challenge was set to match all gifts of at least $500 to new or existing law school scholarships with corresponding gifts from Zander and Andy Blewett to the new Access to Legal Education Scholarship Fund. That fund provides scholarships for Montana residents and/or graduates of all Montana colleges and universities who attend law school in Missoula.

The school announced that the first three recipients of the Access to Legal Education Scholarship are:

- third-year student Kaitlyn McArthur of Everett, Washington, a graduate of the University of Great Falls;
- second- year student Jake Schwaller of East Helena, a graduate of University of Mary; and
- first-year student Lucas Wagner of Anaconda, a graduate of Carroll College.

Members to be eligible for discount on Clio, MyCase thanks to newly approved benefit

State Bar of Montana members will soon be eligible to receive a discount on Clio and MyCase practice management software programs, thanks to a partnership approved by the Bar's Board of Trustees.

The board voted at its September meeting to endorse Clio and MyCase and enter into partnerships with the two companies. Through the non-exclusive partnerships, each company will offer lifetime discounts to their programs.

The State Bar's Technology Committee evaluated Clio and MyCase and in August recommended that the board endorse and enter agreements with both companies.

The Technology Committee determined in its recommendation that each product has its own inherent strengths and that each can serve a niche in the legal profession.

More details on the benefit and how members can take advantage of it will be forthcoming as the partnership rolls out.

Action on other proposed benefits

The Clio and MyCase discounts are among several member benefits the Board of Trustees took action on at the meeting.

Other benefits the board took action on include:

■ **ABA Retirement Funds**: Trustees approved endorsing the ABA Retirement Funds, which provides assistance to firms in handling employees retirement funds give authority for the Executive Committee to negotiate an agreement with the fund on providing educational content on the fund to members.

■ **Leavitt Group ancillary insurance**: Trustees approved a motion to allow the bar's Finance Committee to explore and negotiate a member discount and royalty agreement.

■ **SoFi Refinance Loan program**: Trustees appointed the Finance Committee to review a proposed royalty and licensing agreement on the SoFi loan product that allows qualified borrowers to refinance their existing federal and private student loans.

Resolution calls on U.S. Senate to hold hearings for Supreme Court nominee

State Bar of Montana members approved three resolutions at the 2016 Annual Meeting in Great Falls in September, including one that calls on the U.S. Senate to hold confirmation hearings on the nomination of the Honorable Merrick Garland as United States Supreme Court justice.

The resolution on Judge Garland's nomination was the only one that received opposition. The others, a resolution calling on Congress to fund Montana Legal Services Association and another thanking the Cascade County Bar Association for its efforts in support of the Annual Meeting, passed unanimously.

A divide house of voting members passed the Supreme Court resolution with 61 percent of the vote.

The Supreme Court has been deciding cases with eight justices, instead of the customary nine, since Justice Antonin Scalia's unexpected death on Feb. 13. As a result, the court had a tie vote a record four times in its last term. A tie vote means the lower court decision prevails but sets no national precedent.

Members spoke passionately both for and against the resolution during debate. Some argued that as a mandatory bar, the State Bar of Montana should not wade into political issues.

Some members who spoke in favor of the resolution said they did not feel it was political. The Senate has a duty "to advise and consent under Article II of the United States Constitution," the resolution points out, and the Senate's refusal to hold hearings means it isn't doing its job, some said.

Opponents of the resolution countered that, like it or not, the issue has become a political one: Senate Republican leader Mitch McConnell declared the day Scalia's death was confirmed that there would be no hearings and no vote on anyone President Obama named to fill the vacancy. Since then, Senate Republicans have been nearly unanimous in opposition of hearings, to Democrats' protests.

The bar taking a position on an issue that has become so partisan comes at the risk of alienating the Bar's conservative members, opponents felt.

The resolution on the Supreme Court nomination almost did not come to a vote of members. The Past Presidents Committee met the day before the business meeting to review the three proposed resolutions. With four members present, the committee deadlocked on whether it was consistent with the Constitution of the State Bar.

The Supreme Court started a new term with eight justices on Oct. 4, and most observers expect Scalia's seat to remain vacant for most of the current term.

The resolutions that were voted on at the Annual Meeting are posted at the State Bar of Montana's website, **www.montanabar.org.**

Art for justice's sake

Matt Thiel donated two of his original paintings to be auctioned off at the State Bar of Montana's Annual Meeting in Great Falls in September. Thiel finished his term as president of the State Bar of Montana during the Annual Meeting. The paintings, Blackfoot Evening" (left) and "Autumn on Rock Creek," raised a total of $870, all of which was donated to the Montana Justice Foundation. The winning bidders were Fourth Judicial District Judge Leslie Halligan and Missoula attorney Cynthia Thiel.

New Intellectual Property Law Section of bar OK'd

The State Bar Board of Trustees in September approved the formation of a new Intellectual Property Law Section of the State Bar of Montana.

The initial dues for the section were set at $30 per year beginning in September, with annual dues of $30 thereafter.

Missoula attorneys Sarah J. Rhoades and Shane A. Vannatta signed the petition to form the section. The petition indicated that 10 other attorneys from around the state had committed to membership in the section for at least the first year.

Any member of the State Bar in good standing and having an interest in the law of intellectual property shall be eligible for membership in the Section, and shall be enrolled as member of the Section upon application and payment of the annual dues.

The Section also may permit Associate Membership for persons who are not members of the State Bar, and Law Student Membership for any law student enrolled in an accredited law school in Montana and in good standing. However, Associate and Law Student members would not have voting rights in the section.

A GRAND TIME IN GREAT FALLS

LEFT PHOTO: Bob Carlson, right is shown with Billings attorney Damon Gannett after accepting the 2016 William J. Jameson Award, at the Annual Meeting Awards Banquet. Gannett, a close friend of Carlson's was the 2015 Jameson Award winner.

BELOW LEFT: Gary Bjelland, left, of Jardine, Blewett & Weaver in Great Falls, accepts a George L. Bousliman Professionalism Award from President Matt Thiel.

BELOW, RIGHT: Ed Higgins, left, of Montana Legal Services Association in Missoula, accepts a Bousliman Award from Thiel.

RIGHT PHOTO: Shaun Thompson, of the Office of Disciplinary Counsel in Helena, receives the Frank I. Haswell Writing Award at the Annual Meeting Awards Banquet.

BELOW: Attendees of the President's Reception at the Annual Meeting listen to a performance of the Great Falls Symphony's Cascade Quartet.

CLASS OF DISTINCTION

Seventeen members of the State Bar of Montana were honored this year for 50 years of service to the legal profession in Montana, all of whom are graduates of the University of Montana School of Law. The distinguished class includes a winner of the Bar's William J. Jameson Award, a Montana District Court judge, a past president of the State Bar of Montana, longtime public servants and partners in many respected law firms.

Pictured receiving their 50-year awards from State Bar of Montana President Matt Thiel are (this page, clockwise from top): the Honorable C.B. McNeil, retired 20th Judicial District judge, Polson; D. Patrick McKittrick, Great Falls; Richard L. Beatty, Great Falls; R.D. Corette, Butte, (receiving his award from Bob Carlson); **(opposite page, clockwise from top left):** Richard Gallagher, Great Falls; Donald Hamilton, Great Falls; Donald Herndon, Billings; Charles Knell, Bozeman; Charles Secrest, Olympia, Washington; Larry Riley, Missoula; and Les Loble, Big Sky.

The following attorneys who also were honored for 50 years of service to the legal profession in Montana were unable to attend the Annual Meeting: Gerald Allen, Butte; Steven Dalby, Libby; Dennis Harlowe, Tacoma, Washington; Jon Hudak, Orinda, California; James W. Johnson, Kalispell; P. Keith Keller, Helenal Dolphy Pohlman, Butte.

Matt Thiel, left, passes the gavel as president of the State Bar of Montana to Bruce Spencer during the Annual Meeting. Spencer will serve as president until September 2017.

Beth Brennan gives a CLE on Supreme Court case law during the Annual Meeting. See page 22 for selected Supreme Court case summaries written by Brennan.

Some attendees of Friday's Hot Topics CLE may have had a feeling of deja vu when they received a tax lesson from J. Martin Burke, who for many years taught tax law at the University of Montana School of Law.

Supreme Court hears oral argument in water dispute

ABOVE: Annual Meeting attendees listen as Rachel K. Meredith of Bloomquist Law Firm in Helena argues before the Montana Supreme Court Sept. 23. Meredith was arguing for the appellants, the South Phillips Water Users Group. **TOP PHOTO**: Justices listen to oral arguments in the case.

The Great Falls Holiday Inn Ballroom became the courtroom of the Montana Supreme Court for an hour and a half on Sept. 23.

That is when the court heard an oral argument in a case that will decide whether the federal government owns state water rights in certain reservoirs used by private livestock owners.

Professor Michelle Bryan of the University of Montana's Alexander Blewett III School of Law, who introduced the case, provided the following brief explanation of the case:

In the case of BLM v. South Phillips Water Users Group, the Montana Supreme Court will principally consider the question of whether the U.S. Bureau of Land Management owns state water rights in certain reservoirs constructed on BLM lands but used by private livestock owners with BLM grazing leases.

South Phillips Water Users Group, a group

More **Argument,** page 33

Annual Meeting attendees received hands-on training on Fastcase legal research software from Montana attorney trainers and a trainer on hand from Fastcase. State Bar of Montana Active Attorneys, Paralegal Section members, and Montana Magistrate Association members receive access to Fastcase. Randy Snyder, shown above at far right, was Bar President when the benefit was introduced and has been a trainer at the past two Annual Meetings. "Our unique form of instruction, utilizing Montana lawyers to teach Montana lawyers in small group settings and in our Annual Meeting workshop became a model which Fastcase is duplicating in other states," Snyder said.

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October-November Fastcase webinar schedule

- **Thursday, Oct. 6, 11 a.m. to noon:** Introduction to Legal Research on Fastcase
- **Thursday, Oct. 13, 11 a.m. to noon:** Advanced Tips for Enhanced Legal Research on Fastcase
- **Thursday, Oct. 20, 11 a.m. to noon:** Introduction to Boolean (Keyword) Searches
- **Thursday, Oct. 27, 11 to 11:30 a.m.:** Intro to Fastcase 7
- **Thursday, Oct. 27, 10 to 10:30 a.m.:** Intro to TopForm Web (Fastcase's new Bankruptcy software, not part of free bar benefit)
- **Thursday, Nov. 3, 11 a.m. to noon:** Introduction to Legal Research on Fastcase
- **Thursday, Nov .10, 11 a.m. to noon:** Advanced Tips for Enhanced Legal Research on Fastcase
- **Thursday, Nov. 17, 11 a.m. to noon:** Introduction to Boolean (Keyword) Searches

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▶Caging Reptile Lawyers

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

Matthew Moffett is the immediate past president of the Georgia Defense Lawyers Association and defends wrongful death and serious injury cases in state and federal courts. Several years ago, Matthew tried to a defense verdict a wrongful death case, opposite the author and creator of the Reptile trial strategy. Since then, Matt has presented across the country to defense lawyer organizations, industry associations and for DRI on how to counter and prevail against this strategy, both in discovery and at trial.

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

Mark Bassingthwaighte, 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.

ALSO FEATURING…

▶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

▶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

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Selected case summaries from May 2016

By Beth Brennan
Brennan Law and Mediation

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

Peretti v. State Dept. of Revenue

2016 MT 105 (May 10, 2016) (McGrath, C.J.) (5-0, rev'd)

Issue: (1) Whether the district court erred in reversing the State Tax Appeal Board's valuation order; (2) whether the district court erred in awarding administrative trial costs to the taxpayers; and (3) whether the district court erred in ordering DOR to return all taxes paid under protest.

Short Answer: (1) Yes; (2) yes; and (3) yes. *Reversed with instructions to reinstate the STAB valuation order*

Facts: Perettis own Flathead Lake property with lake frontage. DOR appraised the property in 2012, based on market value in July 2008, and Perettis appealed to the county board. The county board reduced the appraised values from $1,356,201 to $1,192,500 for the land, and $166,980 to $125,000 for the improvements. Perettis appealed to the state board (STAB), requesting a further reduction to $900,000 for the land and $60,000 for improvements.

STAB conducted an evidentiary hearing in September 2013. Perettis presented testimony from a rel estate appraiser and a computer modeler. DOR presented testimony from is appraiser, and submitted a post-hearing rebuttal to Peretti's modeler.

STAB issued findings and conclusions in November 2013, finding that DOR's evidence was more persuasive than Perettis'. Specifically, it found the Perettis' appraiser to be less credible than DOR's, and found the computer modeler's testimony to be inaccurate and not credible. It upheld the county board's valuation.

Procedural Posture & Holding: Perettis petitioned for judicial review. After briefing, the district court reversed the STAB decision, disagreeing with its weighing of the evidence and its determinations of witness credibility. The state appeals, and the Supreme Court reverses.

Reasoning: (1) The district court's decision rests on its re-weighing the evidence and re-determining the credibility of witnesses. A district court sitting in judicial review of a STAB decision may not do either of those things. Administrative findings of fact may not be disturbed on judicial review if they are supported by substantial evidence in the record, which does not mean a lack of evidence supporting a contrary result.

Because the Court reverses on issue 1, it reverses on issues 2 and 3, and orders reinstatement of the STAB order.

Montana Immigrant Justice Alliance v. Bullock

2016 MT 104 (May 10, 2016) (Cotter, J.; Baker, J., concurring) (7-0, aff'd & rev'd)

Issue: (1) Whether the district court erred in holding that MIJA has standing to challenge LR 121; (2) whether the district court erred in concluding that LR 121 is preempted by federal law; and (3) whether the district court erred in awarding attorney's fees to MIJA.

Short Answer: (1) No; (2) no, except for its holding that one section of the law was not preempted; and (3) yes. *Affirmed in part and reversed in part*

Facts: During the 2011 legislative session, the Montana Legislature passed House Bill 638, denying certain state-funded services to "illegal aliens," and submitted the act to Montana voters as a legislative referendum. LR 121 was adopted by the voters and codified at § 1-1-411, MCA, effective January 1, 2013.

Montana Immigrant Justice Alliance is a nonprofit organization dedicated to advancing the rights of immigrants in Montana. Some of its members are Mexican citizens who entered the U.S. without being inspected by a customs or immigration official, but who have since obtained lawful permanent resident status. They fear LR 121's definition of illegal alien includes them and that they will be deprived of state services even though the Department of Homeland Security considers them lawful immigrants.

MIJA filed a complaint in December 2012, seeking declaratory and injunctive relief. MEA-MFT and an individual woman joined as plaintiffs. The district court denied the plaintiffs' request to enjoin most of LR 121, but granted the request as to the definition of "illegal alien."

The state moved to dismiss for lack of standing on the grounds that the law had not been enforced against anyone to date. The district court granted the motion as to MEA-MFT and the individual plaintiffs but denied it as to MIJA.

The parties filed cross-motions for summary judgment — MIJA on the federal pre-emption claim, and the state on MIJA's constitutional claims as well as the pre-emption claim.

Procedural Posture & Holding: After a hearing, the district court held that LR 121 was pre-empted in its entirety, with one exception, and granted MIJA's motion for summary judgment for all but § 1-1-411(3), MCA. The district court denied MIJA's motion for attorney's fees, but vacated its decision after this Court's decision in *City of Helena v. Svee*, and awarded MIJA attorneys' fees. The state appeals, and the Supreme Court affirms in part and reverses in part.

Reasoning: (1) Following the district court's injunction, the state filed a stipulation stating it will not use an individual's unlawful entry into the country in determining whether the individual is eligible for benefits. Based on that, it argued MIJA

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Summaries, from page 22

no longer had standing. The district court disagreed, and the Supreme Court affirms. A new attorney general would not be bound by the decision not to enforce the challenged definition, nor would the current attorney general be legally bound by his promise not to enforce. "The MIJA members who came to the United States unlawfully and settled in Montana are precisely the individuals against whom the law is intended to operate, and denying them standing to challenge LR 121 would effectively immunize the statute from constitutional review." ¶ 25. MIJA's claims are ripe, and its members have standing to sue in their own right. Therefore, MIJA has associational standing.

(2) Because the power to regulate immigration is exclusively a federal power, a state law that attempts to regulate immigration is field pre-empted. The federal government occupies the field of classifying non-citizens for various purposes. LR 121's definition of "illegal alien" attempts to regulate immigration by creating an immigration status that does not exist under federal law, and therefore leaves it up to state officials to make a discretionary determination as to an individual's immigration status. State laws that authorize state officials to perform a discretionary function regarding immigration status are preempted.

Additionally, LR 121 is conflict pre-empted. Under federal law, many MIJA members who submitted affidavits entered the country unlawfully but are not lawful permanent residents. Under federal law, they are eligible for state employment, but under LR 121's expansive definition of "illegal alien," they are not. Similarly, MIJA members who are lawful permanent residents are qualified under federal law to attend a Montana university, but under LR 121 they are not.

The district court held that the reporting requirement, codified at § 1-1-411(3), MCA, was not pre-empted because the federal government encourages reporting and notification. However, the mandatory reporting requirement relies on the same term, "illegal alien," and therefore suffers from the same defect as the other sections. The Court holds that it cannot be severed from the rest of the statute, and holds that it too is pre-empted. "Because the entirety of § 1-1-411, MCA, is infected with a definition of 'illegal alien' that is unconstitutional under the Supremacy Clause, the entire statute is pre-empted by federal law."

(3) The Court affirms the district court's holding that MIJA is not entitled to attorney fees under § 25-10-711(1)(b) because the state's defense of LR 121 was not frivolous. However, it reverses the district court in its award of attorney's fees under *Svee*. This case is more like Western Tradition Partnership than *Svee*.

Justice Baker's Concurrence: Justice Baker believes the Court's decision in *Svee* was incorrect, but notes that this case demonstrates that *Svee* was based on its unique facts. "Garden variety" declaratory judgment actions do not justify an award of attorney's fees under 27-8-313, MCA.

Ibsen v. Caring for Montanans, Inc.

2016 MT 111 (May 11, 2016) (Cotter, J.) (6-0, aff'd)

Issue: (1) Whether the district court erred in holding that the UTPA does not create a private right of action, and (2) whether the district court erred in holding that Ibsen's claims could not be maintained as common law claims.

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

Facts: Ibsen owns and operates the Urgent Care Plus clinic in Helena. He bought health insurance for clinic employees from Blue Cross and Blue Shield of Montana (BCBSMT) through a Chamber of Commerce program, "Chamber Choices." In July 2013, Health Care Service Corporation bought BCBSMT's health insurance business and BCBSMT changed its name to Caring for Montanans, Inc.

Based on its review of BCBSMT's business practices between 2006-2010, the Montana state auditor fined BCBSMT/Caring $250,000 in February 2014 for numerous discrepancies, including improper medical premium billing in violation of the UTPA. Caring did not challenge or appeal the fine.

In April 2014, Ibsen filed a complaint and class action against Caring and Health Care, alleging violations of the Unfair Trade Practices Act on the basis of charging Ibsen and similarly situated employers excessive premiums, and using the excess money to pay kickbacks to the Chamber. In addition to its class allegations, the complaint also alleged breach of fiduciary duty, UTPA violations, breach of contract, and unjust enrichment.

Procedural Posture & Holding: Holding that the UTPA does not provide a private right of action beyond that provided by § 33-18-242, MCA, regarding claims handling or settlement practices, the district court granted Health Care's motion to dismiss and Caring's motion for summary judgment. Ibsen appeals, and the Supreme Court affirms.

Reasoning: (1) After reviewing the history of the UTPA, the Court concludes the legislature intended to limit the expansion of private causes of action after Klaudt. Section 242 is the only provision that affords a private right of action, and does so only for insureds and third-party claimants. Ibsen is neither. "A party may always allege and recover damages in a common law cause of action upon proof of a common law claim, but a party is not entitled to obtain private enforcement of a regulatory statute that is not intended by the legislature to be enforceable by private parties." ¶ 41.

(2) Each count in Ibsen's complaint relies upon incorporation of the Montana Insurance Code. These are not purely common-law claims, and are not permitted under the UTPA.

Fire Insurance Exchange v. Weitzel

2016 MT 113 (May 17, 2016) (McKinnon, J.) (5-0, rev'd)

Issue: Whether the district court erred by concluding Fire Insurance Exchange (FIE) had a duty to defend Weitzel under the terms of the insurance policy.

Short Answer: Yes. *Reversed and remanded for entry of judgment in FIE's favor*

Facts: The estate of Ronny Groff sued Jake Weitzel, alleging that Weitzel gained the trust of Groff, an elderly man, and then absconded with Groff's property and assets over a number of years. Groff's children hired Weitzel in 2010 to provide in-home care services to Groff and his wife, who died in 2011. Weitzel provided services until Ronny died in July 2013.

The estate alleges that after Ronny's wife died, Weitzel began to wrongfully exert control over Ronny and exploit him to her

financial gain. The complaint alleged 19 separate causes of action, but none allege bodily injury to Ronny and none allege false imprisonment.

Weitzel tendered this litigation to his homeowner's insurer, FIE. Weitzel's policies with FIE provided coverage for personal injury, bodily injury, and property damage, all defined terms.

FIE undertook the defense under a reservation of rights. FIE then filed suit for declaratory judgment regarding whether it had a duty to defend Weitzel.

Procedural Posture & Holding: On cross-motions for summary judgment, the district court denied FIE's motion and granted Weitzel's motion, holding FIE had a duty to defend because the complaint triggered coverage under the personal injury endorsement, and could be construed as stating a claim for false imprisonment. FIE appeals and the Supreme Court reverses.

Reasoning: The parties agree that no coverage is triggered under the property damage endorsement. Regarding personal injury, the endorsement provides coverage for 10 causes of action, including false imprisonment. The complaint does not plead false imprisonment or expressly incorporate the elements of that tort. Even under the most liberal standards, the complaint does not state a claim for false imprisonment. Moreover, the Court has never held that an insurer's duty to defend may be triggered by speculating about extrinsic facts and unpled claims.

Regarding bodily injury, the complaint does not allege that Ronny died as a result of Weitzel's action, or that Weitzel physically abused Ronny. Instead, the complaint alleges only economic loss.

Brunette v. State

2016 MT 128 (May 31, 2016) (Baker, J.; McKinnon, J., dissenting) (5-2, aff'd)

Issue: Whether the district court erred in denying Brunette's petition to reinstate his driver's license.

Short Answer: No. *Affirmed*

Facts: In April 2015, Officer Brotnov was on patrol in Cut Bank. Police department dispatch received a call form an unknown officer to run a license plat check on Burnette's vehicle, parked on Central Avenue. Sometime later, Officer Brotnov drove past Brunette's vehicle, at which point Brotnov turned around and drove in the opposite direction. Brotnov and another officer continued to patrol the area, discussing Brunette's whereabouts. After observing Brunette pull over and change directions twice, officer Brotnov began to follow Brunette, saw him make a right-hand turn without using his turn signal, and initiated a traffic stop.

After observing Brunette's behavior, and asking him whether he had been drinking, Officer Brotnov administered standardized field sobriety tests, including a portable breath test that indicated a BAC of 0.143. Officer Brotnov arrested Brunette. At the detention center, Brunette refused the breath test, and his driver's license was suspended under § 61-8-402, MCA.

Brunette petitioned for reinstatement of his driver's license, arguing Officer Brotnov did not have reasonable grounds to stop him. The district court held an evidentiary hearing at which Officer Brotnov testified. Brunette's counsel questioned the officer about his case report and played the dash cam and body cam video but did not offer any of these items into evidence.

Procedural Posture & Holding: At the end of the hearing the district court made several oral findings. It expressed concern about the officers' conduct in running Brunette's license plate, discussing his whereabouts and possibly targeting this individual. However, the court also found that Brunette did not use his turn signal, and that that plus watery eyes and the portable breath test created reasonable suspicion. In its written order, the district court denied Brunette's petition, focusing on whether the stop was a pretext. Brunette appeals and the Supreme Court affirms.

Reasoning: Under § 61-8-403(4)(a)(i), MCA, the issue presented is whether the officer had reasonable grounds to believe Brunette had been driving or was in actual physical control of a vehicle on state roads open to the public while under the influence of alcohol, and arrested him, after which he refused one or more tests.

Brunette relies on the body cam and dash cam videos, but neither is in the district court record and will not be considered on appeal.

Particularized suspicion for the initial stop is determined under a totality of the circumstances test. Brunette does not dispute that he failed to use his turn signal. A violation of a statute is enough to establish particularized suspicion. Brunette did not testify that the officers' actions contributed to his failure to use his turn signal, and there is no evidence the officers manufactured reasonable suspicion to create a justifiable traffic stop. Having failed to meet his burden to prove the state acted improperly, the Court concludes that the district court correctly held that the officer had particularized suspicion to stop Brunette. Officer Brotnov also had reasonable grounds to conduct the field sobriety tests based on his observations of Brunette. Further, Officer Brunette had probable cause to arrest Brunette, although it did not make that explicit finding. Relying on the doctrine of implied findings, the Court affirms the district court's denial of Brunette's petition.

Justice McKinnon's Dissent (joined by Wheat, J.): The district court's findings do not support a determination of particularized suspicion to administer field sobriety tests, which formed the basis for Brunette's arrest for DUI and subsequent seizure of his license. Indeed, the record does not demonstrate particularized suspicion for DUI until after the administration of the tests. The majority errs in stepping into the shoes of the trial court and making "implied" findings or characterizing statements of the court as "oral findings." "The District Court does not articulate those facts giving rise to an escalation of the stop and which would establish particularized suspicion for the administration of field sobriety tests and reasonable grounds to believe that Brunette was driving while under the influence." ¶ 42.

Tyrrell v. BNSF Railway Co.

2016 MT 126 (May 31, 2016) (Shea, J.; McKinnon, J., dissenting) (6-1, aff'd & rev'd) (consolidated appeals)

More **Summaries,** page 36

Prescription for trouble

What does America's painkiller abuse epidemic mean for attorneys — and what can be done?

By Anita Harper Poe

When we think of drug addicts, we rarely conjure up pictures of soccer moms and engineers. Most of us grew up in a world where prescription pain medications were considered safe and effective and were prescribed routinely for even minor aches and pains. We did not realize a prescription from a doctor, taken as directed for a legitimate medical need, by a person with no interest in recreational drug use, could lead to drug diversion, heroin use, and overdose deaths. We were wrong.

There is an epidemic of prescription drug abuse in the U.S. involving opioid painkillers. Misuse, addiction and accidental overdoses related to prescribed painkillers have created a rapidly escalating public health crisis. This is a particularly urgent issue for attorneys who represent health care providers, and for those representing plaintiffs affected by opiates in one way or another. But even lawyers who do not practice health law need an informed and balanced perspective on the issue to effectively fill our roles as advocates, counselors, community leaders, parents and citizens.

Earlier this year, the Montana Pain Initiative, an interdisciplinary project of the Western Montana Area Health Education Center and the American Cancer Society, held its seventh Bi-Annual Pain Conference at the University of Montana. The conference focused on 'An Ethical Approach to Managing Pain,' with a multidisciplinary audience including physicians, nurses, pharmacists, therapists and others on the front lines of treating people with acute and chronic pain. One message from the conference was that the "opioid crisis" is not simply, or even primarily, a criminal justice issue. Rather, it is a far more complex public health issue that requires a thoughtful, multifaceted response. This article was inspired by the conference, although it does not purport to reflect the specialized knowledge and educated opinions of the many presenters.

How bad is it?

Opioids are a class of drugs that include morphine, oxycodone, fentanyl, methadone and heroin. Since 1999, the amount of prescription opioid painkillers sold in the

U.S. has nearly quadrupled. And while there has been no corresponding reduction in the amount of pain that Americans report, deaths from prescription painkillers have also quadrupled during that time.[1] Drug overdose is now the leading cause of accidental death in the U.S.[2] In 2014, overdose deaths related to prescription pain relievers outnumbered those from heroin and cocaine combined.[3] There is growing evidence of a relationship between increased use of prescription opioids and heroin use. Four out of five new heroin users started out misusing prescription painkillers.[4]

Most people who take pain medication, even in high doses for a long period of time, will not become addicted. But it is impossible to predict who will. These "accidental addicts" could be your accountant or your grandmother. Tragically, when legitimate use of a prescribed medication leads to addiction, help is hard to find. Heroin becomes an option when prescribed opiates become unavailable or too expensive.

Of course, accidental addicts are not the only problem. People intent on abusing drugs find prescribed opioids readily available. Prescriptions have been easy to come by. "Doctor shopping" or getting the same drugs from multiple providers, is hard to detect or prevent. Unused prescribed drugs often end up on the street. More than 70 percent of individuals misusing opioids get them from sources other than their own physician, including unknowing friends and family members.

The consequences of this crisis run deep and wide. In addition to addiction, there are preventable overdose deaths, increases in emergency room visits, more drug treatment admissions, higher insurance costs, more accidents, child neglect, and crime. Dr. Tom Frieden, director of the Centers for Disease Control, has dramatically stated, "We know of no other medication routinely used for a nonfatal condition that kills patients so frequently."

How did we get here?

In the late 1990s, the medical profession started a bold and noble experiment to treat serious pain as a medical condition that could and should be treated. Pain became the "fifth vital sign." People seeking medical care for anything from terminal cancer to a twisted ankle were asked to rate their pain on a scale from one to ten, with the goal being to reduce pain to zero. Surely this was a worthwhile effort, and one that has resulted in greatly reducing suffering for many. The effort by the medical profession to relieve unnecessary suffering should not be abandoned, but like many experiments, this one went off in an unexpected direction, and needs to be reassessed and fine-tuned.

So what went wrong? There are many opinions about this. At a minimum, we, as a society, underestimated the risks, and became too casual about opioids. The causes of pain can be complex and multifaceted. Addiction is still poorly understood. Reimbursement models reward providers for spending less time with patients. Opioids are a quick and inexpensive treatment, available to primary care providers as well as specialists. Drug companies marketed the prescription solution heavily and undersold the risks. Patients with relatively minor injuries or brief recovery periods were routinely prescribed 30 days of painkillers when three days would be sufficient. There was little monitoring of patients who used more than expected, or who lacked indications consistent with their pain complaints. Patients received virtually no education about the risks. Signs of dependency were often not recognized or addressed. People predisposed to addiction were not screened. Patients who began to develop dependence or problematic behaviors were avoided by their doctors, or even terminated from their practices, rather than being evaluated and treated.

As patients, we developed unrealistic expectations about pain, and the ability of medicine to eradicate it. We demanded to be pain-free. Patient satisfaction surveys ask how well pain is treated. Patients may give low scores to hospitals and physicians when their pain is not "completely" controlled or when they do not get the medications they want. This, in turn, affects how providers are paid.

Unaware of the danger, patients who would never knowingly abuse drugs, treated opioids casually, trading and sharing their medications with family members, storing excess tablets in the medicine cabinet for later use, or simply losing track of them when more was prescribed than needed. Teens and others looking for a recreational high assumed prescription pain-killers were safe because after all, they were prescribed by a doctor.

It was too much of a good thing. In 2012, 259 million prescriptions were written for opioids — more than enough to give every American adult their own bottle of pills. The results have been devastating to families and communities. The medical profession has now taken a step back to re-evaluate the role of opioids in medical care. Public health agencies, law enforcement, and local and national governing bodies are all searching for solutions. The public needs to become informed and be part of the conversation.

What can be done?

The Montana Medical Association (MMA) has formed a prescription drug misuse ad hoc committee which works with other organizations and agencies to identify solutions and improve patient safety. Through the MMA's website, Montana physicians can enroll at no cost for a pain management course designed to help them provide the best treatment for their patients, while preventing patients from becoming addicted to opioids. Montana physicians have reduced opioid prescriptions by 10 percent from 2013 to 2015.

The medical profession is only part of the solution, however. State and federal lawmakers are tackling the problem with a number of initiatives; some useful, others questionably so. Some states have passed laws limiting the quantity of controlled substances that can be prescribed, or the dose of any individual prescription. Many pain experts find such "dose caps" misguided and even harmful, limiting the provider's ability to provide appropriate care in an individual situation. More common are laws limiting the number of times a prescription can be refilled, the quantity of pills in one refill, and the categories of personnel who can dispense certain quantities of drugs.

1 http://www.cdc.gov/drugoverdose/epidemic/

2 http://www.asam.org/docs/default-source/advocacy/opioid-addiction-disease-facts-figures.pdf.

3 http://www.cdc.gov/vitalsigns/opioid-prescribing/; http://www.cdc.gov/vitalsigns/painkilleroverdoses/

4 Hedegaard MD MSPH, Chen MS PhD, Warner PhD. Drug-Poisoning Deaths Involving Heroin: United States, 2000-2013. National Center for Health Statistics Data Brief. 2015:190:1-8.

Several states, including Montana, criminalize the conduct of attempting to obtain drugs by fraudulent means. Montana Code Annotated § 45-9-104 makes it a crime to obtain or attempt to obtain a controlled substance through misrepresentation, subterfuge, the use of forged or altered prescriptions, the use of a fake name or address, or other types of fraud. A patient who fails to disclose to the prescriber a material fact, or fails to disclose that he or she has received the same or similar drug from another source violates this law. The fact that such conduct constitutes a crime allows a physician who believes a patient is trying to obtain drugs illegally to involve law enforcement.

At the same time, patients with substance abuse disorders need treatment, just like any other chronic relapsing medical disorder. Experience shows that merely criminalizing the disorder is not a solution. Expanding access to evidence-based substance abuse treatment for people struggling with opioid addiction is absolutely essential, as is support for ongoing research into what treatments are effective.

This summer, the U.S. Congress mustered rare bipartisan support to pass the Comprehensive Addiction and Recovery Act (CARA). This is the first major federal addiction legislation in 40 years, and the most comprehensive effort undertaken to address the opioid epidemic. It expands prevention and education efforts, facilitates the availability of an overdose-reversing drug to law enforcement and first responders, provides evidence-based treatment for addiction disorders, expands disposal sites for unused medications, strengthens state prescription drug monitoring programs and funds programs for addiction treatment and recovery services.

An increase in the availability of Naloxone, a drug that can reverse the potentially fatal effects of opioid overdose, is especially promising, as studies show positive results when patients, family members and first responders have access to this relatively safe antidote, along with training on its use.

Doctor shopping can be reduced with increased use of databases such as the Montana Prescription Drug Registry. Authorized by the Montana legislature in 2011 (§37-7-1501 MCA) the Prescription Drug Registry gives physicians online access to the controlled substance prescription history of their patients. Pharmacies are required to document controlled substances dispensed. By searching the data base before prescribing, doctors can determine whether their patients are getting drugs from other providers, and identify individuals who may be abusing drugs, or diverting their prescription drugs for illegal use. Access to databases across state lines would make it harder for abusers to doctor shop in multiple states.

A better understanding of pain, what causes it and what is effective in relieving it, requires support for ongoing medical research. The availability of, and reimbursement for, multi-disciplinary non-opioid treatment models for pain must be encouraged. As lawyers, we can have a positive impact by advocating for legislation and funding of initiatives that have the potential to create long-term solutions, rather than knee-jerk reactions.

The simple solution that does not work

The solution is not to go back to the bad old days. Some physicians have reacted to the crisis by refusing to prescribe opioids at all, even when indicated for acute pain such as fractures or post-surgical pain. Some physicians refuse to see patients with chronic pain. Some treat any patient complaining of pain with distrust and disbelief, which can lead to missing a serious medical problem.

Their fears are not unfounded. Many well-meaning doctors have been tricked by a patient with a believable story, who turned out to be manipulating them to get drugs. Doctors know that law enforcement agencies at the local and national level sometimes view them as criminal conspirators with abusers. Criminal prosecutions of physicians for excessive prescribing are in the headlines. Prescribers face potential medical malpractice cases and actions on their license.

The problem with this aversion approach is that pain is real. Fear of prescribing in a culture of crisis and blame has resulted in an increase in undertreated or untreated pain, which in turn causes unnecessary suffering, disability and economic costs. Diagnoses can be missed. Patients with short-term acute pain find themselves with nowhere to turn as they are conflated with addicts and drug seekers. Patients with stable chronic pain are stigmatized and isolated. And physicians find that refusing to treat pain does not immunize them from liability.

How can physicians protect themselves?

Civil liability for malpractice requires proof of a failure to meet the standard of care, resulting in damages to the plaintiff. Damages from negligent prescribing of opioids include overdose, addiction and even medications getting into the wrong hands and injuring a third person. A physician's refusal to prescribe for pain, when indicated, can result in claims for untreated pain, patient abandonment, unnecessary disability and even suicide. Assuming every patient complaining of pain is just a drug-seeker can lead to a missed diagnosis and delayed treatment.

Prescribing is never risk-free, but prescribers can reduce their risks by educating themselves and keeping up with rapidly evolving standard of care. The MMA has teamed up with the Montana Attorney General and others to develop a website called knowyourdosemt.org, to help physicians learn best practices. The Centers for Disease Control has published the "CDC Guideline for Prescribing Opioids for Chronic Pain" and many other resources at www.cdc.gov. It is critical for physicians to recognize that the standard of care is not what it used to be when it comes to prescribing opioids. There is no substitute for up-to-date, ongoing clinical education.

Prescribing practices must become more comprehensive and individualized, and that will take more time. Using the Montana Prescription Drug Registry, described above, can reduce the risk of inadvertently overprescribing for a patient. Validated risk assessment tools are available to screen patients for potential abuse or susceptibility to addiction. Prescribing should not be based on patient request, but on an appropriate history and assessment. Specific indications for the drug, dose and duration should be documented. Patients should be counseled about the risks and signs of abuse, addiction, and diversion. Painkillers for acute conditions should be thoughtfully limited in amount and duration. Refills should meet the same criteria for indications, duration, and documentation. Appropriate follow up and monitoring can help identify potential problems early. Patients displaying problematic behavior

may require intervention and referral.

It is important to distinguish acute pain from chronic pain. The therapeutic value of opiates in treating chronic pain is coming under scrutiny. Prescribing opiates long-term requires verification and vigilance, and may not be within the scope of practice for every provider. Referral to a pain center or pain management specialist may be appropriate. Most studies show opioids alone to be relatively ineffective for most non-cancer chronic pain. They can, however, be an effective component in a multi-disciplinary approach that includes non-narcotic medications, physical therapy, and behavioral modalities. Chronic pain management is focused on reducing pain and improving function. Additional monitoring tools may be appropriate including pain contracts and random drug testing.

Providers need to educate themselves about strategies used by drug seekers to obtain prescriptions illegally. In a time when addicts and abusers obtain multiple prescriptions easily, some skepticism by providers is necessary. However, the need to exercise clinical judgment is not eliminated because a patient exhibits troubling behavior. Particularly when dealing with established patients, or patients for whom the provider has initiated opioid therapy, there may well be a clinical problem instead of, or in addition to, a law enforcement problem. Ultimately, the physician's best protection comes from following evidence-based best practices, as those continue to evolve over time.

What the rest of us can do

A seismic shift in public attitudes is needed as well if the medical profession and policymakers are to make any headway against this crisis. The following are some suggestions from the experts about what each of us can do.

- Take an active role in your own medical treatment; ask your doctor about any prescription; understand why it is needed, the risks and the benefits.
- Take your medicines only as directed and only for the reason given.
- Learn to recognize warning signs of dependence and addiction in yourself and others.
- Appreciate that opioid medications are serious medicines with serious risks.
- Recognize it is unrealistic to expect to have no pain when sick, injured or undergoing certain medical treatments.
- Learn about alternate and adjunct methods to relieve pain.
- Do not save medications you obtained for a current problem in case you need them later.
- Do not share medications with friends and family and never take medications prescribed for someone else.
- Do not keep old medications around – they may be stolen or misappropriated by others.

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Modest Means

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

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

What are the benefits of joining Modest Means?

While you are not required to accept a particular case, there are certainly benefits!
You are covered by the Montana Legal Services malpractice insurance, will receive recognition in the Montana Lawyer and, when you spend 50 hours on Modest Means and / or Pro Bono work, you will receive a free CLE certificate entitling you to attend any State Bar sponsored CLE. State Bar Bookstore Law Manuals are available to you at a discount and attorney mentors can be provided. If you're unfamiliar with a particular type of case, Modest Means can provide you with an experienced attorney mentor to help you expand your knowledge.

Questions?

Please email: *agoldes@montanabar.org*. You can also call us at 442-7660.

Uniform Law Commission completes 7 new acts or amendments in 2016

By Jonathon S. Byington and Karen Powell

Uniform laws impact the lives of Montana citizens every day — from a simple transaction such as a teenager buying a candy bar to a complex partnership agreement — these and many more transactions and disputes are governed by uniform laws enacted by the Montana Legislature. Although lawyers in Montana use uniform laws every day, many are unfamiliar with the origins of these laws.

Most uniform laws are the product of the Uniform Law Commission (ULC), known until 2008 as the National Conference of Commissioners on Uniform State Laws. The ULC is a nonprofit unincorporated association consisting of more than 300 uniform law commissioners who must be licensed attorneys and appointed by every state. The ULC was originally created as a way to consider state law, determine in which areas of the law uniformity is important, and then draft uniform and model acts for consideration by the states. The ULC has worked for the uniformity of state laws since 1892. Montana has been a member of the ULC since 1893.

The ULC convenes as a body once a year, meeting for a period of seven days, usually in July. At each annual meeting, proposed acts are read and debated line by line, before all commissioners sitting as a committee of the whole. The ULC spends a minimum of two years on each draft, but no act becomes officially recognized as a uniform act until the ULC is satisfied that it is ready for consideration by the legislators of every state. In the interim between annual meetings, drafting committees composed of commissioners, observers, and American Bar Association advisors meet to prepare working drafts that are to be considered at the annual meeting. Work on large-scale projects, such as revisions to the Uniform Commercial Code, can take many years to complete.

The ULC can only propose. No uniform act can take effect unless and until it is adopted by a state legislature.

Montana has enacted over 150 uniform acts, including the landmark Uniform Commercial Code.[1] In recent years, Montana has enacted the Uniform Collaborative Law Act,[2] the Uniform Interstate Family Support Act,[3] the Uniform Power of Attorney Act,[4] the Uniform Unsworn Foreign Declarations Act,[5] the Uniform Powers of Appointment Act,[6] the Uniform Trust Code,[7] and amendments to the Uniform Commercial Code.[8]

Montana's Uniform Law Commission consists of three members each appointed by the Montana Legislative Council.[9] Montana's current commissioners are: Karen Powell, a business, regulatory, and tax attorney in Helena; the Honorable Gregory Pinski, a district judge in the 8th Judicial District in Great Falls; and Jonathon Byington, an associate professor at the Alexander Blewett III School of Law at the University of Montana in Missoula. In addition, the Montana delegation has one member who was recently elected by the ULC to be a life member, E. Edwin (Ed) Eck, the former dean of the law school and the current Deputy Attorney General and Chief of the Office of Consumer Protection at the Montana Department of Justice in Helena. Todd Everts, who is Montana's Code Commissioner and the Director of the Montana Legislative Legal Services Office, serves as an associate commissioner on the ULC. Commissioners donate their time and expertise as a pro bono service, receiving no payment for their work with the ULC.

In July 2016, the 125th Annual Meeting of the ULC convened in Stowe, Vermont. Seven new acts or amendments to acts were completed in 2016, including:

■ **Uniform Family Law Arbitration Act:** States' laws vary when it comes to arbitrating family law matters such as spousal support, division of property,

Montana's Uniform Law Commission

Montana's Uniform Law Commission consists of three members: Karen Powell, a business, regulatory and tax attorney in Helena; Johnathon Byington, an associate professor at the Alexander Blewett III School of Law at the University of Montana; and the Honorable Gregory Pinski, Eighth Judicial District Court judge.

The ULC can only propose. No uniform act can take effect unless and until it is adopted by a state legislature.

If you are interested in any uniform or model acts proposed by the ULC, contact any of Montana's commissioners. You can contact Powell at *kp@renthelena.com* or 406-439-8309. You can contact Judge Pinski at *gpinski@mt.gov* or 406-454-6894. You can contact Jonathon Byington at *jonathon.byington@umontana.edu* or 406-243-6773.

1 M.C.A. § 30-1-101.
2 M.C.A. § 25-40-101.
3 M.C.A. § 40-5-1001.
4 M.C.A. § 72-31-301.
5 M.C.A. § 26-1-1101.
6 M.C.A. § 72-7-101.
7 M.C.A. § 72-38-101.
8 M.C.A. §§ 30-4A-108 and 30-9A-503.
9 M.C.A. § 1-12-101.

child custody, and child support. The Uniform Family Law Arbitration Act standardizes the arbitration of family law. It is based in part on the Revised Uniform Arbitration Act ("RUAA"), though it departs from the RUAA in areas in which family law arbitration differs from commercial arbitration, such as: standards for arbitration of child custody and child support; arbitrator qualifications and powers; and protections for victims of domestic violence. This act is intended to create a comprehensive family law arbitration system for the states.

■ **Revised Uniform Unclaimed Property Act:** The ULC first drafted uniform state legislation on unclaimed property in 1954. Since then, revisions have been promulgated in 1981 and again in 1995. Many technological developments in recent years as well as new types of potential unclaimed property, such as gift cards, are not addressed in the most current uniform act. The Revised Uniform Unclaimed Property Act updates provisions on numerous issues, including escheat of gift cards and other stored-value cards, life insurance benefits, securities, dormancy periods, and use of contract auditors.

■ **Uniform Wage Garnishment Act:** States have different wage garnishment laws and processes. This means that employers who do business across multiple states must know and abide by a different and often complex law for each jurisdiction. If employers make processing errors calculating garnishments they may face civil penalties. The Uniform Wage Garnishment Act seeks to simplify and clarify wage garnishments for employers, creditors, and consumers by standardizing how the wage garnishment process works and offering plain-language notice and garnishment calculation forms.

■ **Uniform Employee and Student Online Privacy Protection Act:** The growing use of social media has implications in both employment and educational contexts. Some employers and educational institutions ask current and prospective employees and students to grant the employer or school access to social media or other name and password protected accounts. The Uniform Employee and Student Online Privacy Protection Act addresses both employers' access to employees or prospective employees' social media and other online accounts accessed via username and password or other credentials of authentication as well as educational institutions' access to students' or prospective students' similar online accounts.

■ **Uniform Unsworn Domestic Declarations Act:** The Uniform Unsworn Domestic Declarations Act builds upon the Uniform Unsworn Foreign Declarations Act, which covers unsworn declarations made *outside* the United States. The Uniform Unsworn Domestic Declarations Act permits the use of unsworn declarations made under penalty of perjury in state courts when the declaration was made *inside* the United States.

■ **Uniform Unsworn Declarations Act:** The Uniform Unsworn Declarations Act combines the Uniform Unsworn Foreign Declarations Act and the Uniform Unsworn Domestic Declarations Act into one comprehensive act.

■ **Revised Uniform Law on Notarial Acts: Amendment on Foreign Remote Notarization:** The Amendment to the Revised Uniform Law on Notarial Acts authorizes notaries public to perform notarial acts in the state in which they are commissioned for individuals who are located outside the United States. The amendment is optional for the states. The amendment requires the use of audio and video technologies for real-time communication and requires the notary to record the interaction. It authorizes the commissioning agency to regulate the technologies used. The act of the individual in making the statement or signing the record must not be prohibited in the foreign state in which the individual is physically located. The certificate affixed by the notary to the record must indicate that the notarial act took place while the individual was located in a foreign state.

State to consider Revised Fiduciary Access to Digital Assets in 2017

The Revised Uniform Fiduciary Access to Digital Assets Act ("Revised UFADAA") will be considered for enactment in the upcoming 2017 Montana legislative session as bill draft number LC0085. A fiduciary is a trusted person with the legal authority to manage another's property and the duty to act in that person's best interest. Revised UFADAA addresses four common types of fiduciaries: executors or administrators of deceased persons' estates; court-appointed guardians or conservators of protected persons' estates; agents appointed under powers of attorney; and trustees. Revised UFADAA gives Internet users the power to plan for the management and disposition of their digital assets in a similar way as they can make plans for their tangible property. In case of conflicting instructions, the act provides a three-tiered system of priorities. First, if the custodian provides an online tool, separate from the general terms of service, that allows the user to name another person to have access to the user's digital assets or to direct the custodian to delete the user's digital assets, Revised UFADAA makes the user's online instructions legally enforceable. Second, if the custodian does not provide an online planning option, or if the user declines to use the online tool provided, the user may give legally enforceable directions for the disposition of digital assets in a will, trust, power of attorney, or other written record. Third, if the user has not provided any direction, either online or in a traditional estate plan, the terms of service for the user's account will determine whether a fiduciary may access the user's digital assets. If the terms of service do not address fiduciary access, the default rules of Revised UFADAA will apply. Revised UFADAA is an overlay statute designed to work in conjunction with existing laws on probate, guardianship, trusts, and powers of attorney.

If you are interested in any uniform or model acts proposed by the ULC, contact any of Montana's commissioners. Karen Powell can be contacted at *kp@renthelena.com* or (406) 439-8309. Judge Gregory Pinski can be contacted at *gpinski@mt.gov* or (406) 454-6894. Jonathon Byington can be contacted at *jonathon.byington@umontana.edu* or (406) 243-6773.

For further information on uniform acts or the ULC, please go to the ULC's website at www.uniformlaws.org.

Jonathon S. Byington is an associate professor at the Alexander Blewett III School of Law at the University of Montana in Missoula. Karen Powell is a business, regulatory, and tax attorney in Helena. Both serve as commissioners on the Uniform Law Commission.

Counsel for those thinking about entering into Of Counsel relationships

Mark Bassingthwaighte, Esq.
ALPS Risk Manager

Of Counsel is one of those terms that has multiple meanings. This term has been used as an honorary designation for retired partners, as a special designation for firm attorneys who are neither a partner nor an associate, and as a way to describe part-time attorneys who have created an association with a firm. In recent years however, more attorneys seem to want to use the term solely as a way to generate additional business. After all, the public presentation of close ties with another firm can be an effective marketing tool that will drive additional business to your firm, right? Well perhaps, but there are risks that come into play and these risks should not be taken lightly.

What is an Of Counsel Attorney?

The Of Counsel designation as envisioned by the authors of various ethics opinions refers to something altogether different from a traditional attorney within a firm. These opinions generally define an Of Counsel attorney as an attorney who is not a partner, associate, shareholder, or member of a firm, and they further state that an attorney may only be designated Of Counsel to the firm if the attorney will have a close and continuing relationship with the firm. This means that any attorney that works with your firm and has a significant degree of shared liability with your firm or managerial responsibilities to your firm and/or its staff should never be designated as Of Counsel. Related terms such as Special Counsel, Tax Counsel, Senior Counsel, and the like are understood to have the same meaning as Of Counsel and thus the requirement of a close and continuing relationship will apply there as well.

The requirement of a close and continuing relationship has been defined as providing for close, ongoing, regular, and frequent contact for the purpose of consultation and advice. Further, the Of Counsel attorney must be more than an adviser on only one case or just a forwarder or receiver of legal business. Attorneys can get into serious disciplinary trouble by designating someone who is merely a referral attorney as Of Counsel because that is usually considered to be a misleading client communication in violation of the ethical rules. This is why the idea of creating Of Counsel relationships solely for marketing purposes falls flat.

Who Can Properly Be Designated Of Counsel?

Evaluating the appropriateness of the designation in the light of what a disciplinary committee could perceive as misleading can help one avoid some of the common Of Counsel designation pitfalls. Remember the average person will take the term at face value so come at the decision from the perspective of the average person's expectations. If you are thinking about being listed on another firm's letterhead as Of Counsel, only do so if you are able to be readily available and actually will provide counsel to that firm.

Examples of acceptable relationships for the Of Counsel designation have included, but are not limited to:

- retired lawyers
- withdrawing partners or associates
- part-time practitioners
- permanent non-partners/non-associates
- partners on leave, and
- probationary partners-to-be.

Examples of unacceptable relationships for the Of Counsel designation have included, but are not limited to:

- outside consultants
- suspended lawyers
- when the affiliation involves only a single case
- those who share office space and nothing more
- public officials who are not engaged in active practice with their former firm.

Can a law firm be Of Counsel to another firm? Can an attorney be of counsel to more than one firm? Can an attorney be Of Counsel to an out-of-state firm? While the answers to these questions can be yes, the reality is that the answers to these questions and a number of others will differ depending upon the jurisdiction in which you practice. Given the numerous and varying state specific rules regarding this designation, I would recommend that prior to establishing any Of Counsel relationship you review any relevant ethics opinions and/or contact bar counsel in your jurisdiction.

What Are the Risks?

There are a few generally applicable issues that take on special significance in an Of Counsel affiliation. In particular, imputed disqualification, vicarious liability, and insurance coverage disputes warrant special attention.

Imputed Disqualification — For conflict purposes the Of Counsel affiliation means that the affiliated firm and the Of Counsel attorney will often be treated as one entity. This does mean that the conflicts the Of Counsel attorney brings to the table may prevent the affiliated firm from continuing to represent current or future clients. Likewise, the Of Counsel attorney has to be concerned about apparent or actual conflicts between his own clients and those of the affiliated firm. The imputed disqualification rule is a two-way street and there is little that can be done to correct the problem once it has arisen. Conflict checks can be burdensome and the potential cost in lost business if a conflict is ever missed can be substantial. Always address the conflict issue prior to establishing Of Counsel relationships so that everyone understands what the additional burden will be and can agree that the benefits outweigh the costs.

Vicarious Liability — While the affiliated firm is not going to be liable for the independent acts and omissions of the Of Counsel attorney that were outside of the apparent scope of the Of

Counsel's involvement with the affiliated firm, this doesn't prevent claims from arising. Problems can and will arise based upon any given client's perspective of the affiliation. Unrestrictive use of letterhead listing the Of Counsel attorney by the affiliated firm or the Of Counsel attorney sends the message that all participants are involved on any and all matters of the firm and/or the Of Counsel attorney even if this isn't the case. To help avoid becoming a named co-defendant in each other's suits, create two versions of letterhead. One will list the Of Counsel attorney and the other will not. Then only use letterhead showing the Of Counsel attorney's name when that attorney is actually working on a firm matter. Likewise, make sure that the Of Counsel attorney abides by the same rule.

Insurance Coverage Disputes — In the unfortunate event of a claim, coverage problems can arise when an affiliated firm has done work on a matter that the Of Counsel attorney had no involvement in or awareness of, but was unfortunately listed as Of Counsel on the letterhead that was in use. Should this Of Counsel attorney not have coverage under the affiliated firm's malpractice policy there may be a significant problem because the Of Counsel attorney's own policy will often not afford coverage either. Why is this? The Of Counsel attorney's own policy will only cover work done on behalf of clients of the named insured which is the Of Counsel's own firm. In this situation the Of Counsel attorney would be facing a claim that arose out of work done for a client of the affiliated firm thus the coverage gap. These sorts of "who is the client," "who is the attorney of record," and "who is the named insured" are common challenges that underscore the necessity of investigating and addressing the insurance coverage issues early on. Appropriate coverage for the exposures of both the affiliated firm and the Of Counsel attorney can usually be obtained, if the issue is addressed at the outset.

Closing Thoughts

Beyond the above, the best risk management advice that I can give regarding Of Counsel relationships is to encourage you to always keep in mind joint accountability. Of Counsel relationships can be quite valuable but clients will rightly respond to these affiliations as if they represent a single "entity." Mutual accountability will be in play, particularly when a client is directly involved with both parties to the Of Counsel affiliation. I do believe that Of Counsel relationships are of significant value as long as these relationships are entered into with client interests in mind as opposed to being a marketing strategy. Overlook this, and problems may lie just around the corner.

ALPS Risk Manager Mark Bassingthwaighte, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Youc can contact him at: mbass@alpsnet.com.

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of livestock owners grazing on BLM lands in Phillips County, seek title to the BLM's claimed water rights under the theory that the livestock owners (or their predecessors) grazed on or near these BLM lands when they were open range, prior to the U.S. BLM creating its grazing lease program. Further, that their cattle relied on the same water sources now impounded in the BLM reservoirs. These livestock owners also argue that because the BLM itself does not graze the livestock, it has not perfected its claimed state water rights through a beneficial use.

The Water Court held in favor of the United States, concluding that the BLM can develop and own water rights for use by grazing lessees, and need not own the livestock that beneficially use the water. The Water Court further held that any water rights that the private livestock owners may claim from their days of grazing on the open range would be separate claims that can co-exist with the BLM water rights. Thus, the court held that the rights are not mutually exclusive, and livestock owners can proceed to file claims for their own livestock water on the same source.

The Water Court also agreed with the BLM that a natural prairie pothole located on BLM grazing land should receive special classification as a federal "reserved" water right under an early federal law that withdrew from the public domain those water bodies large enough to support public uses for watering purposes. The livestock owners argued that the pothole was too small to qualify for withdrawal under the law. If the pothole is considered a reserved water body with a federal water right, the BLM receives an earlier priority date than if it seeks a traditional, state-based water right on the pothole. South Phillips Water Users Group has appealed these Water Court rulings."

Attorney was namesake of Missoula firm, winner of 2009 William J. Jameson Award

By Worden Thane Attorneys and Staff

As many of you may already know, Jeremy Thane, one of the co-founders of Worden Thane P.C., passed away in late August.

Jeremy, or Jerry (as we called him) practiced law for 60 years, and during that time he was a consummate lawyer, public citizen, colleague and gentleman. He had a career of accomplishment, beginning with his astute and keen insight, which others have considered luck, to win the favor of Virginia, or Ginny, form a lifetime partnership, and raise a family in Missoula. His other accomplishments included his service in the Navy in WWII; work as Missoula city attorney and as a deputy county attorney in the 1950s; building the law firm that bears his name; eight years as chairman of the Montana Department of Public Welfare, now the Department of Public Health and Human Services; four years on the Montana Board of Health and Environmental Sciences; president of many Missoula organizations, ranging from the Chamber of Commerce to the Missoula Symphony, to the Boy Scouts; teaching trial practice and labor law to a generation of students at the University of Montana School of Law. He was also elected a Fellow of the American College of Trial Lawyers and was awarded the prestigious William J. Jameson Award by the State Bar of Montana.

To some, he was just a well-dressed gentleman who they might have passed on the street. To those who worked with him, he was a friend, a colleague, and even a legend. It's pretty easy to come up with words to describe Jeremy Thane's character. Jeremy was hard-working and professional, and he cared about the wellbeing of others, regardless of their social standing in life. I don't have any doubt that even though he retired from practice after 60 years, he spent every day of his life after that, until his passing in August of 2016, doing his best to be a role model for professionals in the practice of law.

Jeremy Thane

When our firm learned of Jerry's passing, it was difficult to figure out the best way to let others know the news. We sent out an initial notice to the employees, knowing that the days and weeks to come would be filled with sadness. While this was obviously the case, it was refreshing to see how many employees and attorneys shared stories about interactions they had experienced with Jerry over the years. He will always be remembered for the great man that he was, because he truly did create a legacy. From all of us at Worden Thane, here are just a few things we would like to share about Jerry.

Sean Morris: "Mr. Thane was predominately retired when I joined the firm so I worked very little with him. To me, he was the incredible old time/ Atticus Finch gentleman in the corner office.

"Early in my career, I got into a very ugly fight with an attorney. This attorney had aggressively sued a client, and I was able to outmaneuver him telling him he either had to dismiss the suit or face sanctions. The attorney wrote to Mr. Thane to try to get me to back off. Mr. Thane invited me into his office to talk about it.

"I nervously walked into his office, suddenly unsure in my position. Mr. Thane, in the most direct manner possible, explained it to me. He said he had reviewed the situation and felt he needed to talk to me about it. He said I was right and the other attorney was wrong. He said this attorney I was dealing with was an insufferable ass as any he had ever seen in his 50 years of practice, and he was going to let the attorney know that it was in his best interests to dismiss the suit immediately. I could not have ever been more thankful or proud to work with such a man. The attorney dismissed the suit shortly thereafter."

Amy Scott Smith: "I will never forget the day he passed by my office, turned around and came back just to compliment me on my clean desk one day (probably the only day it was clean) – 'Glad to see someone around here keeps a clean office; good job.'"

Jane Cowley: "I feel dang lucky to have tried one case with Jerry — I did the witness examinations, he did opening and closing — to call him a gifted orator does not do enough to express his skill and command of the court room."

Dawn Donham: "Jerry provided advice and guidance, but always in a supportive, nonjudgmental way. He seemed to admire my work, and my family, despite only knowing them through our day-to-day conversations. He expressed pride in the things that I did in life. I

> *...to call him a gifted orator does not do enough to express his skill and command of the court room.*
>
> *— Worden Thane attorney Jane Cowley*

would like to say I knew Jerry for longer, or more personally than I did. However, my time with him only spanned a decade. How lucky I was to meet such a great man, if for only a short time in this life."

Ron Bender: "Jerry Thane was my good friend, mentor and a person I highly respected. When I was a senior in law school he taught the Law Practice class. I can still remember him taking the class to the office of Worden Thane Haines and Williams, located at 220 Savings Centre (the old Western Federal Savings and Loan at Broadway and Higgins) at night to show us the 2 IBM mag card typewriters they had; then the cutting edge of technology and the predecessor of computer word processing. The data was typed in a magnetic card 8.5 by 3, an original sheet and a carbon was placed in the feeder and the print key hit and the old IBM electric keys took off like a machine gun. Only the secretaries knew how to input or run them- none of the attorneys. When my clerkship with Russell Smith was up and any attorney position in Missoula did not look very good, out of the blue in early February of 1973 Jerry walked into the Federal Court Chambers (second floor northeast corner of Broadway and Pattee of the old Federal Building) and asked me if I wanted to go to work for Worden Thane Haines and Williams. I told him 'yes' and he said, 'when can you come to work?' I said, 'Probably in 30 days.' I went to work for Worden Thane Haines & Williams on March 19, 1973. Other than previously mailing a resume, I had no formal interview.

"Jerry let me handle a lot of labor negotiations and NLRB elections and charges right out of the box. The first jury trial I tried was with Jerry that fall- an auto neck injury. He was defending the insured for the insurance company and asked me to do some initial work and go to trial with him. About two days before trial he asked if we were ready to try it. I said 'yes' and he said, 'fine you can handle it'. He let me handle the whole case as he watched and took the second chair. I can still remember the adage he had behind his desk, 'Old Age and Cunning Will Overcome Youth and Skill Every Time.'

"Jerry's family had a lot of history. His father Shirley Thane came to Missoula to work for William A Clark in the Missoula Water Company, later acquired by the Montana Power Company. His father left the Missoula Water Co. and owned and operated the Hamilton and Plains Water Company. Jerry was still running the Hamilton Water Company when I came to work and eventually sold it to the city.

"The passing of a very distinguished and respected gentleman and lawyer."

Colleen Dowdall: "One time we had just had a meeting in which associates were told that they needed to do more to help the firm bring in money. That did not set well with me for a number of reasons which I of course felt compelled to share. I was pregnant with my third child at the time and I prefaced my comments with the statement that when I am pregnant and angry sometimes I cry. I did not want anyone to mistake my tears as fear.

"Afterwards Jerry came to my office. He closed the door and I believed he had been sent to give me 'the word'. He sat down and looked at me and asked me if I was ok. I nodded. He said he found it damn refreshing that anyone was willing to cry over Worden Thane and Haines. I think I started calling him Jerry after that. (Give me an inch. . .)

"At the end of his distinguished career, Jerry represented women in court pro bono, who were seeking orders of protection. A coordinator of that program told me that the class and dignity that Jerry added to those cases made the women he represented stand taller and be more confident while the white haired gentleman in a suit stood beside them.

"Finally, when I came back to Worden Thane in 2006, Jerry would stop by to chat. I told him I thought he seemed much more mellow than when I was at the firm before. I wanted to know his secret. He thought about it and said, 'I quit drinking coffee.' If only we had known…"

— — —

To add, Gail Haviland was able to find some famous Jerry sayings in our Worden Thane Memory Book:

"Look after the pennies, the dollars will take care of themselves."

"When you're angry at the other party and write a letter, let it sit on your desk overnight. Most times you will tear it up…unless it's to the IRS, then you put in the salutation: Dear Money Grubbing Sons of Bitches."

And finally, Will McCarthy's tribute to Mr. Thane in a Western Montana Bar Association newsletter: "Jerry is a man who knows history, fine art, humor and golf courses as well as the inside of any courtroom in this State. He has the presence of a statesman of an era long forgotten; a heart of gold, a word with the strength of titanium, the wit of a stand-up comedian, and is one tough SOB who you want on your side when the going gets tough. Whenever I walk into his office I feel as if I am meeting with an iconic United States senator. However, when I once told him that, he asked what he had done to me to deserve such a disrespectful comment."

From all of us at Worden Thane P.C., Jerry, you will be missed. We were fortunate to know you, and promise to continue to live by your standards- personally, and professionally. Thank you for your friendship, mentorship, and service to our communities.

Summaries, from page 25

Issue: (1) Whether Montana courts have personal jurisdiction over BNSF under FELA, and (2) whether Montana courts have personal jurisdiction over BNSF under Montana law.

Short Answer: (1) Yes, and (2) yes. *Affirmed (denial of BNSF's motion to dismiss) and reversed (granting BNSF's motion to dismiss)*

Facts: In March 2011, Nelson, a North Dakota resident, sued BNSF in Montana to recover damages for injuries sustained in his employment with BNSF. BNSF is a Delaware corporation with its principal place of business in Texas. Nelson does not allege that he ever worked in Montana or was injured in Montana.

In May 2014, Kelly Tyrrell sued BNSF in Montana for injuries sustained in Brent Tyrrell's employment that eventually led to Brent's death. The complaint did not allege that Brent ever worked in Montana or was injured in Montana.

Procedural Posture & Holding: BNSF moved to dismiss Nelson's complaint for lack of personal jurisdiction, and Judge Baugh granted the motion, citing *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014). BNSF moved to dismiss Tyrell's complaint for lack of personal jurisdiction, and Judge Moses denied the motion, concluding that under Montana's long-arm statute, BNSF is found in Montana and has substantial, continuous and systematic activities within Montana for general jurisdiction purposes. Nelson appeals Judge Baugh's order, and BNSF appeals Judge Moses's order. The Court consolidated the cases for purposes of appeal, and affirms Judge Moses and reverses Judge Baugh.

Reasoning: (1) The U.S. Supreme Court has consistently interpreted FELA as allowing state courts to hear cases brought under FELA even where the only basis for jurisdiction is that the railroad does business in the forum state. BNSF contends that Daimler overruled prior U.S. Supreme Court cases; however, Daimler was not a FELA case and did not involve a railroad defendant. "Therefore, Daimler did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business.'" ¶ 17.

Additionally, based on the fact that BNSF owns and operates railroad lines in Montana, is licensed to do business and has offices and agents in Montana, and its agents transact business in Montana ordinarily connected to operating a railroad, BNSF is "properly sued" in Montana. Terte, 284 U.S. 284.

BNSF's interpretation would mean that a Montana resident who was hired and employed by BNSF in Montana, and injured while working for BNSF in another state, would not be able to bring his action in the state where he resides and where his employer regularly conducts business. This directly contravenes the FELA's purpose of protecting injured railroad workers from the "injustice" of having to travel far from home to bring suit against the railroad. Under FELA, Montana courts have general jurisdiction over BNSF.

(2) Montana courts conduct a two-step inquiry to determine whether the exercise of personal jurisdiction over a nonresident defendant is appropriate. First, whether M. R. Civ. P. 4(b)(1) provides jurisdiction, and if so, whether the exercise of jurisdiction comports with due process. Personal jurisdiction can be general or specific. A nonresident defendant with substantial or continuous contacts with Montana is "found" in Montana and may be subject to Montana's jurisdiction even if the cause of action is unrelated to the defendant's activities in Montana.

BNSF has substantial, continuous and systematic contacts with Montana, and is "found" in Montana under M.R. Civ. P. 4(b)(1). The Court concludes that Montana courts have general personal jurisdiction over BNSF.

Justice McKinnon's Dissent: Justice McKinnon would conclude that Montana courts lack general personal jurisdiction over BNSF under the Due Process Clause, as interpreted by the U.S. Supreme Court in cases such as Daimler. The majority rejects the "at home" standard in favor of substantially the same formulation the Supreme Court rejected in Daimler. The majority does not contend that the plaintiffs could satisfy the "at home" standard. In Daimler, the U.S. Supreme Court explained that the proper inquiry for general jurisdiction "is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,'" but rather "whether that corporation's affiliations with the State are so 'continuous and systematic' as to render it essentially at home in the forum State." ¶ 36. A corporation is "at home" where it is incorporated or where it has a principal place of business.

Justice McKinnon disagrees that due process requires less because the plaintiffs' claims are based on FELA. Congress cannot confer personal jurisdiction, nor did it in 45 USC § 456, which is a venue statute. Even if it did, it does not confer jurisdiction on state courts, as by its plain language it applies only to federal courts.

Prescription, from page 29

- Dispose of unused medications properly.
- Support reasonable legislation.
- Support responsible reimbursement for non-opioid pain management.
- Support treatment and destigmatization for substance abuse disorders.

It is said the first step in solving a problem is to recognize there is a problem. For more information about the opioid addiction crisis and potential solutions, go to the websites of the Centers for Disease Control, www.cdc.org, or the Montana Medical Association, www.mmaoffice.gov.

Anita Harper Poe is a partner at the Missoula law firm Garlington, Lohn and Robinson. Her law practice focuses on representing hospitals and health care providers. She is a member of the Health Care Law Section of the Montana State Bar.

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