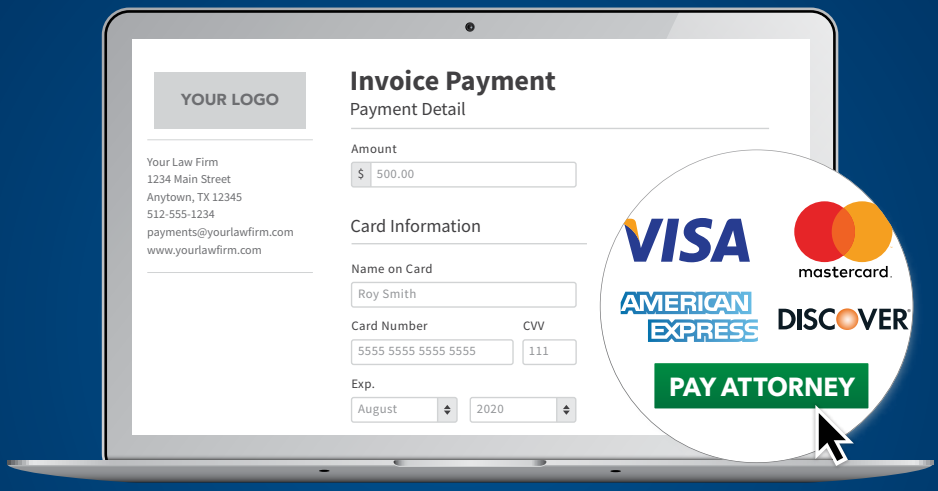
MONTANA LAWYER
AUGUST 2018
THE JOURNAL OF THE STATE BAR OF MONTANA

Glacier Country GETAWAY

2018 ANNUAL MEETING

KALISPELL | SEPTEMBER 20-22

INSIDE



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MONTANA LAWYER

AUGUST 2018

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ON THE COVER

GLACIER GETAWAY

The State Bar of Montana is headed to beautiful northwest Montana for the 2018 Annual Meeting Sept. 20-22. See the CLE programming and registration form on pages 14 and 15.

FEATURE ARTICLES

JAMESON AWARD IS SWEET MUSIC FOR GREG MURPHY

LONGTIME MOULTON BELLINGHAM LAWYER CALLS HONOR THE HIGHLIGHT OF HIS CAREER

DAUBERT, OR NOT DAUBERT?

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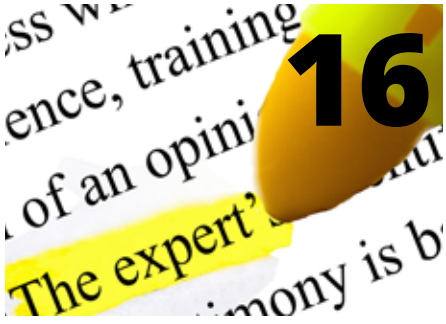

NEW MODEL HEALTH CARE POWER OF ATTORNEY

The bar's Health Care Law Section has worked with other stakeholders to develop an easy-to-understand, legally effective form.

Multigenerational opportunities

LESLIE HALLIGAN

As I near the end of my tenure as State Bar of Montana president, I wish to address an evolution in the measure of success for lawyers. How is our work as lawyers evolving with the advent of technology, and the integration of emerging and disparate views of the millennial generation? Research indicates that differing perceptions and views in our multigenerational workforce are affecting our work environments, including the practice of law. When examining the attitudes and practices of the two most predominant generations, the boomer and millennial generations, the definition of success as an individual and as a practitioner may be quite different.

How can we maximize opportunities in this evolving multigenerational workplace? Millennials are expected to be half of the workforce by 2020. As millennials enter the workplace, they are often supervised by colleagues from the boomer generation (born 1946-1964) and Generation X (born 1965-1979), who may have preconceived opinions as to their long-term employment commitment, work ethic and tendency to use social media as a preferred source of communication. According to Lauren Stiller Rikleen of the Rikleen Institute for Strategic Leadership, to overcome these stereotypes and continue to succeed in the workplace, senior colleagues should be open to new workplace practices and new forms of communication between clients and members of the firm. She identifies several principles for consideration.

First, recognize millennials as future leaders. It is unlikely that this large, diverse and educated young generation will assimilate as they enter the workplace. To retain millennials and develop their leadership potential, set aside any preconceived notions and, instead, pay attention to what truly will motivate them.

Second, she suggests that the "entitled" label you may attach to millennials is not entitlement at all, but rather the self-confidence and self-respect that has been instilled in this generation. Embrace this generations' self-confidence as a building block for future leadership.

Third, she suggests that clout be replaced with mutual respect. Millennials are often viewed as being disrespectful for asking too many questions. Getting past this reaction is crucial, however, to bridging generational differences at work. A free and open exchange of ideas invariably leads to a better result and a more engaged workforce.

Millennials appreciate opportunities to develop personal relationships and communicate. By giving clear directions and feedback, young attorneys will likely achieve high standards. If you are willing to invest in the process of meaningfully integrating millennials into the culture of your workplace, you will increase the likelihood of their optimal performance.

With increasing use of technology in the delivery of legal services, millennials can offer significant advice and assistance. Rikleen suggests reverse mentoring, engaging millennials as mentors to assist less tech-savvy colleagues. These changes may not only be essential to managing the office, but will likely be necessary to meet evolving client expectations.

Lastly, millennials are committed to a life in which family responsibilities are not overshadowed by work. As a woman and mother, I have struggled to find balance with work and family responsibilities. I often feel the guilt associated with missed opportunities. But, this is no longer a women's issue, as the desire for flexibility has become a gender-neutral issue. Millennials value work-life flexibility – don't we all? By recognizing the importance of this work-life balance, you may see increased productivity and engagement from millennials, and enjoy a personal benefit – less stress and greater opportunities for meaningful relationships and balance in your life. And by understanding the expectations of millennial clients, you may develop more effective business relationships and achieve greater satisfaction for them. Rikleen's suggestions regarding the integration of millennials into the workplace and as clients are not revolutionary; they are rooted in longstanding, sound management principles and client best practices that have been taught for decades. They are an evolution in the application of those principles and practices – an evolution that, thoughtfully executed, can lead to success and satisfaction.

To maximize opportunities as millenials join the workplace, senior colleagues should be open to new workplace practices and new forms of communication between clients and members of the firm.

A bright — and colorful — future

JOHN MUDD

August 2018 marks the beginning of a new era for the Montana Lawyer as we launch a color print format, mirroring the existing look of our digital edition. This move comes in response to your many comments over the years about the print quality of the magazine and, I am pleased to report, will reduce the overall, forecast cost of the publication.

While more members are reading the digital edition of the Montana Lawyer each year, our latest member survey confirmed that the strong majority of our members (about 75 percent) continue to read and prefer the print edition. We hope these print changes will enhance your reading experience.

As communication technologies evolve, we will continually assess the ways we deliver to you the information that makes a difference in your practice and the community stories that keep us all connected as Montana lawyers.

In the spirit of continuing to improve, some comments about this month's cover story: the 2018 Annual Meeting in beautiful Kalispell, Montana.

In addition to our traditional meeting and saluting another great class of awardees, for 2018, your bar leaders have assembled a truly outstanding lineup of CLE speakers on important topics of the day.

We'll hear from the national leadership of the American Bar Association on the state of the profession, including its President, Montana's own Robert Carlson, and Immediate Past-President Hilarie Bass. Washington, D.C. super lawyers Robert Bauer and Robert Bennett will share their insights on the ongoing national discussion concerning the intersection of the rule of law, politics and the press, joined by former Montana Attorney General and Governor Marc Racicot and crisis management experts Neil Livingstone and Matt McKenna. The Montana Supreme Court will be on hand for its traditional oral argument (with a much anticipated, third-party stacking case), we've lined up a great group of timely CLE topics assembled by our bar sections and, of course, we've thrown in some fun activities.

This year, we will also continue to grow our partnership with the Montana Justice Foundation through an expanded silent auction in conjunction with our traditional banquet. The silent auction will benefit the important work the Foundation does to support access to justice for all Montanans and, as we gather together as a bar, serves as an important reminder of many good works lawyers do each day across our state.

It's been a busy summer at the State Bar of Montana. We hope you enjoy the new look of the Montana Lawyer, and I look forward to seeing you in Kalispell next month for an informative and memorable Annual Meeting.

This year's Annual Meeting features a truly outstanding lineup of speakers — including ABA President Bob Carlson, Past President Hilarie Bass, and D.C. super lawyers Robert Bauer and Robert Bennett.

MONTANA LAWYER
August 2018
Vol 43, Issue 9

The official magazine of the State Bar of Montana published every month except January and July by the State Bar of Montana, 33 S. Last Chance Gulch, Suite 1B, P.O. Box 577, Helena MT 59624. 406-442-7660; Fax 406-442-7763.

Montana Lawyer Subscriptions are a benefit of State Bar membership. Subscriptions for nonmembers are available for $50 per year.

Advertising rates are available upon request or at www.montanabar.org/page/MTLawyer.

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.

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406-447-2200; fax: 442-7763
email: editor@montanabar.org

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

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Hilarie Bass passes the gavel to Bob Carlson as American Bar Association President on Aug. 6 during the ABA's 2018 Annual Meeting.

Carlson takes oath as ABA president

Bob Carlson became president of the American Bar Association on Aug. 7 at the conclusion of the Annual Meeting in Chicago. He will serve a one-year term ending in August 2019.

A shareholder with the Butte law firm of Corette Black Carlson & Mickelson, Carlson is a past president of the State Bar of Montana. He is a native Montanan and has lived and practiced here his entire life.

"As a Montana lawyer in a small firm, I know firsthand what a difference membership in the ABA makes for my practice and what a difference it makes in all our communities and our nation," Carlson said. "As president, I want to deliver the message that the ABA is essential for all lawyers. We are the voice of the legal profession, an advocate for the rule of law and a place where every lawyer can access abundant resources to be a better practicing lawyer."

Carlson becomes the second Montanan to serve as ABA president. The first was William J. Jameson (1953-1954), who would go on to serve as a U.S. federal judge.

Carlson will also focus on ABA initiatives to promote lawyer and law student wellness, advance diversity in the association and the profession, fight for access to justice for all and for an independent judiciary, and assess the state of legal education and bar admission.

"This is more a relay than a sprint," Carlson said. "I want to build upon all the good things the ABA does every day and all the hard work of my predecessors."

As shareholder, Carlson has a civil trial and mediation practice that primarily involves insurance defense, products liability and insurance coverage. Before entering private practice, he was staff attorney for the Montana Department of Business Regulation and a law clerk for the Montana Supreme Court.

Carlson has a long record of service to the ABA. From 2012-14, he was chair of the ABA's policymaking House of Delegates, the Association's second-highest elected office. This is his third term on the ABA Board of Governors. Carlson has also served in the ABA House of Delegates as both Montana's state bar delegate and state delegate and as a delegate at large. He is a Life Patron Fellow and past state chair of the Fellows of the American Bar Foundation.

Carlson has also been a long-time member of the Montana Supreme Court's Character and Fitness Commission and the University of Montana Law School's Clinical Board of Visitors. He has served as lawyer representative from Montana to the 9th Circuit's Lawyer Representatives Coordinating Committee.

Carlson earned his B.A. with honors from the University of Montana and his J.D. from the University of Montana School of Law.

New look Montana Lawyer

You probably noticed that this month's Montana Lawyer looks and feels a little different than what you're used to. The August issue is the debut of a redesigned magazine, printed in full color for the first time ever.

We're excited about the new look — and about the fact that by shopping around and working with our printer on paper and mailing options, we forecast no cost increase.

We hope you enjoy the printing change, as well as new design elements made to improve readability. We hope they make reading the Montana Lawyer a more enjoyable experience.

Be sure to let us know what you think. Email any feedback or suggestions to editor@montanabar.org.

Letters to the editor

The Montana Lawyer will make every effort to print all letters to the editor submitted by members of the State Bar of Montana.

Letters should be limited to 250 words. Letters longer than 250 words require prior approval of the editor.

Letters can be sent by email to editor@montanabar.org;or by mail to Montana Lawyer, P.O. Box 577, Helena, MT 59624; .

If you have questions, email editor@montanabar.org or call editor Joe Menden at 406-447-2200.

THE 2018 HONORABLE JAMES R. BROWNING SYMPOSIUM

The Future of Federal Indian Law and the (New) Roberts Court

Examining tribal sovereignty, federal power, and individual rights

Hosted by the Montana Law Review

keynote speakers:

Judge Diane Humetewa **Matthew L.M. Fletcher**

panelists include:

Barbara Creel **Gregory Ablavsky** **Angela Riley**
John Dossett **Rebecca Tsosie** **Frank Pommersheim**
Michalyn Steele **Alexander Skibine** **Wenona Singel**

University of Montana Homecoming Weekend

Friday, October 5, 2018 | Blewett School of Law

8:30 a.m. to 5:00 p.m. | Reception to follow

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scholarship.law.umt.edu/browning/symposia

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On-Campus Interviews

Fall 2018

Interview 2L and 3L students for intern, law clerk, and associate positions during our semi-annual OCI program.

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- Log in to Networkx at https://law-umt.12twenty.com/hire;
- Complete the Fall OCI Job Posting Form on our website; **OR**
- Contact Lori Freeman at lori.freeman@umontana.edu | (406) 243-2698.

September 27-28-29
October 4-5

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CAREER MOVES

Hansen joins national financial tech company Accruit as executive VP

Montana-based American Equity Exchange has been acquired by national financial technology company Accruit. Max Hansen, a Montana attorney and founder of American Equity Exchange, will join Accruit as an executive vice president and continue serving 1031 exchange clients from Montana.

Hansen

American Equity Exchange, one of the first qualified 1031 intermediary businesses in the Rocky Mountain region, was founded in 1991.

Hansen, a past president of the State Bar of Montana, has practiced law in the state since 1976. He has served multiple terms as the State Bar Delegate and ABA Delegate to the American Bar Association House of Delegates. He is also a longtime member of the Tax Section of the ABA and its Sales Exchanges and Basis Committee.

"American Equity Exchange has contributed significantly to our industry growth and advocacy over the past two decades," said Accruit CEO Brent Abrahm. "We're very excited to be joining forces with Max and his seasoned team and growing Accruit's portfolio of services for our customers."

Hansen said Accruit is the technology leader in the like-kind exchange industry and said the move will streamline the exchange process and improve security for clients.

Submitting member news

The Montana Lawyer welcomes news about Montana legal professionals including new jobs, honors, publications, and other accomplishments.

Please send member news and photo submissions to editor@montanabar.org. Email or call 406-447-2200 with questions.

Garber joins as associate at Wills Law Firm in Missoula

Wills Law Firm of Missoula is pleased to announce that Carrie L. Garber has joined the firm as an associate attorney specializing in the representation of employers and insurers in workers' compensation cases and other employment law.

Garber

Garber is a fourth-generation Montanan, born in Helena and raised on the family farm outside East Helena. She earned her undergraduate degree from Linfield College (McMinnville, Oregon) in 1990, and her law degree from the University of Montana School of Law in 1994. During law school, she interned at the Montana Attorney General's Office, and after law school, she clerked for the Montana Supreme Court.

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- Search the anonymous resume database to find qualified candidates.
- Manage your posted jobs and applicant activity easily on this user-friendly site.

Garber is the only attorney to have worked as in-house counsel for Montana's two largest workers' compensation insurers, the Montana State Fund (1998-2000) and Liberty Mutual Insurance Group/Liberty Northwest (2001-2006). She has also worked for the Yellowstone County Public Defenders' Office (1995-1998) and as a prosecuting attorney for the Missoula City Attorney's Office (2006-2018).

Huemoeller opens law firm/ government consulting firm serving Bozeman, Denver

Kelley Huemoeller is pleased to announce the opening of KLH Advisors PLLC, offering services in Denver and Bozeman. KLH Advisors is a hybrid law firm and government affairs consulting firm. Prior to forming her law firm, Kelley worked on Capitol Hill in Washington, D.C., for a Wyoming senator, the Colorado Attorney General, and in-house as a regulatory/government affairs adviser for an energy company. Resting on her unique experiences, Kelley now advises corporations on complex legislative and policy issues and serves as outside counsel to smaller companies.

Huemoeller

Huemoeller is licensed in Montana, Colorado, and D.C. and has worked all across the West. Her business industry knowledge touches many sectors including real estate, construction, regulatory, energy and natural resources. She partners with other attorneys and law firms to navigate the governmental and policy obstacles that their clients face and to provide direction with government affairs based on her years of energy industry knowledge.

Based in Montana, Huemoeller is well-versed in tribal law and provides insight into these issues for law firms that do not have an Indian law practice group. She will also continue to provide contract attorney services on energy and land use legal matters.

Jones joins as associate attorney at Gustafson Law Office in Conrad

Gustafson Law Office is happy to announce the addition of Daniel T. Jones as an associate attorney.

Jones is a Conrad native who moved home five and a half years ago. His previous work experience includes his role as a corporate manager for a 10 store implement dealership, an in-house legal counsel and an associate attorney for a medium sized law firm in Great Falls. After spending the last several years on the road, he is looking forward to being back in Conrad full-time.

Jones

In particular, Jones is excited to be practicing law full time alongside Gale Gustafson, Susan Gustafson and Kacia Taylor. While Jones will have a general law practice and is happy to discuss most any area of the law, his past experience has made him particularly adept at working on commercial transactions, business planning, and contracts in general.

Since being admitted to the ranks of Montana's attorneys in 2009, he has consistently assisted farmers and ranchers plan their startups, expansions and retirements. Restaurant, bar and casino transitions are another area in which he has enjoyed assisting clients. Among the more interesting transactions he has helped clients with, was the sale of a manufacturing business with 135 employees to a Fortune 500 company international business where every job remained in Montana.

Jones holds a Juris Doctorate and a Master of Business Administration from the University of Montana and a Bachelor of Arts in Economics from Harvard College.

He is a Conrad city alderman and the executive vice president of the Montana Equipment Dealers Association. He is a volunteer tee-ball and youth wrestling coach.

Dobson named to Navajo Nation Labor Commission

Ed Dobson has been appointed as one of five commissioners for the Navajo Nation Labor Commission. Dobson, a 1987 graduate of the University of Montana School of Law and member of the Editorial Board for the Montana Law Review, served nine years as a water master with the Montana Water Court and 17 years with Navajo legal services (DNA - People's Legal Services, Inc.), including as director of the Navajo Low Income Taxpayer Clinic and as the Clinic's principal U.S. Tax Court litigator..

Jones

APPOINTMENTS

Lindsey Hromadka, an attorney at Conradi Anderson in Whitefish and Bozeman, was appointed by Gov. Steve Bullock to the Montana Board of Realty Regulation as a public representative.

Harry Freebourn, past director of the Montana Office of the Public Defender, was appointed by Gov. Bullock to the State Electrical Board.

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DEVOTED TO RAISING THE BAR

Murphy has been a national leader in both bar examination and law school accreditation

By Joe Menden

Greg Murphy was a newly minted lawyer clerking for the Honorable John F. Kilkenny on the U.S. Circuit Court of Appeals for the 9th Circuit when he first became aware of Judge William J. Jameson.

The Helena native and Notre Dame Law School graduate had come across a memo from Judge Jameson explaining why the judge was reversing his position from an opinion he had written in an appeal involving a "Brady" issue. Murphy thought the memo was so lucid and well written that he felt compelled to remark to his judge, the Honorable John F. Kilkenny, how gracefully Judge Jameson handled the situation. In retrospect, he says it may have been presumptuous to think a circuit judge would care what a 25-year-old thought of another jurist's writing.

"(Judge Kilkenny) looked up, looked me right in the eye and said, 'Bill Jameson should have been on the United States Supreme Court,' " Murphy said.

It was a moment that stuck with Murphy, who from that day on was a big fan and great admirer of the venerable Montana lawyer and judge.

Nearly 40 years later, Murphy's name now will be forever linked with Judge Jameson. Murphy is the 2018 William J. Jameson Award winner, the highest award State Bar of Montana bestows. Murphy will receive the award on Thursday, Sept. 20, at the State Bar's Annual Meeting in Kalispell.

Murphy says he was stunned – and speechless – when he learned he would be receiving the Jameson.

"I regard this as the highlight of my career," he said. "To be mentioned in the same sentence with Judge Jameson and the others who have won this award is humbling and gratifying at the same time."

It has been a career filled with highlights for Murphy, an AV rated lawyer who is listed in the Best Lawyers in America, and as a Mountain States "Super Lawyer." He is also an elected member of the American Law Institute, and will achieve life member status next year. He has been a national leader in both bar examination and law school accreditation, having served as chair of both the National Conference of Bar Examiners (NCBE) and the ABA's Section of Legal Education and Admissions to the Bar, which accredits U.S. law schools. His national footprint led to the opportunity to be a "Distinguished Practitioner-in-Residence," at Cornell University Law School in 2015, as well as an invitation to deliver the 2017 Blankenbaker Endowed Lecture on Professional Responsibility at the University of Montana's Blewett School of Law.

Murphy's work in bar admissions has spanned nearly his entire legal career. He was still a young lawyer when he was appointed to the Montana Board of Bar Examiners in 1985. He joined a board that included high-profile Montana lawyers such as Robert Poore, Jim Garlington, Leo Graybill, Mack Hughes and Tom Monaghan – "I was a cub among lions of the bar," he says.

That year, a group of law students had petitioned the Supreme Court to abolish the Multistate Bar Examination, which Montana had recently adopted. The other board members asked Murphy to write and argue the opposing viewpoint.

Before Montana adopted the MBE, Murphy said, its bar exam consisted of three days of essays. In preparation for it, he read the entire Montana Code Annotated and briefed every Montana Supreme Court decision going back five years –"It seemed that if you knew the case, you knew the answer to the essay question," he said. Even then he didn't think that was the best way to admit lawyers to the bar and that Montana should use the MBE, which in contrast, he said, is highly reliable.

Murphy served on the Board of Bar Examiners for the better part of two decades, eight years of which were as chair. In 1986 he was appointed to the MBE Committee of the NCBE, which he would go on to chair for most of the 1990s. He also served for a decade on the Multistate Performance Test Drafting Committee.

If the adoption of the MBE nationally is an indication, Murphy was on the right side of the argument. The exam is now administered in every U.S. state and territory other than Louisiana and Puerto Rico.

State Bar of Montana Past President Mark Parker nominated Murphy for the Jameson, in large part because of his leadership at the national level in both bar examination and law school accreditation. Parker said in his nomination letter that Murphy, a longtime member of the National Conference of Bar Examiners, was in large part responsible for the success of the Uniform Bar Exam, which has been adopted by 33 jurisdictions, including Montana.

PAST JAMESON WINNERS

1989: Robert A. Poore, Butte
1990: Rockwood Brown, Billings
1991: Leonard Schulz, Dillon
1992: Jack Dietrich, Billings
1993: Sherman V. Lohn, Missoula
1994: William H. Coldiron, Helena
1995: Alex Blewett Jr., Great Falls
1996: William Bellingham, Billings
1997: Neil Haight, Helena
1998: Ward Shanahan, Helena
1999: Carl M. Davis, Dillon
2000: Thomas P. Koch, Hamilton
2001: Judge James R. Browning, San Francisco
2002: George L. Dalthorp, Billings
2003: Hon. John L. Peterson, Butte
2004: Molly Shepherd, Missoula
2005: Hon. John C. "Skeff" Sheehy, Helena
2006: Perry "Jim" Moore, Bozeman
2007: Hon. Gordon R. Bennett
2008: John Connor, Helena
2009: Jeremy Thane, Missoula
2010: William "Duke" Crowley, Missoula
2011: Sherry Scheel Matteucci, Billings
2012: J. Martin Burke, Missoula
2013: Klaus Sitte, Missoula
2014: D. Patrick McKittrick, Great Falls
2015: Damon Gannett, Billings
2016: Robert Carlson, Butte
2017: Robert Minto, Missoula
2017: Greg Murphy, Billings

"If it was not his brainchild, he certainly raised the UBE," Parker wrote.

John F. O'Brien, dean and president of New England Law in Boston, has worked closely with Murphy on the ABA Section on Legal Education and Admission to the Bar. He wrote a letter in support of Murphy's nomination.

"His impact on legal education has been monumental and lasting," O'Brien said. "His personal and professional conduct set the highest example, and his commitment to the well-being of the legal profession and those who rely on it is unparalleled. His numerous awards for leadership and service attest to the high regard in which he is held."

Also writing in support of the nomination was Diane Bosse, a prominent New York lawyer and the chair of the New York Board of Law Examiners, who has known Murphy for nearly 20 years and worked with him on both the National Conference of Bar Examiners and the Section on Legal Education and Admission to the Bar.

She said she saw firsthand Murphy's steadfast conviction to maintaining the high standards of the profession and to maintaining processes guided by principles that are fair and transparent.

"Greg Murphy is as honest and forthright a man as I have ever known," she said. "He doesn't have a curveball, and you can bet your life that what he says is true. His personal integrity is beyond question or reproach."

Long association with Jameson Award

Murphy is the 30th winner of the Jameson Award, and his association with the award goes all the way back to its inception in 1989.

Murphy nominated the award's first winner, Bob Poore, the chairman of the Board of Bar Examiners. Murphy believes it was Poore's recommendation to the Montana Supreme Court that led to his appointment by the court to the Montana board in 1985. Murphy felt it was fitting for the Butte attorney and civic icon to be the first Jameson winner. He noted that Dean Erwin Griswold of Harvard Law School described Judge Jameson as patient fair, reasonable, genial, firm, open-minded and earnest.

"I think Bob Poore was all those things," Murphy said. "I think the Montana bar wanted to put in place a permanent reminder of what is best in the profession, which was exemplified by Judge Jameson and, in my opinion, then by Bob Poore. He was just a wonderful, wonderful man and a wonderful lawyer."

Murphy also nominated 1996 Jameson winner William Bellingham, founding member of his longtime firm, Moulton Bellingham.

Coincidentally, 2014 Jameson winner D. Patrick McKittrick is Murphy's first cousin. Murphy noted that his and McKittrick's grandfather, Thomas Murphy, was an immigrant from Ireland. Murphy said he can't help but think that their grandfather—an Anaconda smelterman who never received an education – would be proud and amazed at his descendants' accomplishments.

Living a charmed life

Murphy says he feels very fortunate about every aspect of his life – starting with the Helena family he was born into in 1954.

He met his wife, Kate, when both were horn players at University of Montana and Greg seated her next to him in the the band the first time he saw her. The two celebrated their 40th anniversary last year.

Greg and Kate raised three children, Megan, Brian, and Allison, all of whom followed their parents into classical music and became accomplished violinists – trained by Kate, even though she was a pianist and horn player rather than a violinist. Megan, who lives in Hawaii, now plays professionally, and all three children once played together with their father in the Billings Symphony Orchestra.

Brian also followed his father into the law, living and practicing in Billings.

Murphy said Notre Dame turned out to be the perfect place for him to study law, instilling in him many of his core values, including the importance of service.

After his 9th Circuit clerkship, Murphy had opportunities to work at larger West Coast firms. Instead, he returned to Montana where he worked at the Billings firm Moulton Bellingham for over 30 years, including 27 years as a shareholder, before starting a private practice limited to mediation and pro bono work. He is glad he did – it allowed him to work on cases in nearly every imaginable area of the law instead of likely having one area of focus at a larger firm.

"That meant the law never got boring for me," he said. "It allowed me to live and practice in Montana, which I still believe is the best bar in the country. There are just terrific lawyers here. I've never regretted the decision to come back to Montana. It truly is the best place."

Murphy stands with his children — from left Allison, Brian and Megan — when the four of them performed together with the Billings Symphony Orchestra in June of 2000. (Photo provided)

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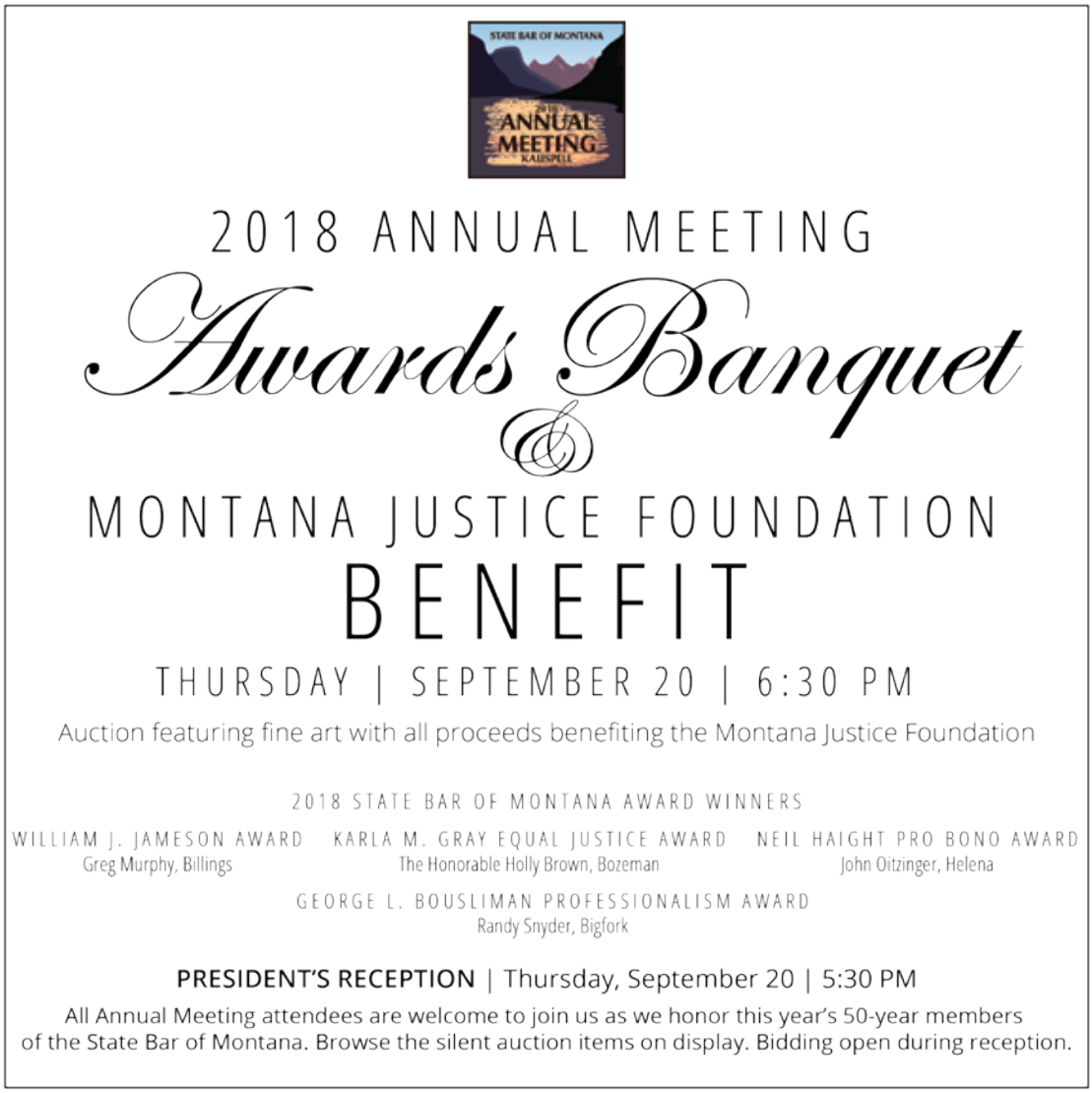

HOT TOPICS CLE

(CLE CREDITS LISTED BELOW ARE PENDING PROGRAMMING BEGINS AT 2 P.M. THURSDAY)

Thursday, September 20

Opening Plenary: The Rule of Law, Politics & the Press *(1.5 CLE)* — Washington, D.C., super lawyers Robert F. Bauer and Robert S. Bennett join former Montana Gov. Marc Racicot and crisis communication experts Neil Livingstone and Matt McKenna to share their insights on this topic of national importance and provide practical guidance to lawyers representing high-profile clients.

Government regulation and the Freedom of Speech *(1.5 CLE)* — Craig Cowie, Assistant Professor, Director of Blewett Consumer Law & Protection Program, and Anthony Johnstone, Professor of Law & Affiliated Professor of Public Administration, Alexander Blewett III School of Law.

Friday, September 21

Oral Argument Intro *(0.5 CLE)* — Greg Munro, Professor (Retired) Alexander Blewett III School of Law.

Oral Argument: *Cross v. Warren* *(1.5 CLE)* — At issue: Whether automobile insurance can be stacked for third-party liability coverage.

Plenary Keynote Panel and Lunch: Presidential Perspectives on the Profession *(0.75 CLE)* — Bob Carlson, American Bar Association President; Hilarie Bass, American Bar Association Immediate Past President & the Honorable Leslie Halligan, State Bar of Montana President.

PRACTICE AREA BREAKOUT SESSIONS

BETTR SECTION CLE

2017 Tax Act: What To Do Before the End of 2018 *(2.0 CLE)* — Ross Keogh, Worden Thane P.C., Tom Copley, CPA, CVA, Wipfli LLP, & Natalya Abdrasilova, CPA, ASA, Wipfli LLP

DISPUTE RESOLUTION CLE

What Could Mediator Certification Look Like in Montana? *(1.5 CLE)* Jay Hunston, W. Jay Hunston, Jr., P.A. (CLE followed by Dispute Resolution Committee Meeting)

HEALTH CARE LAW SECTION CLE

New Model MT Health Care Power of Attorney: A Legal, Social & Policy Perspective *(2.0 CLE)* — Kathy Kenyon, (Retired) Kenyon Health Law; Donald Redfoot, (Retired) Senior Policy Analyst, AARP; Marsha Goetting, Professor & Extension Family Economics Specialist, Montana State University

NATURAL RESOURCES & NON-PROFIT LAW CLE

An Overview of Conservation Easement Law in Montana *(1.0 CLE)* — Alice Jones, Lands Attorney, Five Valleys Land Trust; and Lindsay Hromadka, Attorney, Conradi Anderson PLLC

Local, State and Federal Conservation Easement Programs *(1.0 CLE)* — Christian Dietrich, General Counsel, The Montana Land Reliance & Carolyn Sime, Program Manager, Montana Sage Grouse Habitat Conservation Program

CONCURRENT SESSIONS

Topic: Animal Law *(1.0 CLE)* — Stacey Gordon Sterling, Professor, Alexander Blewett III School of Law, Director, Jameson Law Library

Topic: Emerging Issues in Litigation *(1.0 CLE)* — The Honorable Amy Eddy, 11th Judicial District, Kalispell; additional panelists to be announced in August.

Saturday, September 22

Technology & Rules of Professional Conduct: Evolving Technology & Standards *(1.5 CLE)* — State Bar of Montana Executive Director John J. Mudd, State Bar General Counsel Betsy Brandborg, and State Bar Director of Information Technology and Digital Strategy Sam Alpert.

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Daubert, or not Daubert? That is the question on expert testimony in Montana state courts

By Cynthia Ford

DNA evidence is regularly admitted in court, both in real life and on TV. Psychic evidence is not. Trial judges are required to police the border between "good enough" and "junk/woo-woo" science, but that border is sinuous and ever-changing as knowledge evolves. What standard must judges, lawyers and litigants apply in disputes over the admissibility of expert testimony in Montana state cases?

In federal court cases, the answer to the title question is easy: the *Daubert*[1] standard for expert[2] testimony applies in all federal cases. However, unless there is a constitutional component, the Federal Rules of Evidence and federal cases construing them are only persuasive in Montana state courts. The Montana Supreme Court is our binding authority, and, like many other states, we have diverged from the U.S. Supreme Court and recent amendments to FRE 702 regarding expert testimony. As a result, in Montana, the answer to the question is "it depends." Montana judges are required to apply the *Daubert* analysis only for testimony based on "novel" scientific methods. In most cases, where the specialized field is "non-novel," the state court is not required to apply the *Daubert* test, but still must apply a traditional Rule 702 analysis for challenged expert testimony.

In this article, I will do a brief refresher on the *Daubert* standard, and then discuss the Montana line between "novel" and "non-novel" expert testimony. In the next Evidence Corner column, I will examine in more detail the application of MRE 702 when the area in question is non-novel, as most are. Finally, in a third column, I will delve into the most recent Montana cases about whether a particular witness was sufficiently qualified to give expert testimony.

Daubert standard in federal court

The Federal Rules of Evidence were adopted in 1973 and became effective in 1975. They included Rule 702, governing the admissibility of expert testimony (see below for a comparison of the history and current texts of the federal and Montana versions of Rule 702). Before the FRE became effective, and after that date until 1993, the federal courts assessed the admissibility of expert testimony per the "*Frye*[3] test:" was the methodology used by the expert "generally accepted" in the relevant field? However, in 1993, the U.S. Supreme Court's landmark decision in *Daubert v. Dow Chemical*[4] held that *Frye* had been supplanted by the adoption of FRE 702, and that general acceptance was only one, but not the sole, factor to consider in determining the reliability of the methodology used by the expert:

> In the 70 years since its formulation in the *Frye* case, the "general acceptance" test has been the dominant standard for determining the admissibility of novel scientific evidence at trial. Although under increasing attack of late, the rule continues to be followed by a majority of courts, including the Ninth Circuit.
> The *Frye* test has its origin in a short and citation-free 1923 decision…
> The merits of the *Frye* test have been much debated, and scholarship on its proper scope and application is legion. Petitioners' primary attack, however, is not on the content but on the continuing authority of the rule. They contend that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence. We agree. (Citations and footnotes omitted).

509 U.S. at 585. Note that there was no issue in *Daubert* about the qualifications of the plaintiff's experts; even the Supreme Court noted that all of them were experts in their fields. Rather, the issue was whether the novel techniques the experts had applied were sufficiently reliable to allow the admission of their opinions thus derived.

Although it rejected "general acceptance" as the tool for doing so, *Daubert* continued to require that judges patrol the border between admissible and inadmissible expert testimony:

> That the *Frye* test was displaced by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. **To the contrary, under the Rules the trial judge must ensure**

that any and all scientific testimony or evidence admitted is not only relevant, but reliable.

(Footnote omitted, emphasis added). 509 U.S. at 589. The Court (which does not itself have to make these difficult decisions on the field) then supplied some guidelines for how to do so:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.

509 U.S. at 592–93. The Court then laid out a list of non-exhaustive "*Daubert* factors" for trial judges to use in assessing the reliability of a proffered theory/technique: 1. whether it can be tested; 2. whether it has been tested; 3. whether it has been subjected to peer review and publication; 4. its known or potential rate of error; and 5. the degree of its acceptance in the relevant scientific community. The Court did not indicate the weight to be given to each or any of the factors, nor how to proceed when the factors were equally divided. Subsequent cases throughout the federal system have added more information, but the application of this "test" in specific circumstances remains uncertain and inconsistent.

Daubert represents an attempt to allow admission of more cutting-edge expert testimony based on theories or techniques which have not yet been generally accepted,[5] and concludes with an exhortation to judges and litigants to trust the system:

> In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

509 U.S. at 596.

Implementation of *Daubert* has not been easy.[6] Nonetheless, it continues to be the standard by which federal courts measure the admissibility of expert testimony. FRE 702 since has been amended in an attempt to digest *Daubert* into the rule itself (see below). The Supreme Court itself has cited *Daubert*, with approval, 18 times since it issued the original opinion. Most recently, in 2016, it cited *Daubert* in two separate cases. In an abortion case, the Court affirmed a trial court's admission of the opinion testimony of a university researcher who tracked the availability of abortion services in Texas, on the probable effect of the state's surgical center requirement. *Whole Women's Health v. Hellerstedt*[7]. In *Tyson Foods v. Bouaphakeo*,[8] a Fair Labor Standards case about overtime pay, the Court noted (twice) that the respondent's expert statistical evidence was correctly admitted, because the petitioners neither moved for a hearing under *Daubert* to exclude the testimony nor presented contrary evidence of their own. Thus, it is clear that despite much criticism of *Daubert*, it binds federal judges and lawyers practicing in federal courts.

States' adoption of Daubert spotty

Although most states (including Montana) have adopted some version of the FRE in general, many fewer have bought into the *Daubert* standard and the revised form of FRE 702 which now reflects *Daubert*.[9] In 2016, Bloomberg Law published an article entitled "States Slow to Adopt *Daubert* Evidence Rule,"[10] estimating that nearly a quarter of states have retained their own expert testimony standards. Several nationally prominent evidence professors were quoted to support and explain the premise of the article, including Georgetown professor Paul Rothstein:

> "Judges do not feel competent to decide what is good science, as *Daubert* commands them to do," Rothstein told Bloomberg BNA. Rothstein said that states may also be reluctant to switch over to *Daubert* because it "hasn't worked out very well in federal courts."
> The criteria *Daubert* sets out—testability/testing[11], peer review, low error rate, professional standards, acceptability in the discipline, all leading to reliability—are "so spongy that the cases come out all over the place," he said.

According to the Bloomberg article, several large states have rejected *Daubert* altogether, retaining the *Frye*[12] "general acceptance" test: California, New York, New Jersey, Illinois, Maryland, Washington and D.C.[13] The article described three other states as "hybrid … and not easily categorized:" Virginia, Missouri, Nevada and North Dakota. Montana belongs on this hybrid list, having rejected *Frye* but not incorporating *Daubert* wholesale in its stead.

MRE 702 differs greatly from FRE 702

At the time Montana adopted the Montana Rules of Evidence in 1977, MRE 702 was identical to FRE 702.[14] At that point, the federal courts applied the *Frye* "general acceptance" standard to determine the admissibility of proposed expert testimony. In the interim, the U.S. Supreme Court decided in *Daubert* that the adoption of Rule 702 had supplanted *Frye*. In its stead, the Supreme Court outlined five non-exclusive "*Daubert* factors" to guide the district courts in assessing the reliability, and thus admissibility, of expert testimony. Those factors have been clarified and expanded in hundreds, if not thousands, of federal cases since. In 2000, FRE 702 was amended to reflect the holdings of those cases. The Federal Advisory Committee noted:

> Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167 (1999). In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho*, 119 S.Ct. at 1178 (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use

to assess the reliability and helpfulness of proffered expert testimony.

The current version of FRE 702, reflecting the 2000 and 2011[15] amendments, is:

> Rule 702. Testimony by Expert Witnesses
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Meanwhile, Montana has not amended the original version of MRE 702 in any way. Because the FRE have been amended to reflect the holding of *Daubert* and its progeny, the two versions of Rule 702 now differ significantly. Montana's 702 states (just as it did when originally adopted in 1977):

> Rule 702. Testimony by experts.
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

The difference between the Montana and the federal version of Rule 702 reflects a conscious decision by the Montana Supreme Court to avoid inflicting a full-fledged *Daubert* analysis on the judges, lawyers, and litigants in most Montana cases. The current (original) version of MRE 702 is consistent with Montana's judicial approach.

Montana rejects Frye and Daubert

The Montana Supreme Court rejects both the general acceptance test and wholesale adoption of the *Daubert* standard for admissibility of expert testimony

Background cases:

Like the federal courts, Montana has struggled with the line between admissible "good-enough" and non-admissible "junk" science. Like other states, Montana has struggled with whether to follow the federal lead in drawing that line. Ten years before the *Daubert* decision did so for federal courts, the Montana Supreme Court rejected the *Frye* general acceptance test in *Barmeyer v. Montana Power*:[16] "the general acceptance rule is not in conformity with the spirit of the new rules of evidence." 657 P.2d at 598. In *Barmeyer*, a clearly qualified metallurgical engineer testified for the defense, using "corrosion analysis" to controvert the plaintiff's evidence on the causation of the Pattee Canyon Fire in Missoula. On appeal, the plaintiffs argued that this methodology was not generally accepted, and therefore the opinion was inadmissible. The Supreme Court acknowledged that this might bar admission under the *Frye* standard, but pointed to the courtroom usefulness of new developments, even before they achieved general scientific acceptance, quoting from a 4th Circuit case[17]:

> "Absolute certainty of result or unanimity of scientific opinion is not required for admissibility. 'Every useful new development must have its first day in court. And court records are full of the conflicting opinions of doctors, engineers, and accountants, to name just a few of the legions of expert witnesses.' Unless an exaggerated popular opinion of the accuracy of a particular technique makes its use prejudicial or likely to mislead the jury, it is better to admit relevant scientific evidence in the same manner as other expert testimony and allow its weight to be attacked by cross-examination and refutation."

202 Mont. at 192. The Court affirmed the admission of the corrosion analysis testimony, commenting that the plaintiff's "searching and adept cross-examination" was sufficient guarantee that the jury would understand any problems with the expert's methodology.

Barmeyer clearly rejected Frye and opened the door to more liberal admission of expert testimony, but it did not offer a specific new test, other than "not *Frye*." Ten years later, the U.S. Supreme Court did lay out an alternative analysis, in *Daubert*. Initially, Montana seemed inclined to adopt *Daubert*.

State v. Moore[18] was decided in 1994, just a year after *Daubert*. Moore was accused of deliberate homicide. Part of the evidence against him stemmed from human tissue fragments found in his camper. In its opinion, the Montana Supreme Court noted that *Moore* was the first case presented to it in which forensic DNA analysis evidence had been introduced in a criminal trial. It also noted that the U.S. Supreme Court had recently joined Montana's abandonment of the *Frye* test for reliability of the expert's methodology, and outlined the "flexible inquiry" to be performed by a trial judge. Finally, the Montana Supreme Court recited the specific *Daubert* factors, and appeared to hold that the *Daubert* test would henceforth govern the admissibility of expert testimony:

> The [Supreme] Court emphasized that the inquiry under Rule 702, F.R.Evid., is "a flexible one," and that the focus is on the principles and methodology underlying the proffered evidence rather than the conclusions they generate. *Daubert,* 509 U.S. at ––––, 113 S.Ct. at 2797. We conclude that the guidelines set forth in *Daubert* are consistent with our previous holding in *Barmeyer* concerning the admission of expert testimony of novel scientific evidence, and **we, therefore, adopt the *Daubert*** standard for the admission of scientific expert testimony. Accordingly, we conclude that before a trial court admits scientific expert testimony, there must be a preliminary showing that the expert's opinion is premised on a reliable methodology. We note, however, that the court must be flexible in its inquiry. "Not every error in the application of a particular methodology should warrant exclusion. An alleged error in the application of a reliable methodology should provide the basis for exclusion of the opinion only if that error negates the basis for the reliability of the principle itself." (Citation omitted; emphasis added)

268 Mont. at 42.

The Montana Court quickly tempered its original blanket statement about the application of *Daubert* to all scientific expert testimony. First, in a 1996 fingerprinting case, the Court described its holding in *Moore* as adopting the *Daubert* standard for "determining whether to allow expert testimony concerning **novel** scientific evidence",

despite the absence of any such adjective in *Moore*. *State v. Cline*[19]. The Court then clarified its position:

> We apply the *Daubert* standard to this case because we consider fingerprint aging[20] techniques in this context to be novel scientific evidence. **Certainly all scientific expert testimony is not subject to the *Daubert*** standard and the ***Daubert*** test should only be used to determine the admissibility of novel scientific evidence. (Emphasis added).

275 Mont. at 55. (The district court had not held a formal *Daubert* hearing on the reliability of fingerprint aging, for the simple reason that *Daubert* had not yet been decided at the date of the trial. However, it did consider the information submitted by the defense as to the alleged unreliability of the technique, and relied further on the availability of both cross-examination and contrary evidence by opposing experts. The Supreme Court found that the district court had met its responsibility to ensure reliability and affirmed the admission of the testimony.)

Two years after *Cline*, and only four years after *Moore*, Montana cemented the distinction between novel and non-novel scientific methodology in *Hulse v. State*.[21] Ms. Hulse petitioned for reinstatement of her driving license, arguing inter alia that the HGN (horizontal gaze nystagmus) field sobriety test was not sufficiently reliable to be admitted under the *Daubert* standard. The Supreme Court reiterated that *Daubert* applied only to novel scientific evidence, and held that because HGN was not novel scientific evidence, *Daubert* was not the appropriate test:

> Hulse suggests that *Daubert* is not limited to the admissibility of "novel" scientific evidence and that *Barmeyer* and *Daubert* are inconsistent. We disagree. Accordingly, we take this opportunity to clarify our decision in *Clark* concerning the admissibility requirements of HGN test results and to clarify the admissibility requirements of scientific evidence in general.
>
> ¶ 56 First, as is clearly stated in *Cline,* **"all scientific expert testimony is not subject to the *Daubert*** standard and the ***Daubert*** test should only be used to determine the admissibility of novel scientific evidence." . …We reassert our holding in *Cline* that **the *Daubert*** test should only be used to determine the admissibility of novel scientific evidence. (Citations omitted; Emphasis added)

1998 MT 108, ¶¶ 55-56, 289 Mont. 1, 28. The Court then delineated the two paths and the liberal admissibility approach inherent in both:

> a trial court, presented with scientific evidence, novel or not, is encouraged to liberally construe the rules of evidence so as to admit all relevant expert testimony pursuant to *Barmeyer.* Certainly, if a court is presented with an issue concerning the admissibility of novel scientific evidence, as was the case in both *Moore* and *Cline,* the court must apply the guidelines set forth in *Daubert,* while adhering to the principle set forth in *Barmeyer.* However, if a court is presented with an issue concerning the admissibility of scientific evidence in general, the court must employ a conventional analysis under Rule 702, M.R.Evid., while again adhering to the principle set forth in *Barmeyer.*

1998 MT 108, ¶ 63, 289 Mont. 1, 31. The Court found that the HGN methodology itself was not novel because it had been in use by law enforcement for several decades and had been admitted at trial by courts around the country. Thus, the Court held that no *Daubert* analysis was necessary but that a district court dealing with non-novel expert testimony "must still conduct a conventional Rule 702[22], M.R.Evid., analysis to determine the admissibility of HGN test results while adhering to the principle of *Barmeyer."* 1998 MT 108, ¶ 69, 289 Mont. 1, 33. Its final conclusion was that HGN tests are sufficiently reliable but that the specific officer who testified to administering the test and Ms. Hulse's result lacked sufficient expertise in the scientific background of the HGN test to testify. (Even without this evidence, however, the Court found that the officer had probable cause to arrest Ms. Hulse and affirmed the suspension of her license for refusal to take a breath test. Good try.)

Novel v. non-novel split persists

There has been a steady stream of cases posing expert testimony/702/*Daubert* issues since the early cases discussed above.[23] A 2015 case, *McClue v. Safeco Ins. Co. of Illinois*[24], synthesizes these cases and expresses the current approach. Justice Baker's opinion elegantly examined the differences between the Montana and federal versions of Rule 702 and the reasons for these differences. She then reaffirmed Montana's twofold approach to *Daubert*:

> ¶ 21 In contrast to its status in the federal system, *Daubert* is not generally applicable in Montana. In *State v. Moore,*… we observed that *Daubert* was consistent with our previous precedent "concerning the admission of expert testimony of novel scientific evidence," and we adopted *Daubert* "for the admission of scientific expert testimony."
>
> We later clarified, however, that *Daubert* does not apply to all expert testimony; instead, it applies only to "novel scientific evidence." *State v. Cline,* (1996); see Hulse v. DOJ, Motor Vehicle Division, 1998 MT 10 ¶ **69** (reasoning that because "the HGN test is not novel scientific evidence," a district court "need not employ" *Daubert* to determine the admissibility of the test results).

McClue also reiterated the Court's preference to admit scientific evidence on the border of either approach (novel or non-novel):

> ¶ 23 District courts should "construe liberally the rules of evidence so as to admit all relevant expert testimony." *Beehler,* ¶ 23 (quoting *State v. Damon,* 2005 MT 218, ¶ 17, 328 Mont. 276, 119 P.3d 1194). Our standard recognizes that **admissible expert evidence should come in, even if that evidence may be characterized as "shaky."** The expert's testimony then is open for attack through "the traditional and appropriate" methods: "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof." *Clifford,* ¶ 28 (quoting *Daubert,* 509 U.S. at 596, 113 S.Ct. at 2798).

But a question remains

In McClue, the plaintiff alleged that a motor vehicle accident had caused his wife's ALS (from which she had died). The plaintiff listed two (clearly qualified[25]) neurologists as expert witnesses to establish the causation link. After

deposing them, the defense moved to exclude their testimony. The trial judge excluded both, and then granted the defense motion for summary judgment. On appeal, after making the general statements quoted above, the Supreme Court reversed, holding that one of the plaintiff's experts should have been allowed to give an opinion, although the other was properly excluded. The key difference lay in the experts' degrees of certainty as to their opinions. One neurologist testified in his deposition that the cause of the victim's ALS was trauma she sustained during the accident. He also testified that the cause of ALS is unknown, which led the trial court to conclude he was inconsistent and thus should be excluded. The Supreme Court held this to be an abuse of discretion:

> ¶ 22 The District Court purported to apply M. R. Evid. 702 in excluding Dr. Sabow's testimony. Safeco has not argued that Dr. Sabow's testimony is based on novel scientific evidence, and does not suggest that *Daubert* should be invoked to determine its admissibility. Indeed, we have noted that *Daubert* is used to assess whether the expert field is reliable, the first factor in our expert testimony jurisprudence. *Clifford,* ¶¶ 29–30. When the District Court assessed the reliability of the *opinion* that Dr. Sabow offered, it ventured to the third factor, misinterpreting its role. Under M. R. Evid. 702, the District Court needed simply to determine "whether the expert field is reliable" and "whether the expert is qualified," leaving to the jury "whether the qualified expert reliably applied the reliable field to the facts." *Harris,* ¶ 36.
>
> 2015 MT 222, ¶ 22.

WHOA, cowpersons! Did you see the "no *Daubert* because not novel" but "*Daubert* is part of the 702 jurisprudence" conundrum above? Here it is again:

> Safeco has not argued that Dr. Sabow's testimony is based on novel scientific evidence, and does not suggest that *Daubert* should be invoked to determine its admissibility. Indeed, we have noted that *Daubert* is used to assess whether the expert field is reliable, the first factor in our expert testimony jurisprudence. *Clifford,* ¶¶ 29–30.

So: we don't use *Daubert* because this is not an issue of novel science, but we do use *Daubert* as part of the traditional Rule 702 analysis which applies to non-novel science?

Fade to black: Continued next month

Clearly, we need to go on to explore this further, but it is the summer, and you have done more than enough reading. Thus, I will encourage you to get outside (if it's not too smoky), and we will resume this inquiry in the next episode. I will there lay out the Montana tests for both the very rare novel science cases where *Daubert* for sure rules and the usual non-novel science cases where Rule 702 applies, but *Daubert* still may lurk. Meanwhile, in the river or on the lake or the mountain, ponder:

> Whether 'tis nobler in the mind to suffer
> The slings and arrows of outrageous fortune [*Daubert*?],
> Or to take arms against a sea of troubles,
> And by opposing end them?

Endnotes

1 Shouldn't we start by deciding on how to pronounce the name of the plaintiffs, the Dauberts? Apparently, they themselves use the French pronunciation, which starts with an "o" and omits the "t" sound at the end: doh-bayr. However, during oral argument in the Supreme Court, the Chief Justice mispronounced the name as daw-bert, and on the fly, plaintiffs' counsel had to choose whether to correct the Chief Justice. His choice to "go with it" means that in most places (and I think this includes Montana), the Americanized version is used. See, Michael H. Gottsman, "Admissibility of Expert Testimony after Daubert," 43 Emory L.J. 867, 867 (1994); Garner's Dictionary of Legal Usage (3d ed., 2011), p. 246.

2 I use the term "expert" in this context as shorthand for Rule 702 opinion testimony based on specialized knowledge helpful to the jury. However, as I explained in an earlier column, I (and more importantly, the ABA) recommend against the use of the term "expert" by counsel or the judge before a jury, including in the jury instructions. See, "Tender is the Night: Should Your Expert Be?" Montana Lawyer, August 2013.

3 Frye v. United States, 54 App.D.C. 46, 47, 293 F. 1013, 1014 (1923). Maybe we should have stuck with this test not only for its simplicity, but for ease in pronunciation.

4 509 U.S. 579 (1993).

5 A frequently given example is allowing Magellan to testify that the earth is round, despite the fact that most other geographers believe it to be flat.

6 WestlawNext (as of July 10, 2018) shows 19,737 federal cases (at all levels) citing Daubert, and 13,970 secondary sources. This article should boost the total to 13,971.

7 136 S.Ct. 2292, 2318 (2016).

8 136 S.Ct. 1036 (2016).

9 Rather than actually surveying all 50 states myself, I used the ever-helpful interweb. The most authoritative source I found is the ABA's Litigation Section "50 State Survey of Daubert/Frye Applicability" located at http://apps.americanbar.org/litigation/committees/trialevidence/daubert-frye-survey.html. Note: you must log in as a member of the Section to access this survey.

10 https://www.bna.com/states-slow-adopt-n57982070384/.

11 Prof. Rothstein has combined the first two factors listed by the Supreme Court into one: "testability/testing." Above, I chose to keep them separate only because that is what the Supreme Court did. Again, this is a flexible standard. But, if I were in federal court or in Montana on an issue of novel scientific theory, I would ask my expert both "Is this theory testable? Please explain" AND "Has this theory in fact been tested? When? What were the results?"

12 293 F. 1013 (D.C, 1923).

13 Disclaimer: I have not independently verified or updated this list.

14 The Montana Evidence Commission Comment to MRE 702 states: "This rule is identical to Federal and Uniform Rules (1974) Rule 702. It states the two common-law standards required before an expert is allowed to give his opinion, each of which is found in existing Montana law.... The first standard is concerned with whether or not the subject matter is that requiring expert testimony. Case law has construed the phrase 'science, art, or trade' to include any particular area ' ... not within the range of ordinary training or intelligence.... ' The second standard is concerned with whether or not the particular witness is qualified as an expert to give an opinion in the particular area of his testimony. This is consistent with Section 93-401-27(9), R.C.M. 1947 [superseded], quoted above (' ... when he is skilled therein.'), and with case law which has allowed an expert to be qualified in the same terms of the rule, that is ' ... qualified as an expert by knowledge, skill, experience, training, or education ...' "

15 The 2011 amendment was stylistic only.

16 202 Mont. 185, 193-194, 657 P.2d 594, 594-598 (1983).

17 United States v. Baller (4th Cir.1975), 519 F.2d 463, cert. den. 423 U.S. 1019, 96 S.Ct. 456, 46 L.Ed.2d 391.

18 268 Mont. 20, 885 P.2d 457.

19 275 Mont. 46, 54.

20 The Court commented that fingerprint identification was not novel, but that determining the age of a given fingerprint was, necessitating a Daubert analysis.

21 289 Mont. 1, 961 P.2d 75 (1998)

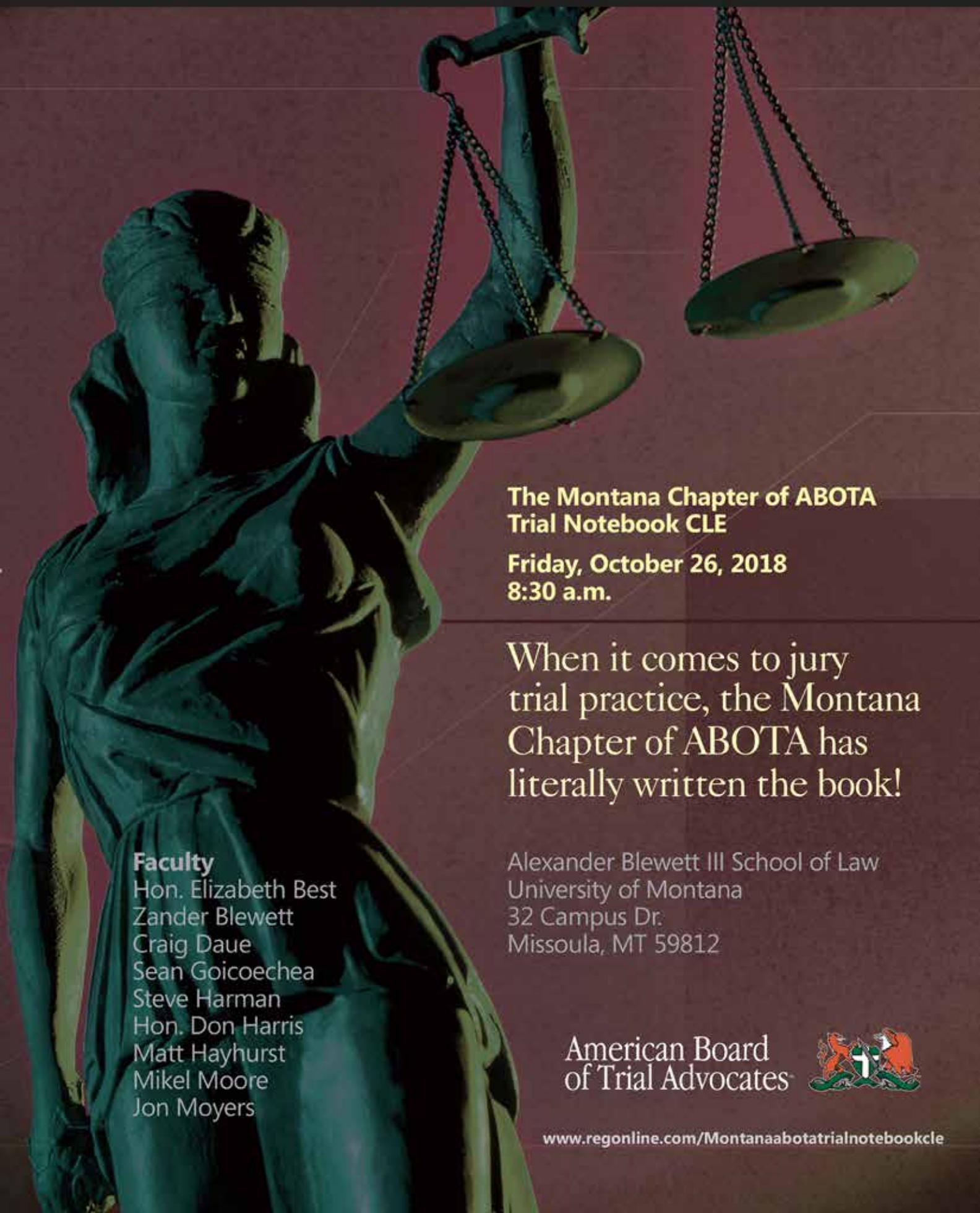
22 The next installment in the Evidence Corner series will examine the requirements for a "traditional Rule 702 analysis" in more detail.

23 For example, as of July 10, 2018, WestlawNext indicates that 98 Montana Supreme Court cases have cited Hulse.

24 2015 MT 222, 380 Mont. 204, 354 P.3d 604.

25 Dr. Sabow was a board-certified neurologist, with over 40 years' experience in neurology and particular expertise in ALS. He himself testified that he knew more about the cause and effect of ALS than probably 90 percent of neurologists.

Montana law and practice tips from the very best.



The Montana Chapter of ABOTA Trial Notebook CLE

Friday, October 26, 2018
8:30 a.m.

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New Model Health Care Power of Attorney form addresses Alzheimer's patients' needs

By Marsha A. Goetting and Kathy Kenyon

A health care power of attorney is one of those basic legal documents that everyone should have. Anyone could need help on a health matter at any time. But, as people age, the need for a health care power of attorney becomes more obvious, the need more inevitable. The need becomes pressing for individuals diagnosed with a medical condition that will impair their ability to make health care decisions and to manage relationships with health care providers and health plans.

The federal privacy law the Health Insurance Portability and Accountability Act (HIPAA), limits disclosures by health care providers and health plans of "protected health information" to anyone but the individual, except in limited circumstances. Having a health care power of attorney ensures individuals will have a "personal representative" with the same right to information they have under HIPAA. See 45 CFR Sec. 502(g).

This article introduces a model Montana Health Care Power of Attorney. It has been developed by a committee within the Montana Alzheimer's Disease/Dementia Work Group that developed the *Montana's Alzheimer's and Dementia State Plan—Addressing the Current and Future Needs of the Individuals and families with Alzheimer's Disease and Related Dementias* (mtalzplan.com/). This group of volunteers consists of health care professionals, advocacy groups, stakeholders, caregivers, doctors, educators, attorneys and citizens who have been affected by dementia and are passionate about improving dementia care in Montana.

One of the concerns expressed during town hall meetings across the state was the need for a health care power of attorney. And, one that takes into consideration the many years of slow decline, with ups and downs of capacity that are characteristics of Alzheimer's disease and other dementias. If a health care power of attorney is limited to end of life issues (e.g. breathing tubes and feeding/hydration) or becomes effective only when individuals cannot make their own health care decisions, then it is inadequate for the reality of living with Alzheimer's disease and many other conditions.

This Model Health Care Power of Attorney is designed to work for everyone, not just people who need help as they age or who are struggling with Alzheimer's disease and related dementias.

The form was developed with leadership provided by a number of people, including Kathy Kenyon, a recently retired health attorney whose parents faced the

CLE scheduled for Annual Meeting

The Health Care Law Section of the State Bar of Montana will present a CLE on the new Model Health Care Power of Attorney on Friday, Sept. 22, at the State Bar's Annual Meeting in Kalispell.

Find form online

Check the State Bar of Montana website, www.montanabar.org, for a link to the new Model Health Care Power of Attorney form.

long journey of Alzheimer's disease, and attorneys representing the State Bar of Montana: Business, Estates, Tax, Trusts, and Real Property (BETTR) Section (Peter Simon) and Health Care Law Section (Erin MacLean). Also included were Susan Gobbs and Katy Lovell from the Legal Developer's Office, Senior and Long Term Care Division of Montana DPHHS; and Marsha Goetting, MSU Extension Family Economist whose mother lived with Alzheimer's disease for 15 years.

The form was designed for individuals who want to choose a trusted agent to help them make health care decisions and manage the complexities of dealing with HIPAA. But it was written with consideration of the use of the form by designated agents, who are often family caregivers; the many individuals in HIPAA "covered entities," especially health care providers and health plans that must comply with HIPAA; as well as by advocates and health educators who want to help people understand and complete the form.

Goals for the project include:

■ Individuals should have meaningful choices and should understand the implications of using a Health Care Power of Attorney to designate an agent. The form should be easy to understand, fill out, and sign in a way that makes it legally effective.

■ Agents should have confidence that they have the legal authority to act for the principal under HIPAA. Not only does having clear authority make it easier to work with physicians and other health care providers, but it makes it much easier to manage records and handle financial matters. The form should also help agents understand the nature of their duty to the principal, whose trust agents must honor.

■ Physicians and other health care providers should be confident they can disclose protected health information to designated Agents without running afoul of HIPAA. This can be especially comforting if there is disagreement in the patient's family, and the patient has appointed an agent who is in charge when the patient has difficulty making decisions. Furthermore, when there is a doctor-patient relationship built over many years, and the patient is becoming less and less able to manage their health and other aspects of their lives, such as food preparation and personal care, the physician (and the physician's team) can rely on the Health Care Power of Attorney to know who they can turn to and when.

■ The staff of HIPAA covered entities – especially the medical records and finance offices of health care provider systems and of health plans – should be able to rely on a health care power of attorney that clearly establishes the authority of the agent to act for the principal on the full range of health care matters, including authorizing disclosures, requesting records, and dealing with billing and health plan matters.

■ Advocates and health educators should have a form that is easy to explain and for individuals to understand, fill out, and sign.

After many revisions the committee has a proposed model Montana Health Care Power of Attorney form, with Instructions and Attachments. The form is designed to make it simple for individuals to designate a health care power of attorney, while giving individuals additional meaningful options.

The model Health Care Power of Attorney form, which is four pages long, requires the principal to designate one agent and choose when the agent can act on behalf of the principal immediately or upon the principal's disability. The form requires a signature, but not a notarization. That is all that is required under Montana law to have a legally effective Health Care Power of Attorney.

The model form also offers the individual the option of designating back-up agents and identifying a preferred legal guardian (if one is needed in the future). It gives individuals the option of adding two attachments on matters that may be meaningful to them.

Attachment A is a Declaration Related to Use of Life-Sustaining Treatment, based upon the Montana Rights of the Terminally Ill Act. It requires two witnesses. MCA Sec. 50-9-103 et seq.

Attachment B allows an individual to provide special directions on religion and on preferred place of death, as well as providing directions on disposition of the body after death, based upon the Montana Rights of Disposition Act. MCA Sec. 37-19-701 et seq. The attachment requires either notarization or witnesses, depending on the selection made.

The form includes instruction that will help individuals understand the implications of choosing when to make the Health Care Power of Attorney effective. The instructions also encourage people to seek legal advice, especially if they need or want a form tailored to their unique situation.

In drafting the form, the committee relied upon work that has been done by others, including models from Wyoming and other states, the National Hospice and Palliative Care Organization, and the American Bar Association's Commission on Law and Aging.

The proposed model Health Care Power of Attorney, with Instructions and Attachments, is available from a link on the State Bar of Montana website at www.montanabar.org.

Marsha Goetting is a family economics specialist Montana State University Extension. Kathy Kenyon, J.D., M.A, retired, is a family caregiver.

This Model Health Care Power of Attorney is designed to work for everyone, not just people who need help as they age or who are struggling with Alzheimer's disease and related dementias.

MJF announces 2018 Access to Justice Grant awards

The Montana Justice Foundation is proud to announce the 2018 recipients of its Access to Justice Grants. This year, MJF has awarded over $323,000 to 19 nonprofit organizations across the state – its largest grant cycle in nearly a decade. MJF's grant programs serve ordinary Montanans: children in foster care, families struggling to make ends meet, veterans denied hard-earned benefits, seniors, and survivors escaping abusive and violent environments. They support projects that help people stay in housing, receive medical care, and get back onto a path of financial security.

Many grantee organizations provide direct legal representation, such as Montana Legal Services Association, Cascade County Law Clinic, and programs that serve survivors of sexual assault and domestic violence, including SAFE Harbor of Ronan, Montana Coalition Against Domestic and Sexual Violence, Sanders County Coalition for Families, YWCA Billings, and HAVEN of Bozeman.

However, the range of services provided by grantees is much broader. As many communities in Montana face alarming increases in child abuse and neglect cases, Montana Justice Foundation continues to provide funding to Court Appointed Special Advocate programs across the state to help recruit and train new volunteer advocates, ensuring that children have a voice in the legal system. This year, Montana Justice Foundation awarded grants to the CASAs in Kalispell, Hill County, Lake and Sanders County, Missoula, Great Falls, Yellowstone County, and eastern Montana.

Montana Justice Foundation also awarded grants to the mediation programs at the Community Mediation Center in Bozeman and the Community Dispute Resolution Center in Missoula, the housing discrimination program at Montana Fair Housing in Butte, and the wrongful conviction program at the Montana Innocence Project.

Funding for Access to Justice Grants is made possible through the generous support of our donors and the Interest on Lawyers Trust Accounts (IOLTA) program. MJF is grateful to attorneys for maintaining their IOLTA accounts, which helps us provide funding to impactful legal aid programs across our state.

2018 Montana Justice Foundation Grant Recipients

CASA for Kids (Kalispell)
CASA of Hill County
CASA of Lake & Sanders Counties
CASA of Missoula
CASA-CAN (Great Falls)
Cascade County Law Clinic
Community Dispute Resolution Center of Missoula County
Community Mediation Center
Eastern Montana CASA GAL
HAVEN
Montana Coalition Against Domestic and Sexual Violence
Montana Fair Housing
Montana Generational Justice
Montana Innocence Project
Montana Legal Services Association
SAFE Harbor
Sanders County Coalition For Families
Yellowstone CASA
YWCA Billings

MLSA gets $237K grant to help retired attorneys give advice, limited services

Montana Legal Services Association will receive a $236,797 grant to help retired attorneys to provide advice and limited-scope services to low-income clients.

Legal Services Corporation announced in early August that MLSA will receive one of the organization's Pro Bono Innovation Fund grants. The fund is intended to encourage and expand robust pro bono efforts and partnerships to serve more low-income clients.

MLSA will use its grant to develop and support a statewide network of retired attorneys to provide advice and limited-scope services to low-income clients throughout the state.

Volunteers will provide legal advice through the Montana Pro Bono Connect Phone Advice Program. They will also mentor and provide litigation support to MLSA attorneys.

MLSA is among 15 legal aid organizations in 11 states that received grants from LSC this year totaling $4.5 million.

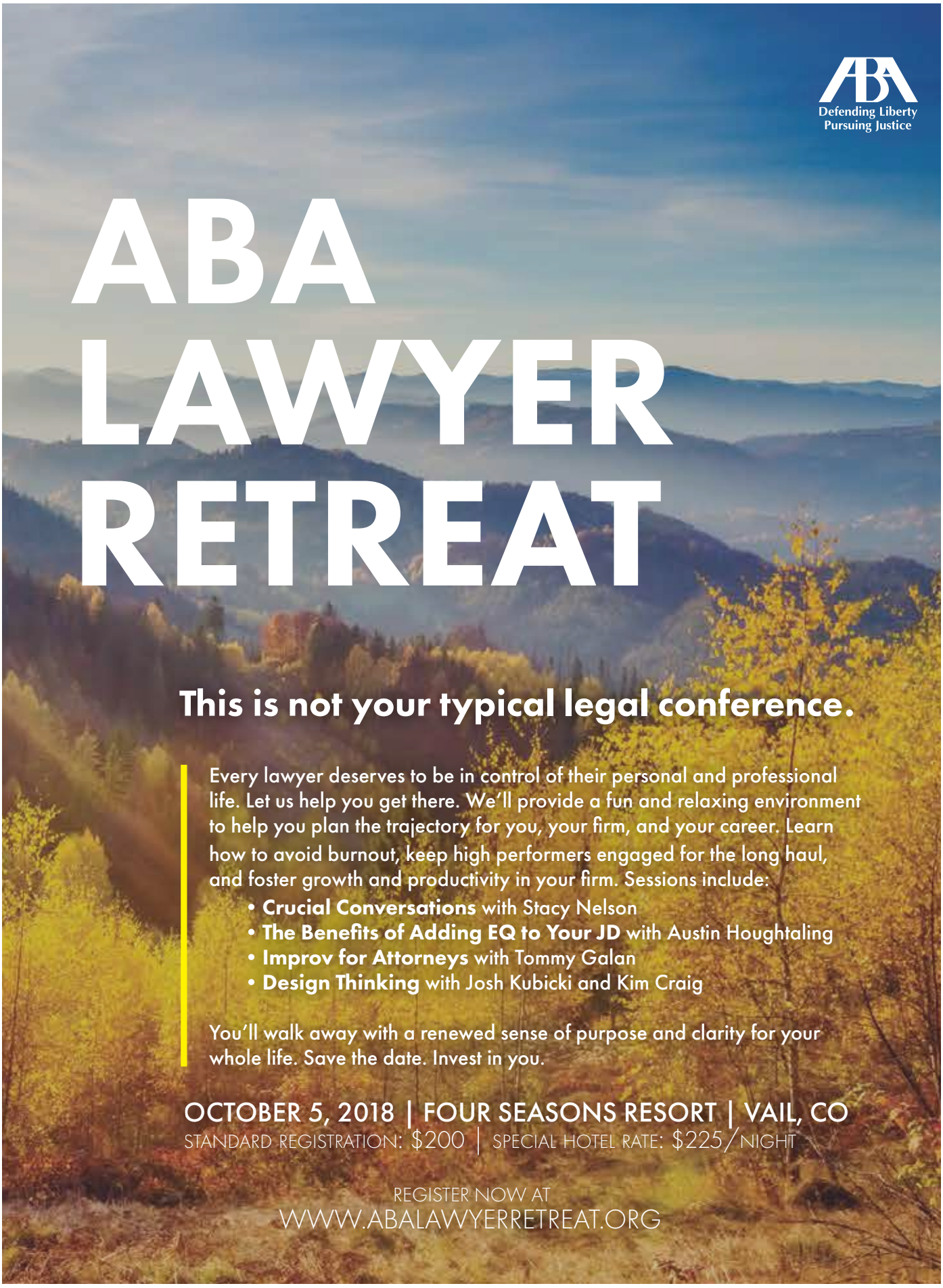
"We are grateful to Congress for establishing the Pro Bono Innovation Fund and for increasing funding by $500,000 this year," said Jim Sandman, LSC president. "These grants stimulate more volunteer participation by the private bar, leverage the federal investment in civil legal aid, and allow our grantees to reach more people in need of civil legal assistance."

Montana's Sen. Steve Daines and Sen. Jon Tester both applauded the grant.

"Going to court can be challenging especially when you don't have the resources," Daines said. "Organizations like Montana Legal Services are critical to helping those Montanans who need assistance. I'm glad to support the recent funding and will continue to be a supporter of important programs like Montana Legal Services."

"By connecting experienced legal professionals with Montanans, these resources will help give a voice to the voiceless," Tester said. "In our system, justice tends to go to the highest bidder, but Montana Legal Services is helping level the playing field to make sure justice is served, regardless of means."

This is the fifth year LSC has awarded Pro Bono Innovation Fund grants.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If you aren't careful, making a referral can come back to haunt you

Mark Bassingthwaighte

In reality negligent referral claims are not a significant problem for malpractice carriers. Yet when they arise, and they do, these claims can be costly.

Lawyers make referrals. It comes with the territory. For some, making a referral is almost a daily occurrence. They are often made after work is declined. Staff may make them in response to a cold call or give one to a client who needs a service that the firm doesn't provide. Referrals are sometimes made during dinner conversations, at social events, or after a presentation given to the general public. Names may be passed along to family members, friends, a colleague, and to good clients. After all, we do want to make sure our good clients are well taken care of! Too often however, referrals seem to be made without any thought of the potential malpractice exposure. Is such casualness justifiable? Unfortunately, the answer is sometimes no.

Nationwide, malpractice coverage statistics vary geographically and over time due to any number of reasons. Some lawyers do not feel that malpractice coverage is necessary. They prefer to protect their assets in other ways. Others simply can't afford the coverage, particularly during economic hard times. I have even had a few lawyers tell me that they believe having malpractice coverage simply invites claims. As they see it, if they have no insurance no one will bother suing them. Regardless, this is a roundabout way of sharing that contrary to popular belief not all lawyers are insured for malpractice. In fact in a few states the percentage of uncovered lawyers has been estimated to be as high as 50 percent. This reality begs the question of what would happen if a lawyer made a referral to another lawyer who was uninsured and that lawyer eventually made a mistake? Might the referring lawyer be exposed? You bet. There are ways that liability can be found. It's a hunt for a deep pocket and it will be framed as negligent referral. The good news is that avoiding this type of claim is relatively easy.

The most dangerous type of referral is one that results in a referral fee and it doesn't matter if the fee was expected or simply offered as a gift. Acceptance of the fee can and will bring to the referring attorney liability for the other attorney's work. If a fee is offered, the best advice is to decline it or suggest that the referral fee be refunded to the client because referral fees are too easily viewed by the client as payment for legal advice to have them work with the other attorney.

If your practice is to accept referral fees, proceed fully aware of the risk involved and be up front with the client about the arrangement. Remember, when you share fees you share liability. Rule 1.5 of the Model Rules of Professional Conduct states that a division of a fee can only occur if the division is in proportion to the services performed and the client agrees in writing. In addition, the fee must be reasonable and each lawyer will assume joint responsibility for the representation. This rule clearly requires that a referring attorney who will be accepting a referral fee inform the client of the presence of the referral fee and obtain written consent to the fee division. Given all this, it would seem to be prudent to stay in contact with the other attorney in order to monitor critical dates and see that work is completed on time because there is no free lunch here.

Two side notes are in order. First, prior to ever making a referral where a referral fee is expected, consider making certain that the attorney you are referring to has malpractice insurance in place and that the limits are adequate for the size of the matter being referred. Do not accept verbal verification of coverage. There are attorneys who will say they are insured in order to obtain the business. Ask the other attorney for a copy of the declaration page to the malpractice policy prior to ever making this kind of referral. Second, occasionally an

attorney who has recently been disbarred will seek to refer clients and request a referral fee. If the referral happened to be made while this attorney was in good standing with the bar, payment of the referral fee would be acceptable. If this attorney is seeking to make the referral and asking for a fee after being disbarred, the payment of a referral fee would be prohibited under Model Rule 5.4(a) which prohibits the sharing of fees with a non-attorney.

That said, acceptance of a referral fee is not the only method of creating a liability from a referral. Referrals to specific lawyers or a referral made with a promise such as "Attorney X is the finest personal injury plaintiff attorney in the area and always gets great results" can also create liability. To avoid exposure for a negligent referral claim, the rules are simple. When referring anyone to another lawyer always provide a minimum of three names and make no promises. Of course, suggesting the individual contact a state or local bar referral service would be another very safe practice.

Sometimes, however, we do wish to make a specific referral if for no other reason than to see that a good client is properly taken care of. If negligent referral claims are a concern for you, consider documenting adequate malpractice coverage by asking the other lawyer for a copy of the declarations page to her malpractice policy prior to making a specific referral. Why? It's because one shouldn't run with assumptions. Negligent referral claims are about coverage, not competency. Competent lawyers can and sometimes do make a mistake or miss a deadline and again, not all lawyers are insured.

One other type of attorney referral that can potentially create a serious problem is the referral made to an officemate in an office-sharing situation. By their very nature office sharing arrangements create added vicarious liability for every lawyer in the space. A simple referral to an officemate just increases the difficulty of avoiding this liability should a claim ever arise. In this situation it is particularly important to give a minimum of three names. It is fine to include an officemate in this list. Just be certain to disclose that one of the names provided is an attorney in the suite, make no promises about the suitemate, and be certain that the client understands that this attorney is completely independent. It would also be advisable to document in some fashion how this referral was made. Finally never make a referral to an officemate who is uninsured or underinsured. This risk simply isn't worth it.

Now here is the interesting twist to the issue of negligent referral. Many referrals are made to non-clients. A lawyer's duties to non-clients are minimal and thus negligent referral claims arising out of such referrals are few and far between. The real concern is when an attorney refers a client to another attorney or, perhaps more frequently, to another professional. Making matters worse, words of assurance are also often shared with the client in this situation perhaps as a way to make sure the client follows through. To underscore this concern, consider an estate planner who regularly refers clients to the same CPA and is surprised to learn, after the CPA has made an error, the CPA has no errors and omissions coverage. The client, now harmed, may very well look to the estate planning lawyer for a recovery based upon her legal advice to work with that particular CPA. Here, following the above advice becomes even more important. The same rules should apply whenever making a referral to an existing client. Always provide a minimum of three names, make no promises, and verify that an errors and omissions policy is in place if a specific referral is preferred.

Remember that these rules not only apply to referrals made after work is declined. They also apply to referrals made at a dinner party, in an email to a friend, in response to an email from someone contacting you as a result of a visit to your firm's website, in a casual conversation following a public presentation, on a chat site, or in response to an inquiry over the phone.

The next issue concerns staff. Occasionally a firm will have a sound referral policy in place that all attorneys understand and follow, yet a staff member may not understand the reason the policy is in place and thus not follow the rules in every instance. There is no ill will here, just an honest desire to try and see that clients get the best help possible. Their motivation is to provide good service. This staff person will make a specific referral to an attorney or other professional whom they know and think highly of, blissfully unaware of the associated risks. For clients who are upset, staff may even try to reassure them by making certain "harmless" promises about the receiving attorney. "Attorney X is a very good attorney and well respected by our firm." If attorney X misses a statute date and is uninsured or underinsured, the client may not agree with the statement that attorney X is a good lawyer and they may want to hold the firm liable for their loss.

Make certain that all staff understand your firm's policy and procedure for referrals and also the reasons why such a policy is in place. Develop a referral list with three names for the various types of matters the firm will refer out and make it available to everyone in the office. If this list doesn't cover a referral request, have the staff pass the matter on to one of the attorneys, politely decline by stating the firm does not make referrals, or have staff refer to the state or local bar referral line.

Last but not least, an often overlooked source of potential liability for negligent referral claims may come from links on your firm's website. If there are links to other sites, an appropriate external links disclaimer should be prominently displayed near these links. The disclaimer should simply state that the firm has provided these links for the convenience of users of the site and that these links do not constitute an endorsement of the linked websites, or of the information, products, or services contained therein.

In reality negligent referral claims are not a significant problem for malpractice carriers. Yet when they arise, and they do, these claims can be costly. Given that the actions that can be taken to avoid this type of claim are highly effective and quite minimal, there really is no reason not to take the prudent course of action and follow the advice shared here.

ALPS Risk Manager Mark Bassingthwaighte has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars across the U.S., and written extensively on risk management and technology. Many of his recent seminars are available at our on-demand CLE library at montana.inreachce.com. Reach him at mbass @alpsnet.com.

Court rules for McLean in dispute over rescission of malpractice insurance

The Montana Supreme Court ruled in August that a lawyer malpractice insurance company was wrong to rescind the policy of an Anaconda lawyer whose father and business partner stole hundreds of thousands of dollars from clients.

In a 4-3 decision the court ruled on Tuesday that a state district court wrongly granted summary judgment for ALPS Property & Casualty Insurance Company on rescinding Michael McLean's policy. ALPS rescinded the policy as well as those of Michael's father, David, and the McLean & McLean law firm after the theft of clients' funds came to light.

The Supreme Court's Commission on Practice in 2015 found that the elder McLean stole at least $522,564 from clients over a period of six years.

However, the court ruled against two of David's clients who intervened to file claims on the elder McLean's policy.

Tuesday's ruling said that the district court's summary judgment granted ALPS the remedy of rescinding Michael's policy while disallowing equitable exceptions, with no explanation or legal basis.

"The result is a hodgepodge that, for innocent insureds such as Michael, is all stick and no carrot," Justice James Shea wrote for the majority.

Justice Jim Rice dissented – joined by Justice Beth Baker and District Judge Michael Moses of Billings, who was sitting for Justice Michael Wheat – saying the majority made its decision on the premise that Michael McLean was without blame.

"However, summary judgment was entered by the District Court without consideration of Michael's culpability, and thus, no determination has yet been made in this proceeding about his involvement, what he knew, or what he should have known," Justice Rice wrote.

The court heard the argument in *ALPS v. McLean* at the State Bar's 2017 Annual Meeting in Fairmont.

3 names submitted for 21st Judicial District judge post

The Judicial Nomination Commission has submitted the names of three Hamilton attorneys to Gov. Steve Bullock for appointment to a vacant Ravalli County District Court judge seat.

- Jennifer Boatwright Lint,
- Howard Frank Recht
- Thomas John Schoenleben Jr.

The action came after a 30-day public comment period and interviews the commission held with the candidates. The person the governor appoints will replace the Honorable James Haynes, who announced his retirement is subject to Senate confirmation during the 2019 legislative session. The successful candidate will serve a six-year term.

Lint, 50, is a 1997 graduate of the University of Montana School of Law. She has been the owner and principal, Boatwright Law Office since 1999. She has been a contract attorney for the city of Hamilton since 1999. She has served as a substitute Ravalli County justice of the peace since 2015 and as a substitute Missoula city judge since 2016.

Recht, 58, is a 1986 graduate of the University of Montana School of Law. He has been the Ravalli County Attorney's Office's chief civil counsel since 2011. Before that he was in private practice in Hamilton for most of his career, with the exception of a stint as corporate counsel at a Hamilton business from 1997-2002.

Schoenleben, 30, is a 2012 graduate of the University of Montana School of Law. He has been the principal and owner of Bitteroot Law since 2016. Before that he worked for the Montana Office of the Public Defender for four years, including a year as the regional deputy attorney in Havre.

Volunteers needed for Aging Services legal clinic

The Montana Aging Services Bureau is looking for legal professionals to volunteer for a legal clinic in Red Lodge on Thursday, Aug. 23.

Volunteers will be drafting estate planning documents for low-income senior citizens. Templates for each form are provided, and the seniors have been polled to determine what documents are needed. Volunteers can be reimbursed for travel, per diem, and lodging. A block of rooms is reserved at the Rock Creek Resort.

The bureau will also be conducting training for legal and aging professionals on Aug. 22 from 2 p.m. to 5 p.m. at the Red Lodge public library.

Anyone interested can contact Richard Heitstuman at Richardheitstuman@gmail.com 406-465-6950; or Katy Lovell at klovell@mt.gov or 444-7787.

More information is available at https://www.eventbrite.com/e/working-with-older-adults-red-lodge-capacity-exploitation-abuse-and-reporting-tickets-48882411609.

Keller was a judge in Flathead County, Lincoln County

Robert Keller ('Bob') was born Dec. 5, 1927, in Bellefonte, Pennsylvania, to Ellis and Marguerite Keller, and passed away peacefully on July 3, 2018, at the Libby Care Center in Libby. Bob grew up in Baltimore and Pittsburgh, and moved back to State College, Pennsylvania, his junior high school year, graduating in 1945. He attended Penn State University where he was active in campus politics and boxing, and earned a pre-law degree in 1950 with one military service interruption (Air Force at the end of WWII). Upon graduation, Bob was commissioned in the Army, serving two tours in Korea as a tank commander where he earned the Silver Star, Bronze Star, and was wounded in action earning the Purple Heart and a medical retirement. In December 1952, Bob married his high school classmate, Susan Bissey, in Colorado while on leave from the Army.

Keller

Bob always said his four favorite passions in life were hunting, fishing, skiing and flying. After his military service he decided to move west to pursue those passions and attend law school at the University of Utah. Upon graduation Bob and Susan moved to Kalispell where Bob practiced law with the Murphy & Robinson firm before setting up his solo practice. He particularly loved trial practice and was very comfortable in the courtroom where he later served as a Montana District Court Judge in both in Flathead County (1968 – 1976) and in Lincoln County (1988 – 1995). In his retirement Bob enjoyed acting as a visiting judge in Great Falls and Miles City, and teaching law students at the Trial Advocacy Program at the University of Montana School of Law.

Bob and Susan raised their family in the Flathead Valley where he enjoyed coaching and umpiring the boys' baseball teams, flying Cessna planes, participating in Evergreen Lions, playing bridge with friends and skiing at Big Mountain in Whitefish (where the family earned the first Kalispell Ski Club Family Race trophy). In 1988 Bob and Susan moved to Libby where he golfed daily, played duplicate bridge, and skied the slopes at Turner Mountain. Bob truly loved Montana – in the summer he enjoyed cocktails on the dock at Echo Lake while planning the annual family fly fishing and horse packing trip to the South Fork of the Bob Marshall Wilderness. Bob's last 25-mile trail ride in was at age 74. But his favorite Montana activity was pheasant hunting with his beloved springer spaniels and his dear friend and neighbor, Bill Crismore, by his side.

Bob is survived by his children Geoff (Teri) in Billings, Jamie (Catriona) in Ohio, and Jill Mitchell (Kurt) in Minnesota. He was preceded in death by his parents, his wife, Susan (July 1, 2014). Donations may be made to a charity of choice. A memorial will be held by the family at a later date. Special thank you to the staff at the Libby Care Center, who gave 'Judge' excellent care and a reason to share his big smile and sparkling blue eyes. Arrangements are by Schnackenberg Funeral Home in Libby. Online condolences and memories may be shared at www.schnackenbergfh.com.

Memorial submissions

The State Bar of Montana will publish memorials free of charge or any State Bar of Montana member who has died. Please email submissions to jmenden@montanabar.org using the subject line "In Memoriam."

Online 'In Memoriam' page

The State Bar of Montana's online "In Memoriam" page — www.montanabar.org/?page= In_Memoriam — lists Montana attorneys who have recently died, with links to online obituaries where possible. There you can also find a form to submit a memorial for inclusion in the Montana Lawyer.

MICHAEL A. VISCOMI, ESQ.

Viscomi, Gersh, Simpson & Joos, PLLP
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ASSOCIATE ATTORNEY: Brown Law Firm, P.C., with offices in Billings and Missoula, is seeking a Litigation Associate Attorney with 0-3 years of experience for its office in Billings. All levels of experience are welcome to apply, including recent law school graduates. Practice areas include insurance defense and general personal injury defense. We offer a competitive salary, benefit package including profit sharing and 401(K). Please send a cover letter, resume, references and a writing sample to Brown Law Firm, P.C., Attn: Teresa Delvo, P. O. Box 849, Billings, MT 59103-0849, or email to tdelvo@brownfirm.com. All applications will be confidential.

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MEDIATION

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

MICHAEL A. VISCOMI, of Viscomi, Gersh, Simpson and Joos, PLLP, in Whitefish, practice now limited to mediation, arbitration and special master assignments throughout the state of Montana. For scheduling, call (406-862-7800), email (randi@bigskyattorneys.com) or use online calendar available through the National Academy of Distinguished Neutrals (www.nadn.org/michael-viscomi).

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PSYCHOLOGICAL EXAMINATION & EXPERT TESTIMONY: Montana licensed (#236) psychologist with 20+ years of experience in clinical, health, and forensic (civil & criminal) psychology. Services I can provide include case analysis to assess for malingering and pre-existing conditions, rebuttal testimony, independent psychological examination (IME), examination of: psychological damage, fitness to proceed, criminal responsibility, sentencing mitigation, parental capacity, post mortem testamentary capacity, etc. Patrick Davis, Ph.D. pjd@dcpcmt.com. www.dcpcmt.com. 406-899-0522.

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