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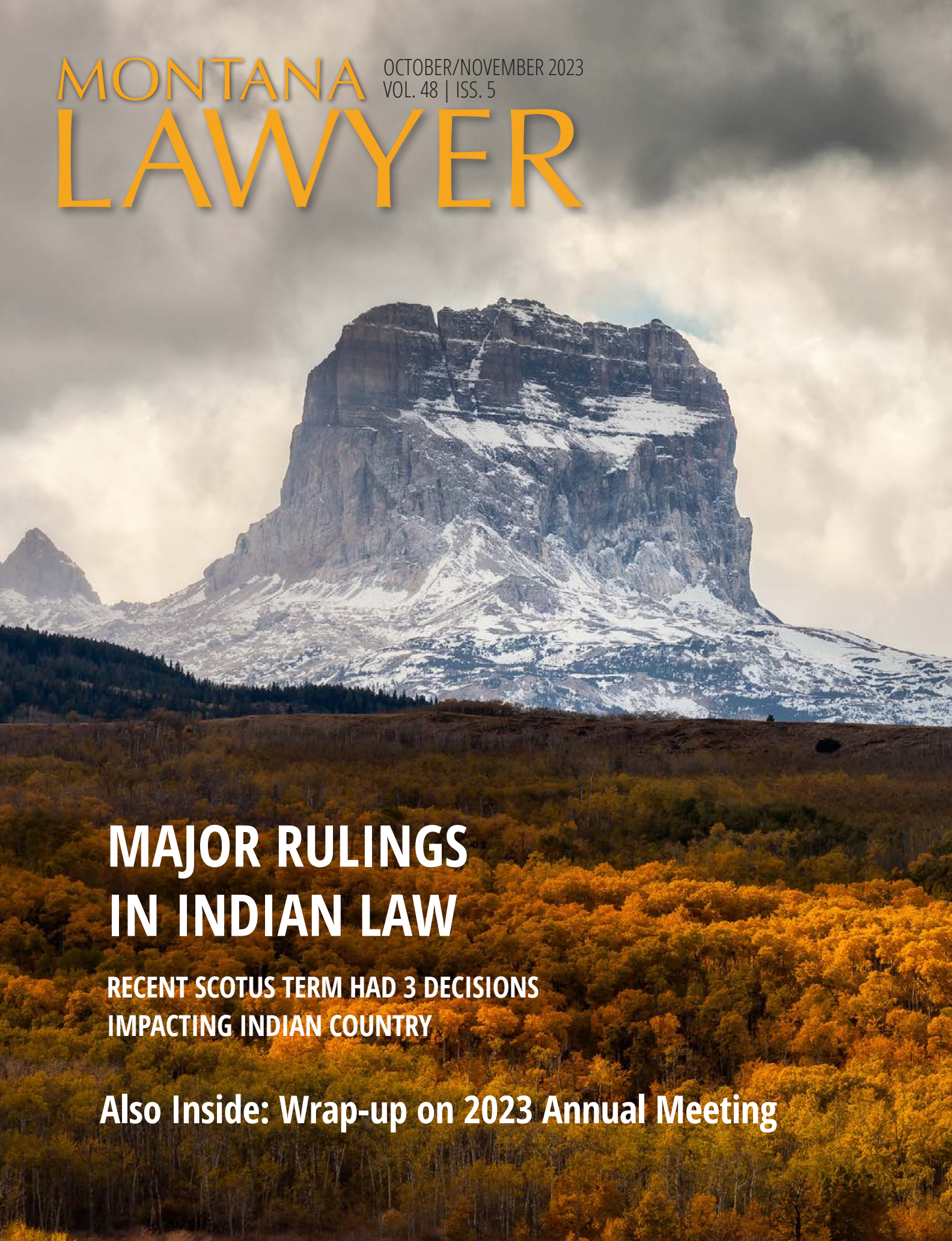

MAJOR RULINGS IN INDIAN LAW

RECENT SCOTUS TERM HAD 3 DECISIONS IMPACTING INDIAN COUNTRY

Also Inside: Wrap-up on 2023 Annual Meeting

MONTANA LAWYER

OCTOBER/NOVEMBER
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FEATURE ARTICLES

2023 ANNUAL MEETING WRAP-UP

Cutting-edge Continuing Legal Education presentations and the inspirational stories of our 2023 Annual Award winners highlighted the State Bar of Montana's Annual Meeting in September in Billings.

ON THE COVER

Chief Mountain, located on the border of Glacier National Park and the Blackfeet Indian Reservation, is one of the most prominent peaks along the Rocky Mountain Front and has been a sacred site for tribes in the U.S. and Canada for centuries. This issue features an article on three recent U.S. Supreme Court cases that greatly impact tribes. **Page 20**

GIVING AND RECEIVING CRITICISM WITH GRACE

Life as a music major made practice of law seem like a tea party for Meri Althauser

See page 14

ALSO IN THIS ISSUE

Public education outreach, impacts of AI, access to justice among major focus of my term as Bar President

STUART SEGREST

Stuart Segrest is a senior attorney at Christensen & Prezeau, PLLP where he handles a wide range of litigation and appellate matters. Before joining the firm, he worked for the Montana Attorney General's Office, where his career spanned the terms of four different Attorneys General. He served as Chief of the Civil Services Bureau, which represents the State of Montana in complex constitutional litigation and other cases of statewide importance in both state and federal court. He is currently serving as the President of the State Bar of Montana.

In the wake of a very successful, and engaging, State Bar Annual Meeting, and with fall in full effect, I write to introduce some of the themes I hope to work on during my year as Bar president. Before I do, a quick note of appreciation to the presenters, staff, and members who made the Annual Meeting a success. Thank you all.

First, in line with the Bar's long-range plan, we will continue to support and strengthen the rule of law, support our judiciary, and educate the public about the important work lawyers do to support our society. As Immediate Past President Dave Steele noted in his last president's message, there is still much work to do in this area. We will be reaching out to our sections, committees, and individual members to aid us in this important work.

Second, we need to continue addressing Artificial Intelligence, in particular "generative" AI, as it enters our legal practice. AI was addressed in several panels and presentations during the Annual Meeting, and the common theme was that it is a rapidly advancing field that will affect how we practice. We therefore need to educate ourselves and consider the numerous ramifications of the use of AI by lawyers and law firms. This includes not only understanding the potential for AI legal tools to aid our legal research, document handling, and drafting, but also the technological and ethical risks inherent in this new technology. We don't want lawyers submitting briefs with made up cases, but we also need to think about how to train lawyers to use prompts effectively, which AI products are reputable, how to bill for the use of AI, etc. I will be looking to our sections, committees, and partners in this effort, including the Technology Committee, Ethics Committee, and the Law School. This of course, is not the first time technology has changed our practice—think of online legal research—but the use of machine-learning and large-language models means this technology will evolve quickly and requires preparation and awareness.

Third, and finally, we'll focus on ways to increase access to justice for all Montanans (which is critical to maintaining a fair system of dispute resolution, and thus the rule of law). In particular, I hope to leverage the State Bar organization to add momentum to the exciting work already being done to increase pro bono representation in our State; work being done by the Supreme Court's Access to Justice Commission, the Justice Initiatives Committee (JIC), and by Montana Legal Services. Already these groups are revamping pro bono resources for lawyers and judges, but there is still much to do. As part of this effort, JIC will facilitate an article in the Montana Lawyer chronicling Montana pro bono stories and successes.

Before I sign off, thanks to all of you for allowing me to serve as president for this year. It will take some work, and some travel, but I look forward to a successful year and to the opportunity to engage with, learn from, and make progress with you. See you around, and please contact me or the State Bar if you want to help in these important initiatives.

> "It will take some work, and some travel, but I look forward to a successful year and to the opportunity to engage with, learn from, and make progress with you."

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CAREER MOVES

Christensen

Sandler

Christensen, Sandler join Moore, Cockrell, Goicoechea & Johnson in Kalispell

Moore, Cockrell, Goicoechea & Johnson, P.C., is pleased to announce that Sean Christensen and David Sandler have joined the firm in Kalispell.

Christensen attended the University of Montana, where he received his bachelor's degree in economics. Sean earned his law degree from the Alexander Blewett III School of Law at the University of Montana. Since law school, Sean has primarily worked as a transactional and estate planning attorney.

Sandler received his J.D. from the University of Montana School of Law in 1998. After clerking at the Montana Supreme Court, he represented plaintiffs and defendants in civil litigation in western Montana. For the last nine years, he served as Judge of the Workers' Compensation Court.

Sandler works as a civil litigation attorney. He also mediates civil actions and workers' compensation claims.

Nygren tapped as Chief Legal Counsel at Montana Department of Transportation

Chris Nygren has recently been selected as Chief Legal Counsel and Professional Services Division Administrator for the Montana Department of Transportation. In this position he is responsible for all legal affairs of MDT.

Nygren

Nygren has been with the Department as Senior Litigation Counsel and prior to joining MDT, he was in private practice in both Bozeman and Missoula and served as Associate General Counsel for Barnard Construction Company Inc. In addition, he also serves on the Montana State University Foundation Board of Governors and on the State Board for the Montana Backcountry Horsemen.

GUIDELINES FOR SUBMITTING MEMBER NEWS TO THE MONTANA LAWYER

The Montana Lawyer welcomes news from members including announcements of new positions, advancements, honors, appointments and publications. There is no charge for Member News submissions.

If you have news you would like to submit to the Member News section, you can email it to editor@montanabar.org. Please direct any questions to the same address.

We will include firm name, location, the change that is being announced, attorney's name, law school, practice areas, and a high-resolution photo.

Cotner Ryan Law, PLLC Announces Sherine D. Blackford Joins firm as a Partner.

Cotner Ryan Law, a general practice law firm located in Missoula, is pleased to announce the association of its firm with Sherine D. Blackford of Bozeman, Montana.

Sherine, a Montana native, graduated from the University of Montana School of Law in 2012. Sherine is a member of the American Bar Association, State Bar of Montana, Gallatin County Bar Association, and Montana Trial Lawyers Association. Her practice emphasizes civil litigation in a wide variety of practice areas at both the trial and appellate levels. As a practicing litigator, Sherine has handled complex matters, taken several cases to trial, and has achieved excellent results in the courtroom. Sherine's practice focuses on litigation, personal injury, business law, real estate transactions, and liquor licensing. In addition to her practice, Sherine is a Trustee for the State Bar of Montana (2021-current), former President of the Gallatin County Bar Association (2022-2023), and former Chairperson for the Family Law Section of the State Bar of Montana (2015 to 2017). In 2016, she was named a Top 10 under 40 Family Law Attorney by the National Academy of Family Law Attorneys.

Cotner Ryan Law, PLLC was formed by Dave Cotner in 2017. With Sherine joining the firm, Cotner Ryan Law offers more than 70 years of combined experience for clients throughout Montana.

90 candidates for admission pass July 2023 bar exam

Congratulations to the 90 candidates for admission to the State Bar of Montana who passed the July 2023 administration of the bar exam.

A total of 110 applicants sat for the exam July 25-26, for a pass rate of 81.8%. All 90 of those who passed have met all requirements for admission, and the Board of Bar Examiners has recommended they be admitted to practice law in Montana.

Earning passing scores on the bar exam were:

- Diana Jo Abbott
- Valan Zander Anthos
- Cathryn Irene Arno
- Lindsey Marie Bales
- Paul Whitman Banks
- Alexi Jo Baumgardner
- Natalie Rose Bergen- Henengouwen
- Cole William Berry
- Christopher Anthony Bittel
- Sarah Virginia Brennan
- James Dunbar Brien
- Whitney Marie Bugni
- Kenyon Cairns
- Cole Lowry Catlin
- Henry David Charpentier
- Brooke Lyn Chmura
- Jon Marc Christiana
- Steaphan Scott Clement
- Julia Katherine Clements
- Matthew Stephen Cranston
- Benjamin Murphy D'Alton
- Emily Jane Dardis
- Timothy Christian Devine
- Ryan John Dieken
- Bridger Daniel Dolan
- Taylor Leigh DuBois
- Sheldon Ray Eilers
- Samuel Anderson Fossum
- Trevor Parrish Funseth
- Malcom MacIntyre Gilbert
- Seth Sigward Haack
- Brian Joseph Hagan
- Rhett Dean Harmon
- Slade James Heggen
- Shelley Lynn Hendricksen-Scott
- Victoria Noelle Hill
- Cristin Laine Hochhalter
- Paul Andrew Hutton
- Natalie Anne Jeude
- Albert Gordon Jones
- Donald Austin Stewart King
- Blake Robertson Koemans
- Cole Everett Kostelny
- Zachary Michael Krumm
- Cydney Taylor Kurth
- Denise Ranae LaFontaine
- Hannah Branch Laub
- Stephan Joseph Licitra
- Marti Auburn Liechty
- Christine Anne Lindley
- Charles Loken
- Jackson Trent Maynard
- Benjamin Francis McKee
- Whitney Elizabeth McKiddy
- Katarina Mitrovic
- Eric Daniel Monroe
- Katherine Louise Naef
- Kelsie Lorraine Nolan
- Clare Noelle Ols
- James Randolph Olsen
- Lauren Mackenzie O'Neill
- Christopher Paul Patalano
- Danielle Hope Pease
- Edi Planincic
- Hamilton Que Platt
- Dillon Otto Ratz
- Anthony Frances Romano
- Talon Chantry Sandstrom
- Emma Nelson Sauve
- Genevieve Patricia Schmit
- Nicholas Donnelly Shapiro
- Analisa Skeen
- Alec Skuntz
- Annabelle Marie Smith
- Nathan Andrew Smith
- Shelby Anne Soares
- Emily Rose Steinberg
- Liam Andrew Sterup
- Kali Betty Taylor
- Pierce Tyler Teeuwen
- Taylor Marie Thompson
- Marisa Lynn Wahlstrom
- Cameron Scott Wainwright
- Sonya Anne Walker
- Aspen Brook Ward
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- Bryana Michelle Williams
- Alexander Barclay Wilson
- Montana Duke Wilson
- Callie Ann Woody

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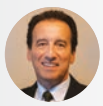
- Construction law
- Contract disputes
- Contract negotiation
- Easements
- Employment law
- Encroachments
- Insurance coverage
- Land use
- Nuisances
- Partner/Shareholder/ Member disputes
- Personal injury
- Probate and will disputes
- Professional negligence (architects, engineers, attorneys, etc.)
- Real estate disputes
- Soil and structural engineering
- Union contracts
- Water disputes

OUR **REFERENCES**

> I strongly recommend that Cory Gangle be considered as your mediator. Over the last few years, I served as a mediator for Cory in a series of complex litigated matters. I found Cory to always be extremely prepared. By working with Cory, I found that he has many of the attributes and skills necessary to be an effective mediator. These include his knowledge, experience, intelligence, patience, neutrality, optimism, respectfulness and professionalism. I know Cory will do great work".



– Michael A. Viscomi, Esq.

> Over the past several years, I have had the opportunity to mediate many cases in which Cory Gangle was involved. Cory has evolved into an outstanding litigant in both his approach to resolution and demeanor. I believe Cory would be a very good mediator, studious, and balancing arguments to effect an acceptable resolution. I recommend Cory as a choice for your mediation".

– Dennis E. Lind, Esq.

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SOMETIMES IT'S OK TO SAY IT'S NOT OK

By Kent Kasting

(Reflections of a senior divorce lawyer)

The client came in and said the case would be easy. I said OK. It wasn't.

The client came in and said he had done nothing wrong. I said OK. He had done a lot wrong.

The client came in and said her father would pay my fee. I said OK. He didn't.

The client came in and said the child wasn't his. I said OK. It was.

The client came in and said his tax returns were squeaky clean. I said OK. They weren't.

The client came in and said his spouse had been unfaithful. I said OK. She hadn't. The client came in and said the children hated their father. I said OK. They didn't.

The client came in and said, "I don't care what it costs, it's the principal of the thing." I said OK. It wasn't.

The client came in and said he would always tell the truth and be respectful to the court. I said OK. He didn't and he wasn't.

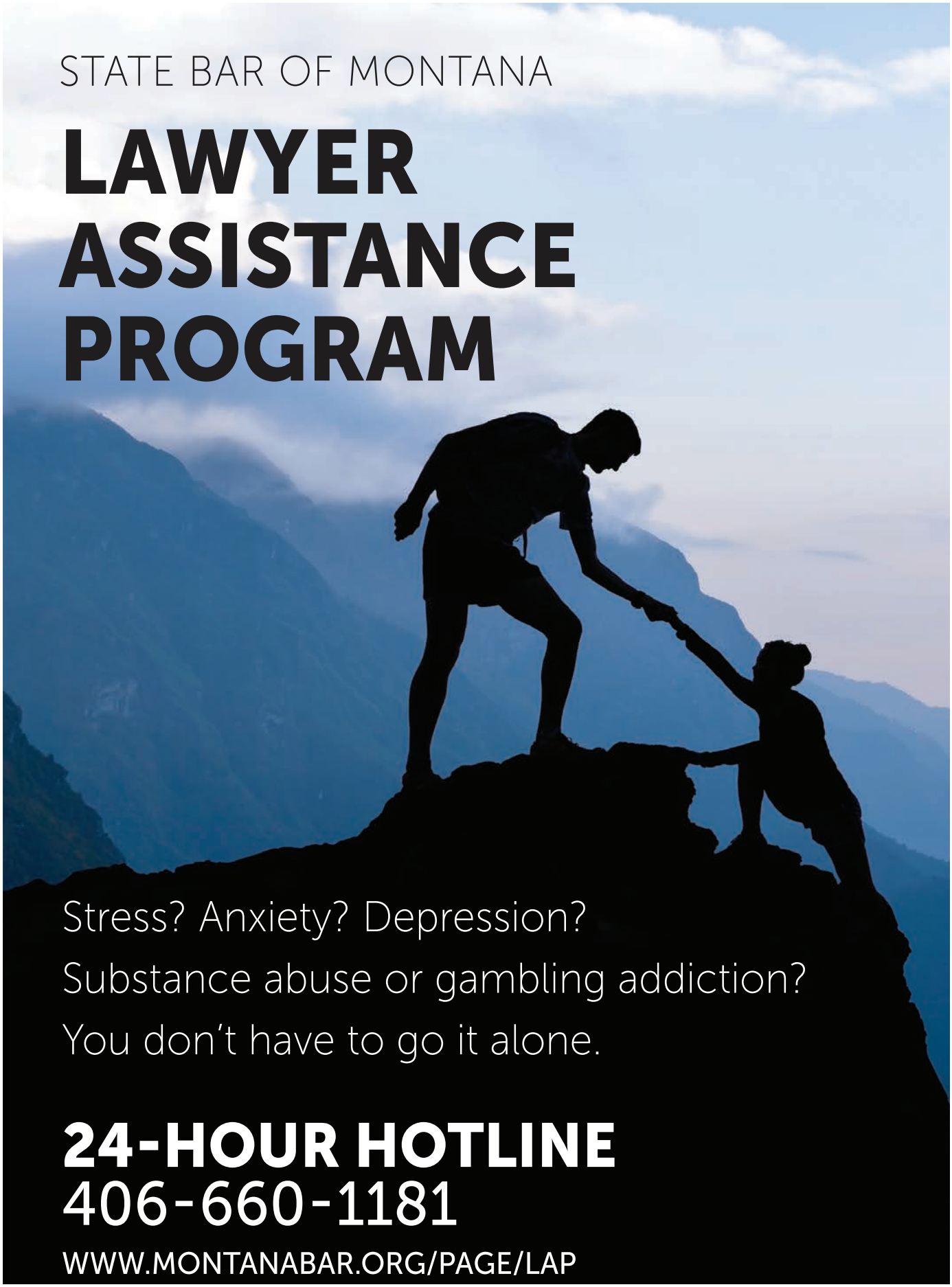
The word "OK" is so easy to say:

It pacifies;

It makes people feel good;

It's an easy out - at least when you first say it.

This poem was submitted by Kent Kasting, now retired, who was a partner in the Bozeman law firm of Kasting, Kauffman & Mersen, P.C. He is a Fellow in the American Academy of Matrimonial Lawyers, Past President of its Mountain States Chapter; a Past President of the Utah State Bar; and an avid skier, whitewater rafter, fly fisher, and goose, duck, and elk hunter.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For full schedule and additional information, visit www.mdtl.net.

Seminar Schedule

8:00 - 10:00 am	**Empowering Your Clients to Speak Their Whole Truth at Deposition and Trial** *(1 ethics credit applied for)* Mark A Basurto, Esq., *Cogent Edge - Strategic Witness Preparation, Bend, OR*
10:15 - 12:15 am	**In the *Defense* of Cannabis: Cannabis Legalization and the Fast-Growing Trend of National and State-Wide Cannabis-Related Litigation** Sarah N. Turner ,Esq., *Gordon & Rees Scully Mansukhani, Seattle, WA*
12:25 -1:30 pm	**MDTL Annual Membership Meeting & Elections** *Lunch on your own if not attending*
1:30 - 2:30 pm	**Legislative Panel** Sean Slanger, Esq., *Jackson, Murdo & Grant PC, Helena, MT* *Bruce Spencer, Esq., Bruce Spencer, PLLC, Helena, MT* *Senator Steve Fitzpatrick, Montana Senate Majority Leader, Browning Kaleczyc Berry & Hoven, Great Falls, MT*
2:30 - 3:30 pm	**Litigation from the Other Side** A. Clifford Edwards, Esq., *Edwards & Culver, Billings, MT*
3:45—4:45 pm	**Litigation Skills (Avoiding Nuclear Verdicts, Build Defense Case on High Risk, etc.)** Marshal Mickelson, Esq., *Corette Black Carlson & Mickelson PC, Butte, MT* Paul R, Haffeman, Esq., *Davis, Hatley, Haffeman & Tighe, PC, Great Falls, MT*

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Giving and taking criticism with grace: How music school rigors taught me to adapt on the fly

MERI ALTHAUSER

Meri Althauser is an attorney of over 10 years practicing family law and mediation in Missoula. Her practice focuses on collaboration and solution-finding for her clients and their families. She also offers consulting services in workplace wellness, with a certification as a Workplace Wellness Specialist through the National Wellness Institute and as a Resilience and Thriving Facilitator through Organizational Wellness and Learning Systems.

Many of you probably don't know this tidbit about my backstory but I was previously destined to be a concert violinist from the age of 4 years old through post-college.

I took lessons at the university starting at 9, played in the University Orchestra and Missoula Symphony starting in late middle school, and attended Lawrence University, a music conservatory in Wisconsin, for college. Surprisingly, I dropped to a music minor after feeling like the music community was just too adversarial and competitive for me. That ironic choice will have to be saved for another article, but I digress.

In college, we were required to practice for 40 hours per week in addition to all of our regular classes and homework. We were given challenging pieces of music to learn for playing tests and recitals, and we played in the Lawrence Symphony. The endeavor was for technical perfection, musicality, and moving emotional expression. A lot of time and energy was poured into perfecting each piece of music. Tears were shed. Frustrations regularly mounted at 2 a.m. in the basement of that music conservatory.

Part of music education included what's called "masterclass" where each of the students in the studio played the pieces we were working on for the group in a classroom setting. While the student performed, the instructor often sat in the front row or stood over the student to yell corrections during the performance and the other students in the class were also free to holler their input in real time: "Faster!" "With more emotion!" "F-sharp!!" "Sadder!" "Shhhhh" "We can't heeaarrr youuuuu!" "Wilder!" "More Cat-like!" and so on.

We were expected to hear, process, and incorporate these friendly suggestions in the millisecond between hearing the cue and playing the next note without getting frustrated, stopping, or disagreeing. When done, then the full class repeats their feedback round-robin style for next time. Fun, right? Masterclass!

But this torturous-sounding method

was probably one of the great gifts of a music education. The ability to take a pelting of criticism, on a task that is both technically difficult and emotionally challenging, and meet the wave of nitpicking with determination and unflappable adaptation. Absorb, recalibrate, keep trying, and improve. There simply wasn't time nor mental energy to let each peck affect me on any level. Could you imagine if I took personal offense to the glib, nay ... the AUDACITY … displayed by the student, who had likely never played my piece, yelling "too slow!" in front of everyone when I had practiced probably 100 hours on that piece? I'd be a mess!

In law practice, though, I quickly learned that my criticism tolerance-o-meter was clearly off. My delivering of corrections on other people's work had to quickly be dialed down and my high tolerance for people being rude and out of line with me had to be recalibrated. Luckily, I was aware of what I had gotten used to through music school and was able to cultivate the right attitude when it comes to criticism. But I still consider being unflappable in the face of criticism a superpower. Here are a few tips to cultivate that right balance:

Accepting Criticism

Exercise empathy. You are doing your best on a project and so is whoever is correcting your work. They likely honestly and earnestly believe that improvements are necessary and they are doing their best too, so don't take it personally.

Don't lose the forest for the trees. There will be a million times where a style guide doesn't answer whether a comma belongs or does not belong, where one of many words will do, and where it really makes no difference whether a certain turn of phrase is at the beginning or end of a paragraph. Brush off those tiny points of contention and limit those things that you feel you need to stand up for to those things that really matter.

Find the grain of truth. Critical messages, even those that you don't agree with, likely always have some grain of truth. Maybe you didn't state your true message clearly enough, maybe you made an assumption about something you shouldn't have, or made a mistake that was minor from your perspective but major from someone else's.

Always remember that criticism of your work is not criticism of you.

Delivering Criticism

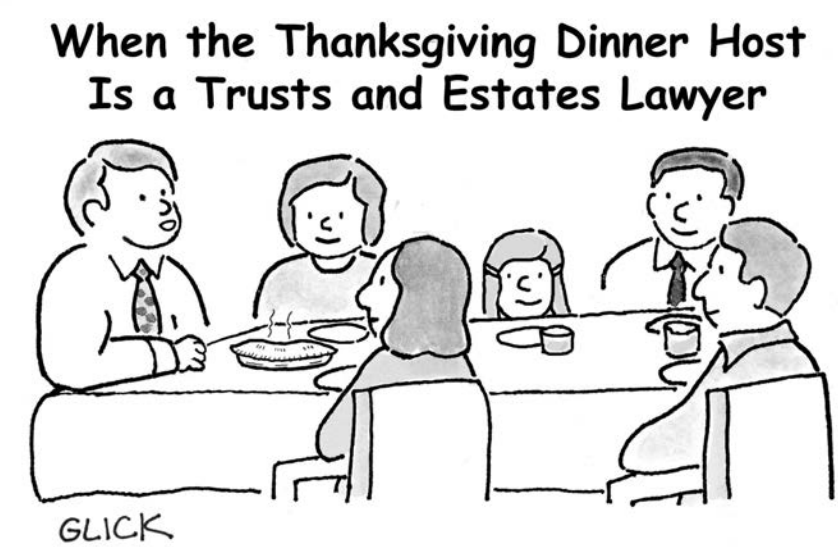
It is actually not appropriate nor nice to pelt anyone with criticism! Maybe in music or in sports, but nowhere else. Are you a habitual offender? Do you meander into a paralegal or associate's office and ramble off a list of corrections without a thank you or positive note mixed in anywhere? If that sounds like you, your criticism-meter might be off! Open and close with strengths and appreciation from now on.

Deliver criticism in terms of opportunities instead of failures. "I think we have an opportunity to model good problem solving by taking this parenting class" instead of "You are damaging your child's mental health when you fight in front of him." The more you strive to inspire instead of correct, you're working in partnership instead of in a hierarchy.

Also don't lose the forest for the trees. Are you harping on details that really don't matter for the sake of your own control? If so, maybe drop some things for the good of your working relationships and focus on the big picture you share with your teammates.

"Critical messages, even those that you don't agree with, likely always have some grain of truth. Maybe you didn't state your true message clearly enough, maybe you made an assumption about something you shouldn't have, or made a mistake that was minor from your perspective but major from someone else's."

JEST IS FOR ALL **ARNIE GLICK**



"I am now ready to serve the apple pie to each of you, in equal shares, per capita and not per stirpes."

ANNUAL MEETING PROVIDES CUTTING-EDGE PRESENTATIONS

The State Bar of Montana's 2023 Annual Meeting in Billings had one of the highest attendance totals in the event's history, and attendees enjoyed presentations on cutting-edge issues facing today's attorneys and society as a whole.

CLE presentation highlights included programs on the impact of artificial intelligence on the legal profession and the ethical implications of using the emerging, disruptive technology; the criminal cases that arose over the disputed 2020 U.S. presidential election; the contentious *Held v. Montana* "clean and healthful environment" suit; and a live Montana Supreme Court oral argument in a Goguen v. NYP Holdings.

The bar also honored its Annual Award winners during an inspiring Awards Banquet, with E. Edwin Eck receiving the William J. Jameson Award; Dirk Williams winning the George L. Bousliman Professionalism Award; Morgan Dake winning the Neil Haight Pro Bono Award; and the Honorable Mike Moses winning the Karla M. Gray Equal Justice Award.

Also at the Annual Meeting, the Art for Justice silent auction raised $4,370 for the Montana Justice Foundation.

See pictures showing the highlights from this year's Annual Meeting festivities the following pages, continuing through page 19.

Below photo: State Bar of Montana Executive Director and General Counsel John Mudd, left, moderates a panel discussing the criminal cases related to the 2020 elections with Anthony Gallagher, former Executive Director of the Federal Defenders of Montana, and Leif Johnson, former U.S. Attorney for the District of Montana.

In the above photo, Adrian Miller, left, of Sullivan Miller Law moderates a panel on Alternative Dispute Resolution consisting of University of Montana School of Law Dean Emeritus John O. "Jack" Mudd, Magistrate Judge Carolyn Ostby of the U.S. District Court for the District of Montana, and Dennis Lind of Datsopoulos, MacDonald & Lind. (Note: Judge Ostby was misidentified in the print edition of the magazine.)

At right, E. Edwin Eck, Dean Emeritus of the University of Montana Blewett School of Law, speaks after winning the 2023 William J. Jameson Award at the 2023 Annual Meeting in Billings.

Below: The Honorable Mike Salvagni (retired) of the 18th Judicial District speaks during the honoring of this year's 50-year members of the bar.

SAVE THE DATES: 2024 ANNUAL MEETING SEPT. 18-21 IN MISSOULA

The Honorable Mike Moses (retired) of the 13th Judicial District, addresses the crowd after receiving the 2023 Karla M. Gray Equal Justice Award.

Morgan Dake, Senior Pro Bono Counsel at Crowley Fleck in Billings, speaks after receiving the 2023 Neil Haight Pro Bono Award.

Decisions impacting Indian Country in the 2023 US Supreme Court term

By Sarah Crawford, Reneau J. Longoria and Heather Whiteman Runs Him

During each U.S. Supreme Court term, there are always the "must watch" cases. One cannot easily predict the outcome of these cases - certain opinions are in line with precedent, honoring the doctrine of stare decisis, while others carve new paths and shift landscapes. The 2022-2023 term included three cases that both positively and negatively impact tribes across Indian Country.

The U.S. Supreme Court decision in *Haaland v. Brackeen* surprised many by entirely upholding the constitutionality of the Indian Child Welfare Act and the sovereignty of tribes. The court in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* diminished tribal sovereign immunity as it pertains to the U.S. Bankruptcy Code. In *Arizona v. Navajo Nation*, the Supreme Court held that the Navajo Nation could not protect its treaty-based water rights through a breach of trust claim against the federal government. This article will go into more detail on the twists and turns of these three Supreme Court decisions and their impacts on Indian Country.

U.S. Supreme Court Upholds the Constitutionality of the Indian Child Welfare Act

"Kill the Indian…save the man." U.S. Supreme Court Justice Gorsuch used this phrase in his concurring opinion in *Haaland vs. Brackeen* to highlight the federal government's historical views on its duty to forcibly remove Native children from their families stemming from the use of Indian boarding schools to adoption.[1] This particular phrase was the mission statement of the Carlisle Indian Industrial School, an Indian boarding school. Starting in the late 1800's, the federal government utilized Indian boarding schools to assimilate Native children through the use of physical and emotional abuse, thus stripping away these children's cultural practices, language, and identity.

Justice Gorsuch further highlighted the atrocities of the mid-1900's when the use of adoption became a tool for federal and state governments to remove Indian children from their homes and communities to be placed with non-Indian families.[2] The federal government would actively work with organizations to promote the removal of Indian children from their families and tribal communities. State governments advertised the adoption of Indian children. During state court proceedings, Native families were not provided legal counsel and due process. Much like the Indian boarding school era, these children would not have access to their own tribal cultural traditions after they were taken from their family homes.

These two policies were the foundational reasons that Congress passed the Indian Child Welfare Act in 1978 ("ICWA"). In its reasoning for enacting ICWA, Congress highlighted how an "alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."[3] Congress further stated that the purpose of ICWA is "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families…"[4]

ICWA squarely focuses on the need to protect tribal culture and heritage, and recognizes that the best practice is to ensure tribes retain self-governance and exert tribal sovereignty over the care and custody of Indian children.[5] ICWA uplifts tribal sovereignty by allowing tribes to intervene in custody cases, assert tribal jurisdiction over these cases, and designate preferences for the placement of Indian children. After dealing with assimilation attempts for well over a century, tribes across Indian Country utilize ICWA to foster and safeguard their tribal cultural ways and practices for the next generations to come.

ICWA has become known as the "gold standard" of child protection systems. ICWA's requirements in child custody proceedings – including termination of parental rights – for a showing of active efforts made to prevent the breakup of an Indian family earned it this high designation. There are many reasons that a child may be removed from the custody of their parent; however, parents have the ability to overcome many of the reasons that lead to these custody issues. ICWA focuses on supporting parents by connecting them with tribal resources, parenting classes, rehabilitation services, therapy, and job training. The goal is to reunite the child with the parent if it is in the best interest of the child.

Despite being a model of custody proceedings, ICWA has been continually challenged. These attacks are aimed at removing protections for Indian children and tribes. The most recent attack came in the U.S. Supreme Court case of *Haaland v. Brackeen*. After years of uncertainty, the U.S. Supreme Court, in a 7-2 ruling, rejected the constitutional challenges against ICWA.

In *Haaland v. Brackeen*, the Petitioners, including a birth mother, foster and adoptive parents, and the State of Texas, filed a suit against the United States. Several tribes also intervened in support of the federal parties in the case. The Petitioners' arguments fall under three categories: that Congress lacks the authority to enact ICWA, anticommandeering, and equal protection. The Supreme Court's ruling, written by Justice Barrett, rejected each challenge brought by the Petitioners.

Regarding the first set of arguments, the Supreme Court held that Congress did not exceed its plenary power in passing ICWA and ICWA does not tread on states'

1 *Haaland v. Brackeen*, 599 U.S. 255, 1642 (2023) (Brackeen).

2 *Id.* at 1645.

3 25 U.S.C. §1901(4).

4 25 U.S.C. §1902.

5 *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

authority over family law.[6] Justice Barrett proceeded to list eight well-cited U.S. Supreme Court cases, dating back to 1899, that have held that Congress possesses exclusive, plenary power over Indian tribes and Indian affairs.[7] Further, the Supreme Court stated that the U.S. Constitution's Indian Commerce Clause and the Treaty Clause authorizes Congress to deal with matters relating to Indian affairs.

Secondly, the Supreme Court held that ICWA does not violate the Tenth Amendment's anticommandeering principle.[8] The Petitioners argued that ICWA forces states to follow its federal requirements of active efforts, notice requirements, heightened burden of proof and expert testimony, placement preference, and recordkeeping. Justice Barrett highlighted several cases that supported the Court's conclusion that because ICWA applies evenhandedly to state and private actors it therefore does not implicate the Tenth Amendment.

Finally, the Supreme Court rejected the Petitioners' equal protection challenge to ICWA's placement preference.[9] The Supreme Court found that both the individual petitioners and the State of Texas lacked standing to raise the claims and rejected that challenge.

The U.S. Supreme Court decision in *Haaland v. Brackeen* has ultimately upheld and protected tribal sovereignty and thus the protection of Native children. The decision produced a ripple of relief across Indian Country. This will not be the last attack on ICWA, however, the *Brackeen* decision has unequivocally cemented the legitimacy and importance of the Act and its purpose.

I will simply end with Justice Gorsuch's powerful ending to his concurring opinion: "[i]n adopting the Indian Child Welfare Act, Congress exercised that lawful authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history. All of that is in keeping with the Constitution's original design."[10]

— Sarah Crawford

Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382 (2023)

At first glance, the June 15, 2023, decision in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* ("*Lac*")[1], affirming the First Circuit's decision, and resolving a split in the circuits[2], appears to be a straightforward statement that the Bankruptcy Code applies to tribal creditors. Peeling back the history of the case, as well as the path carved through the heart of the sacred principles of Sovereign Immunity, reveals the significance of the decision.

In 2019, Coughlin filed a motion in the United States Bankruptcy Court of Massachusetts, alleging "catastrophic" damages from alleged emails and calls attempting to collect a Payday Loan in the amount of $1,600.00.[3] In Coughlin's sur-reply in Response to the Motion to Dismiss for Lack of Jurisdiction he argues, for the first time, "that the long line of Supreme Court cases finding that Indian tribes are entitled to sovereign immunity subject only to precise congressional limitations should be overruled."[4] That argument would become the tail that wagged the dog of this case as it evolved even though, as Judge Bailey pointed out, "Coughlin has not stated (overruling precedent that Indian tribes are entitled to sovereign immunity) [as] a basis for that relief."[5]

In 2020, the First Circuit aligned with the Ninth Circuit finding that the language in the Bankruptcy Code was sufficient to find that Congress had "clearly" intended to abrogate tribal sovereign immunity, notwithstanding the detailed, lengthy, historical analysis of precedent by Chief Judge Barron in the dissent.[6] Justice Barron analyzed not only the precedent, but the language throughout legislation clearly identifying when provisions were not subject to the Sovereign Immunity of tribes by clearly stating that fact. *Id.* at 612-626. The fiery debate between the Majority and the Dissent, notes 1-13 vs. 14-19, is uncharacteristic of the First Circuit and clearly illustrates the division of thought in the Circuit, and the Country, over these issues.

In June of 2023, the United States Supreme Court resolved the division in the First Circuit as well as the Circuits across the Nation when it affirmed the First Circuit decision opining, "our analysis of the question whether the Code abrogates the sovereign immunity of federally recognized tribes is remarkably straightforward. The Code unequivocally abrogates the sovereign immunity of all governments, categorically. Tribes are indisputably governments. Therefore, § 106(a) unmistakably abrogates their sovereign immunity too."[7]

The diverse opinions on the issues of tribal sovereignty and construction are also reflected in the Supreme Court's opinion in a dialogue that is woven through the notes and the text as arguments are discussed and criticized.[8] What is even more significant, however, is how this opinion has been used across the circuits over the past three months to further erode the historical principles of sovereign immunity as well as support for a myriad of other arguments.[9]

The impact of the decision in *Lac* may extend beyond Bankruptcy Law and may be used to support challenges to tribal sovereignty and immunity across the board. Careful business planning and compliance will be required as we move forward. The division of the Court here, as in *Haaland v. Bracken*, 599 U.S. 255 (2023), reflects that the conversation is far from over.

— Reneau J. Longoria

Arizona et al. v. Navajo Nation, 599 U.S. 555 (2023)

On June 20, 2023, the Supreme Court issued its decision in *Arizona v. Navajo Nation*, ruling that the Navajo Nation could not assert a claim for breach of trust against the United States for its failure to assess or plan for the fulfillment of the Navajo Reservation's water needs and unquantified rights to water in the mainstream of the lower Colorado River, and to perform certain management roles in relation to the Colorado River in a manner consistent with meeting the unquantified water rights of the Navajo Nation.[11] On Nov. 4, 2022, the court granted *certiorari* to two petitions – one by the United States[12], and another by state and non-Indian water user intervenor-appellants[13] – and consolidated its review of the Ninth Circuit Court of Appeals decision in *Navajo Nation v. Department of Interior*.[14] The Court's ruling overturned the Ninth Circuit decision, but left room for the Navajo to potentially pursue relief through other approaches. Writing for the majority, Justice Brett Kavanaugh

6 *Brackeen* at 1627.
7 *Id.*
8 *Id.* at 1633.
9 *Id.* at 1638.
10 *Brackeen* at 1661.
11 599 U.S. 555(2023.)
12 No. 21-1484.
13 No. 22-51.
14 26 F.4th 794 (2022.)

was joined by the Chief Justice and Justices Alito, Thomas, and Coney-Barrett. Justice Gorsuch wrote a lengthy and detailed dissent, joined by Justices Sotomayor, Kagan, and Jackson.

The history of the case is lengthy, extending back to 2003 when the Navajo Nation brought suit against the Department of Interior and federal officials in federal district court in Arizona, seeking declaratory and injunctive relief. The claims initially asserted by the Nation were based on the National Environmental Policy Act and the Administrative Procedure Act and stemmed from management and allocation decisions in relation to the lower Colorado River. After a lengthy stay for settlement negotiations, which did not ultimately resolve the issues in the case, the trial court granted motions to dismiss the Nation's claims in 2014, largely on standing and sovereign immunity grounds[15].

The Ninth Circuit Court of Appeals affirmed in part, reversed in part, and remanded the case back to the lower court.[16] The Nation then moved to file its third amended complaint, adding additional allegations to support its breach of trust claim, as well as new claims based on its 1868 Treaty and the trust responsibility of the United States to the Navajo Nation. The District Court denied the Nation's motion to amend, citing to the United States Supreme Court's retained exclusive jurisdiction over the allocation of water in the lower Colorado River under *Arizona v. California*.[17] The District Court determined that allowing the Nation's amended complaint to go forward "would require this Court to determine the Nation's rights to water from the [Colorado] River."[18] The court found that such a determination was "off limits to any lower court."[19] The Nation renewed its motion to file a third amended complaint, which was also denied by the federal District Court, again citing to the "Supreme Court's reservation of jurisdiction" over allocations of water rights to the lower Colorado River, as well as to limitations on the United States' liability for violations of its trust responsibility to Indian tribes under existing precedent.[20]

In its review of the lower court's decisions on the lack of jurisdiction to review the Nation's claims, the Ninth Circuit Court of Appeals reversed and remanded the case back to the District Court with instructions.[21] The panel decision, authored by Judge Gould, held that jurisdiction over the Nation's asserted breach of trust claim was not barred by the Supreme Court's ongoing authority over allocation questions in *Arizona v. California*; that the claim was not barred by res judicata; and that the Nation's proposed third amended complaint sufficiently stated a breach of trust claim.[22] The Ninth Circuit's decision noted that the Nation did not seek an actual quantification of rights to the Colorado River, and based on that distinction, ruled that the lower court could exercise its jurisdiction to determine the Nation's claims. The Ninth Circuit further ruled that the proposed amendment was not futile, and explored in detail the history of the Navajo Nation's relationship with the United States through its treaties and with respect to water resources. The opinion also noted the importance of water for "healthy human societies" and the correlation between Navajo Nation's water insecurity and the "exacerbation of the risks from COVID-19."[23]

The State Intervenors' and the United States' petition for rehearing *en banc* before the full Ninth Circuit Court of Appeals was denied by the panel.[24] Both the federal defendants and the state intervenors petitioned for *certiorari*. The United States Supreme Court granted *certiorari* on November 4, 2022.[25]

The Court granted *certiorari* as to two questions: (1) whether allowing the Nation to proceed with its claims would violate the Court's retained exclusive jurisdiction in *Arizona v. California*; and (2) whether the Nation could state a cognizable breach of trust claim against the federal trustee based on unquantified implied water rights, consistent with prior precedent on tribal claims for breach of trust.

Briefing was completed on March 3, 2023. Nine briefs by *amici curiae* were submitted in support of the Nation; two *amici curiae* filed briefs in support of the federal and state petitioners.[26] Oral argument was heard on March 20, 2023. Arguments were presented by attorneys for the United States, the State of Arizona, and the Navajo Nation. The Justices' questions ranged from the Nation's treaties with the United States and the extent of the federal government's obligations under those treaties to the *Winters* Doctrine recognizing implied water rights on establishment of a Reservation to drought and the water shortages plaguing the American Southwest, and the Law of the River's reach with respect to questions pertaining to the waters of the Colorado River.[27]

The Court issued its decision on June 22, 2023, ruling largely in favor of the federal government, holding that the trust doctrine does not provide a cause of action – even for non-monetary relief – without specific language in a statute, agreement, or similar pronouncement establishing an enforceable duty on the United States.[28] The Court declined to rule on the question of whether its reservation of exclusive jurisdiction over allocations of Lower Colorado River water in *Arizona v. California* barred the Nation's complaint from being heard by the lower court.[29] Justice Thomas wrote a concurring opinion expressing his ongoing discomfort with the federal government's trust relationship with Indian tribes, characterizing it as "an additional and troubling aspect of this suit."[30] Justice Gorsuch wrote a lengthy dissent, joined by Justices Sotomayor, Kagan, and Jackson, offering a more detailed exploration of the history in question – important context regarding the 1868 Treaty, and the "many steps the Navajo took to avoid this litigation."[31]

While the Court declined to hold that there was an enforceable trust duty in relation to an implied right stemming from the Nation's treaty with the United

15 34 F. Supp. 3d 1019 (D. Arizona 2014.)
16 876 F.3d 144 (9th Cir. 2017)
17 2018 WL 6506947 (D. Arizona 2018.)
18 2018 WL 6506957, *Id.* at 1 (D. Arizona 2018.)
19 *Id.* at 2.
20 2019 WL 3997370 (D. Arizona 2019).
21 26 F.4th 794 (9th Cir. 2022).
22 *Id.* at 800-803.
23 *Id.* at 802.
24 *Id.* at 799.
25 143 S. Ct. 398 (2022) (granting and consolidating State Intervenors' and federal defendants' Petitions for certiorari.)
26 *See generally* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-1484.html (last visited on October 1, 2023.)
27 For a detailed account of the oral argument, see Matthew Fletcher, Justices appear divided over Navajo Nation's water rights, SCOTUSblog (Mar. 21, 2023, 2:13 PM), https://www.scotusblog.com/2023/03/supreme-court-justices-appear-divided-over-navajo-nations-water-rights/
28 599 U.S. 555 (2023).
29 599 U.S. 555 at n.4 ("[W]e need not reach the question of whether particular remedies would conflict with this Court's 2006 decree.").
30 *Id.* at 570-574.
31 *Id.* at 574-599.

States,[32] it also left little doubt about the ongoing viability of the Nation's rights to water sufficient to meet the purposes of its reservation.[33] Indeed, the Court's favorable discussion of tribal water rights as recognized by the *Winters* Court over a century ago indicates that the Navajo Nation's ability to secure and protect its rights to water is not foreclosed, but rather that a different approach or legal theory will be needed to achieve that goal. The limitations on the federal trust doctrine are certainly a setback, and may have broader implications on water rights litigation and settlement negotiations beyond the Navajo Nation, but the water rights reserved by tribal nations through treaties and agreements with the United States remain intact.

— Heather Whiteman Runs Him

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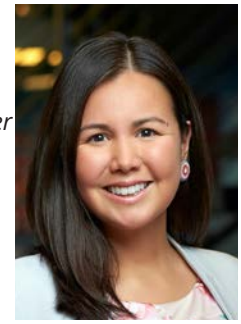

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32 *Id.* at 565.

33 *Id.* at 569 ("The 188 treaty reserved necessary water to accomplish the purpose of the Navajo Reservation.").

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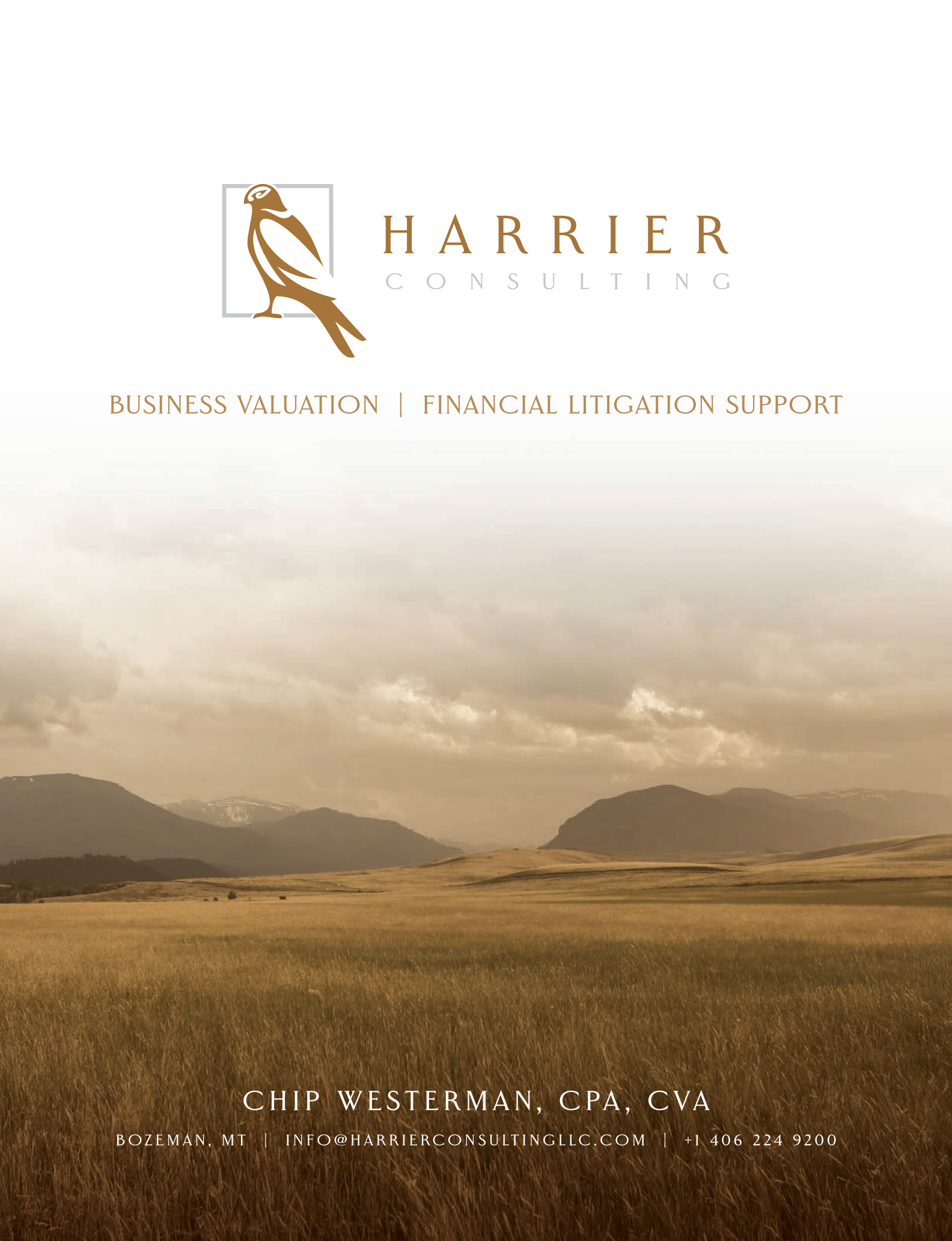

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Do lawyers need to be concerned about falling victim to deepfakes?

The short answer is yes, everyone does; but the reason lawyers need to be concerned requires a longer explanation.

What is a deepfake?

The word "deepfake" comes from combining the words "deep learning" with the word "fake." A deepfake is digital content that can be created using powerful techniques from machine learning and artificial intelligence to manipulate existing or generate new visual and audio content that can easily deceive others who view or hear it. Deepfakes aren't by definition all bad. For example deepfake technology is used by the film industry. It's only when a bad actor creates a deepfake for use in furtherance of a cyberattack, fraud, extortion attempt, or other scam that they become a serious concern.

Isn't making a deepfake crazy hard?

Not anymore. Jai Vijayan, Contributing Writer at Dark Reading recently stated: "It's time to dispel notions of deepfakes as an emergent threat. All the pieces for widespread attacks are in place and readily available to cybercriminals, even unsophisticated ones."

Researchers with the security company Trend Micro expressed similar concerns in an online post this past September with this opening statement: "The growing appearance of deepfake attacks is significantly reshaping the threat landscape. These fakes bring attacks such as business email compromise (BEC) and identity verification bypassing to new levels." They went on to say that more serious attacks will be forthcoming because of the following issues:

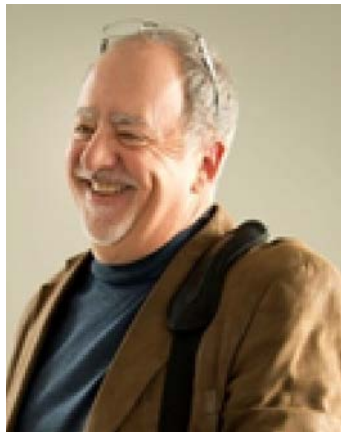
- "There is enough content exposed on social media to create deepfake models for millions of people. People in every country, city, village, or particular social group have their social media exposed to the world.
- "All the technological pillars are in place. Attack implementation does not require significant investment and attacks can be launched not just by national states and corporations but also by individuals and small criminal groups.
- "Actors can already impersonate and steal the identities of politicians, C-level executives, and celebrities. This could significantly increase the success rate of certain attacks such as financial schemes, short-lived disinformation campaigns, public opinion manipulation, and extortion.
- "The identities of ordinary people are available to be stolen or recreated from publicly exposed media. Cybercriminals can steal from the impersonated victims or use their identities for malicious activities.
- "The modification of deepfake models can lead to a mass appearance of identities of people who never existed. These identities can be used in different fraud schemes. Indicators of such appearances have already been spotted in the wild."

Why must lawyers be concerned?

I would hope it would be self-evident. Due to the amount of other people's money law firms are responsible for coupled with the amount and variety of sensitive and confidential information lawyers maintain, law firms have been and will continue to be an attractive target for cybercriminals and scammers. The only thing that is changing is the sophistication of the attacks.

As a lawyer, you need to know that a tool that enables someone to create a deepfake of you exists. That deepfake could be used to hack your Amazon Alexa; manipulate a colleague, family member, friend, or employee into moving money; used to hijack your bank

MORE RISK, PAGE 28



Mark Bassingthwaighte

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Requests for damages are anchoring strategies for plaintiffs and defendants

By Thomas O'Toole, Ph.D
&
Kevin Boully, Ph.D

A lot has been written over the last few years about the rise of "nuclear verdicts." Reasons range from the rise of the millennial majority in jury boxes to inflation and distrust in society's institutions. There are many explanations, all of which have contributed to the inflationary trend in noneconomic awards, but one simple explanation is anchoring. Anchoring is a strategy typically deployed by plaintiffs' attorneys where they ask for numbers well beyond what they believe the jury will award with the expectation that the net effect will be an amount larger than what the jury would have otherwise awarded absent the anchor. For example, if attorneys know the jurors are most likely to "split the baby," a $30M damages request will produce a larger award than a $20M request.

The empirical research on jury damages awards is replete with findings on the effectiveness of anchors. For example, a 2017 study out of Washington University examined two scenarios for a medical malpractice case, one in which no amount was suggested by the plaintiff and the other where the plaintiff specifically asked for $5M. Without the influence of an anchor demand, the mock jurors in this study awarded an average of $473K. With the anchor request, the average shot up to $1.9M. That is a significant effect with the anchor quadrupling the award.

While anchors are nothing new, we have seen an inflationary trend in the anchor amounts suggested by plaintiff attorneys across the country over the last few years. Emboldened by headlines about monstrous jury awards and this empirical research, plaintiffs' attorneys are understandably asking for larger numbers with some requests entering the realm of the obscene. A decade ago, trials where the plaintiffs asked for numbers in the hundreds of millions or billions were sparse. In the past few years, they seem to be common, certainly from what we have seen in our practice.

We regularly witness the impact of these "absurd" damages requests in our jury research. In a recent mock trial in an admitted liability case, the attorney asked for $175M for a plaintiff who suffered several broken bones and a mild traumatic brain injury. 83% of the mock jurors indicated in their questionnaires they thought the plaintiff was asking for too much money. During deliberations, there were numerous comments about the absurdity of how much the plaintiff was requesting, yet the three mock juries all awarded damages in excess of $40M, which was well above what the defendant expected. The mock jurors' criticism of the plaintiff's extraordinary request had little impact on their awards. In this respect, these seemingly outrageous damage requests are a lot like political ads: everyone hates them, yet they work.

So, what are the lessons we have learned from our jury research in recent years. The first lesson that might stand out is that plaintiff attorneys should have no fear asking for "outrageous" numbers in closing argument, but that is not necessarily true. It depends on the strength of the liability arguments in the case. In cases where liability is admitted (or should be admitted because of the strength of the evidence), our research shows that there are virtually no limits on what the plaintiff attorney can ask for. As long as they have the admission or the evidence to leave jurors with no question about the defendant's liability, there seems to be no downside to asking for outrageous numbers.

However, where the defense has reasonable arguments on liability or evidence of contributory negligence by the plaintiff, we have found that outrageous damages requests can backfire. The reason is that in these cases, the jurors have a reasonable path they can take in deliberations that is critical of the plaintiff. Visceral reactions to absurd damage requests can trigger jurors and motivate them to focus more on criticizing the damages strategy than on other more pro-plaintiff issues in the case. In admitted liability cases, there seems to be no consequence for jurors believing the plaintiff is overreaching on damages, but in disputed liability cases where the defense has reasonable evidence, beliefs about overreaching can generate skepticism that hurts the plaintiff on liability and apportionment. Consequently, plaintiff attorneys should carefully evaluate the strength of their liability case when determining how high they want to set the anchor for damages in closing argument.

Where does this leave defendants? The first and most obvious answer is counter-anchoring, which any experienced defense attorney already knows and understands. The research on efforts by defendants to counter-anchor is equally strong. In 2020, Sound Jury Consulting conducted a large national study involving thousands of mock jurors on damages, nuclear verdicts, and the effectiveness of defense strategies in managing these. Using a motor vehicle accident case, it found that the average damage award decreased by $10M

> Plaintiff attorneys should carefully evaluate the strength of their liability case when determining how high they want to set the anchor for damages in closing argument.

when the defense provided an alternative damage figure of $2M compared to when it offered no alternative damage figure at all. Other research has demonstrated similar findings showing that alternative damage anchors are effective.

This might lead defense attorneys to conclude they should always offer an alternative damage number, but there are downsides to doing so. First and most important is that many jurors perceive alternative damage awards suggested by the defense as admissions of fault. These jurors are quick to assume the alternative damage suggestion is "what the defense is willing to pay," which leads them to conclude the defense believes it has liability in the case. Unfortunately, the standard speech about how it is the job of the defense attorney to address all issues in the case does not solve this problem. Some jurors are adamant that a defendant that does not believe it is liable would never suggest an alternative amount to give to the plaintiff at trial.

We have not been able to find any research studies on this issue, but one strategy defense attorneys might consider is raising this issue in voir dire and asking venire members if there is anyone who would be quick to assume the defense is admitting liability if it suggests and alternative damage award. This provides an opportunity for good discussion (and education) on this issue early in trial while also potentially identifying high-risk jurors for the defense so it can use peremptory strikes on those jurors who would see it as an admission of liability.

Another downside to alternative damage anchors by defendants has to do with their arbitrary nature. Too often, the alternative numbers thrown out by the defense are seen as nothing more as an attempt to "lowball the plaintiff" or "pay as little as possible," which can frustrate jurors. Consequently, while the alternative anchors have the effect of lowering the overall award, often the final awards are still well above the range the defense had in mind. Defendants are often understandably unsatisfied with verdicts that award the midpoint of the plaintiff and defense anchors. After all, the plaintiff can always ask for more, but the defense has a clear floor. So how can defendants magnify the impact of their alternative damage anchor? The key is in the presentation.

Defense attorneys should offer jurors alternative damage frameworks, not just alternative damage numbers. The difference is that the former gives jurors a formulaic way of thinking about the process of awarding damages, and jurors love formulas. If defendants can influence the process jurors use to determine the damages award, they can exert much greater influence over the final award. Let's look at an example with an admitted liability, personal injury case where outrageous anchors by a plaintiff are very effective. In these cases, defense attorneys should reframe the central question on damages, telling jurors the key question is "how can money help the plaintiff?" This central question focuses jurors on the practical value of money, which moves them away from damages decisions based purely on gut feelings. Gut feelings almost always favor plaintiffs, especially on noneconomic damages. From there, the defense should create categories of how money can help the plaintiff. In doing so, it should look for opportunities to be "generous."

For example, we worked on an mTBI case where the plaintiff testified that one of the things he missed most was his dogs. The plaintiff loved dogs and had six dogs before the accident, though his attorneys did not ask for any damages specifically tied to this issue. In our closing, the defense acknowledged the plaintiff was not asking for money regarding his love of dogs, but argued that he should still get something, and created a damages category for it. The defense said he should have dogs again and have someone to help him take care of them and set aside $50K in that category. The jurors were shocked the defense would offer money the plaintiff did not ask for, and thought $50K for dogs was incredibly generous (some even said it was an absurdly high amount). This violated all their negative expectations about how a large corporate defendant approaches money in a lawsuit and led them to conclude the defense was genuinely interested in finding ways in which money could help the plaintiff. This, in turn, opened them up to adopting the defense's alternative damage framework.

That is just one example. In wrongful death cases, defendants can set aside $50K a year for the family to get away on vacation. The language is key in an example like this. The defense attorney

MORE JURY, PAGE 28

> Defense attorneys should offer jurors alternative damage frameworks, not just alternative damage numbers. The former gives jurors a formulaic way of thinking about the process of awarding damages, and jurors love formulas.

RISK
FROM PAGE 25

account, bypass an identity verification process, or even to plant fake evidence in an attempt to blackmail you. All that person needs is a good photo or a short voice recording. How many people do you know, including yourself, who have already posted all kinds of audio, video, and photos in the social media space? You and I both know it's practically all of us.

My purpose in sharing all of this is not to instill fear. Rather, it is to create awareness and an appropriate level of concern. We all need to continue to stay abreast as to how the attack vectors continue to change in order to have an opportunity to be proactive in our efforts to avoid falling prey to these ever evolving cyberattacks and scams.

What should law firms do about the deepfake threat?

As with so many cyber and scam threats, there is no one step you can take and there are going to be no guarantees that any combination of steps will successfully block this threat. All you can do is try your best. That said, the following are becoming more important than ever.

- Use multifactor authentication on every critical or sensitive account or service. Think bank and other financial accounts, cloud-based services such as practice management programs, email accounts, remote access, and the list goes on.
- Mandate the use of an out-of-band communication process to verify the legitimacy of every request to transfer funds, regardless of the communication channel the person making the request uses. And if you are not already aware, an out-of-band communication is a method of challenge and response to the requestor of a transfer, payment, or delivery of money using a communication method that is separate and distinct from the communication method the requestor originally used.
- Conduct periodic mandatory training that over time covers all the various tactics utilized in social engineering attacks. Include current examples in order to demonstrate how these attacks "look and feel." Note that mandatory means no exceptions; all lawyers and staff must participate.
- Encourage social media users to limit their presence on social media and to minimize the posting of high-quality personal images online.
- Consider using biometric verification processes for access to critical accounts such as banking or other financial accounts. The reason why is biometric data typically has minimal public exposure.
- Make all conference calls, video calls, etc. private and/or password protected. The goal is to ensure that only trusted known individuals have the ability to participate.

JURY
FROM PREVIOUS PAGE

should say in closing that nothing will ever take the pain away or make them forget their loss, but this money gives the family an opportunity to get away somewhere nice every year and possibly find some momentary peace. In another wrongful death case, a defendant created a category to cover college for each of four grandchildren because the evidence was clear the deceased grandparent wanted the grandchildren taken care of, and this as just one example of how money can help the plaintiffs.

The key is to have several categories that cover the issues that have come up over the course of trial and then be generous in these categories. The dog example is on point here. The jurors were shocked by the generosity of suggested $50K for dogs when the plaintiff had not even asked for money for this, yet $50K was nominal in the bigger picture (the plaintiff asked for $70M). Generosity surprises jurors by violating their expectations and makes it more likely they will adopt this defense framework for thinking about damages.

One final tip for defendants using this strategy: build up to the total number. It is important to create all these categories with money allocations and impress jurors with the sense of generosity before showing them the total alternative damage award. If the defense attorney starts with the total number and then goes to the individual categories, jurors are more likely to have the negative, visceral reaction to the total number as nothing more than an effort to "lowball the plaintiff." If the defense builds up to that total number through a series of generous allocations, jurors will be more open to the total number when it is finally revealed because they understand with clarity the "generous" reasoning behind it.

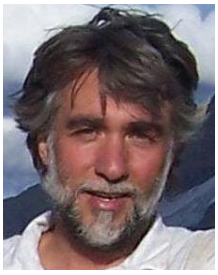
Alternative damage frameworks rather than just alternative damage numbers give jurors a different way to think about how to determine damages and naturally exerts downward pressure on damages.

Thomas M. O'Toole, Ph.D. is President of Sound Jury Consulting in Seattle. Kevin R. Boully, Ph.D. is Senior Consultant at Perkins Coie in Denver.

Scott Albers

Scott Albers, 64, died peacefully in Miles City after a sudden but mercifully swift battle with brain cancer.

The eldest of four, Scott was born in Champaign, Illinois, in 1958. His childhood and teenage years were spent throughout Illinois, Missouri, and Florida. He was a voracious reader and developed a lifelong love – and often encyclopedic knowledge – of history. Once he began playing the piano, he also immersed himself in music. He wrote his own compositions, as well as played intricate, classical concertos and early jazz ballads.



Albers

He completed his undergraduate degree at St. Louis University and attended law school at the University of Missouri: Columbia.

His sense of righteousness – along with his innate inquisitiveness, relentless advocacy, and philosophical mind – animated his career as a criminal defense attorney. He first served as a public defender in Missouri before falling in love with Glacier National Park and leaving the Midwest for Montana in 1994. He took the role of Chief Public Defender in Great Falls and launched his solo practice there a few years later. In 2000, he received the Montana Association of Criminal Defense Lawyers Lawyer of the Year award.

In 2018, he opened his Helena practice in Reeder's Alley, enchanted by its brickwork and narrow little streets. Over the last five years, he made his office there as interesting and individualistic as his own life, often playing the piano in his front room and chatting with visitors who strolled by and stopped to listen.

Scott was blessed with three children – Andrew, Alison, and Rachel – and a 23-year marriage to his first wife, Claire; he remarried in 2022 to his second spouse, Charity Nakabugo. Other surviving family members include his mother, Muriel Albers, and siblings: Jeff Albers, John Albers, and Alison Burns. His family would like to thank Holy Rosary Hospice for the compassionate care they showed him in his final weeks, and suggest a donation to the ACLU of Montana in lieu of flowers.

Fred E. Whisenand Jr.

Fred E. Whisenand, Jr., 94, of Whitefish, passed away peacefully on Sept. 21, 2023, surrounded by his family.

Fred was born in Williston, North Dakota, on Feb. 11, 1929. He graduated from Williston High School in 1947 and then attended the University of North Dakota. His education was interrupted by a tour of duty with the U.S. Army in the Korean War. After the war, he returned to North Dakota and married the love of his life, Coral Helland. They were married for 69 years. Fred graduated from the University of North Dakota and University of North Dakota School of Law in 1957. He was later admitted to the California Bar Association in 1965 and the State Bar of Montana in 1995.

Whisenand

After law school, Fred and Coral moved to Williston where they raised a family and Fred ran a successful law practice before entering into a nearly thirty-year law partnership with Ray McIntee in 1967. Fred had a diverse law practice and tried many cases to jury verdict throughout his career. The McIntee Whisenand firm continued until merging with the Crowley Law Firm in 1996. Fred enjoyed his profession and practiced law into his seventies and eighties.

Fred was preceded in death by his parents Fred and Gladys, his wife Coral, his brother Ray, his sister Maxine Pasley, and his son John Whisenand. He is survived by his sister Donna Dugan and his sisters-in-law Sharon Jones and Noreen Schroeder. Fred is also survived by his children: Tracey Whisenand, daughter-in-law (John, dec.); Fritz Whisenand and his wife, Theresa; Barbara DiBene and her husband, Steve; Nancy Johns; and his beloved pug, Hugo; 15 grandchildren and grandchildren-in-law; and eight great-grandchildren.

Paul Clifford Bunn

Paul Clifford Bunn of Libby died on Sept. 15. He was 85.

Paul was born in Miles City on on March 31, 1938, to Clifford and Chloe Bunn, and he grew up in Glendive.

The family survived the Great Depression era in spite of Clifford dying from pneumonia when Paul was only 12. While growing up in Glendive, Paul achieved Eagle Scout honors. Through the aid of a math scholarship, he was able to graduate from Augustana College. From there, he met a navy recruiter who took him on a jet ride to Minneapolis. He loved it, ultimately leading to his service during Vietnam. After serving as a radar intercept officer in F-4 Phantoms during Vietnam, he decided to become a lawyer. He was accepted to Harvard, Duke, and Montana. His love for Montana and family led him back home. He subsequently married Sandra Meilinger. They lived in Missoula where she taught school and he attended law school. They moved to Chester where he practiced law for 10 years.

Paul took up his third career in the 1980's as a South Dakota wheat farmer after saving up money from the law practice. He later moved to Columbia Falls where he took up his fourth career — as a real estate investor. His final years were spent in Libby, and much time at beloved Bull Lake.

Memorials can be made to Kootenai Country Montana Foundation.

Memorial submissions

The Montana Lawyer will publish memorials of State Bar of Montana members at no charge.

Please email submissions to jmenden@montanabar.org using the subject line "Memorial." Memorial submissions are subject to editing.

JOBS & CLASSIFIEDS

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Senior Level Associate: Tappan Law Firm is a small firm representing numerous clients from individual landowners with single-issue property disputes to large businesses with complex permitting and land-use demands. Ideal candidates will have a minimum of three to six years of litigation experience and desire to work collaboratively on water rights adjudication and disputes, property disputes, and contractual disputes. Salary is highly competitive and includes health, dental, vision and 401k with firm match. Please send a cover letter, resume, writing sample, and two references to jpharmer@tappanlawfirm.com. Incomplete applications will not be considered. Please do not hesitate to email or call with any questions.

Director of Human Resources: Montana State University-Northern (MSUN), invites applications for their Director of Human Resources position. The successful candidate will be a full-time professional beginning immediately and onsite at the campus in Havre, Montana. The position is on a 12-month contract following the fiscal year calendar. The benefits package includes paid employee health insurance, retirement plans, paid sick leave, 12 paid holidays, and Montana University System tuition waivers. View a benefits summary at this link, https://www.msun.edu/hr/benefits.aspx. Submit your online application and required materials at https://jobs.msun.edu/postings/2371.

Litigation Attorney: The Missoula-based law firm of Worden Thane P.C., is seeking applications for attorney positions. Worden Thane P.C. is a general practice law firm with cutting edge attorneys specializing in litigation and transactional matters in the areas of real estate, natural resources, business and commercial, labor and employment, intellectual property, product liability, banking and finance, trusts and estates, and tax. The ideal applicant should have an established litigation practice, and an interest and experience in real estate or trust and estate litigation. Email application materials to ddonham@wordenthane.com

Associate Attorney: Buckwalter Galbraith & Webb, PLLC, a busy, boutique, full-service law firm in Kalispell, Montana, is seeking a full-time litigation associate. Ideal candidate is a hard-working self-starter, who is willing to put in the time and effort to make the most of this opportunity. Preference for candidate to have at least two- years' experience in civil litigation practice in Montana, but newly admitted Montana licensed attorneys are welcome to apply. Position is in-person. Depending on experience, attorney's practice could also include estate planning matters. Applicants should include CV, cover letter, writing samples, and references. Recent graduates, please provide law school transcripts. Competitive salary DOE. Apply by email to Laura@bgwfirm.com. Phone: (406) 314-6444.

Estate Planning Attorney: Buckwalter Galbraith & Webb, PLLC, a busy, boutique, full-service law firm in Kalispell, Montana, is looking to hire a contract attorney with experience in estate planning. Experience in transactional law a plus. Ideal candidate has 3-5 years of experience in estate planning in Montana. The ideal candidate will have a sound knowledge of drafting wills, complex trusts, POA's, deeds, and tax implications related to estate planning. Position could be remote or in-person and would likely start out as part-time. Applicants should include CV, cover letter, writing samples, references, as well as some background information about your experience in estate planning. Competitive compensation DOE. Apply by email to Laura@bgwfirm.com. Phone: (406) 314-6444.

Medical Legal Partnership Attorney: Montana Legal Services Association is looking for two Staff Attorneys to be based in MLSA's Missoula, Helena, or Billings office. The pay we're offering is $57,000 and up, depending on experience. MLSA is a progressive Montana non-profit law firm. We offer our staff challenging and fulfilling work, where you can go home each day knowing you made a tangible difference. MLSA provides a supportive and collegial work environment, a healthy work-life balance, and a generous benefits package. Please apply at https://montanalegalservices.bamboohr.com/careers/66

Personal Injury Attorney: The Advocates Injury Attorneys is looking for a full-time Personal Injury Attorney in our Missoula, Montana office. We believe everyone deserves an advocate and our aim is to provide personalized, high-quality care for every client. At The Advocates, we care about our employees and their happiness. We believe in setting big goals and rewarding our team members when we achieve them. Please submit your resume to DeeDee at dfox@advocates.com.

Tribal Defenders Holistic Defense Model: The Confederated Salish and Kootenai Tribal Defenders provide public defender services to indigent tribal members in tribal court. In addition to representation of adults in criminal court, youth in youth court, parents in child protection proceedings, and respondents in adult protection and mental health matters, the Tribal Defenders provide services that address the issues that bring their clients into the justice system and those collateral consequences to criminal charges and convictions. Utilizing a client-directed and interdisciplinary approach, the Tribal Defenders offer psychological services, case management, civil and pro se assistance, driver's license restoration, cultural mentoring, the Flathead Reservation Reentry Program and permanent supportive housing at the Morning Star. Apply by email to ann.miller@cskt.org

Tax Attorney: Silverman Law Office is changing the way law is practiced, and we're looking for the right attorneys to join our team. A few things we are looking for: Self-Driven - We expect everyone to be part of the community and market themselves to bring in their own clients. Self-driven individuals that are concerned with the minimum expectations but enjoy working hard and efficiently to maximize their efforts. Growth-Oriented - Work with the team to enhance your capabilities. Find opportunities for you to further develop your expertise so we can better advise our clients. Smart - Not just in a legal sense, but everything client-facing. To apply, send your cover letter, resume, references, and a writing sample to Shalee@mttaxlaw.com.

Deputy County Attorney: Big Horn County seeks a Deputy County Attorney. In the absence of, or under the direction of the County Attorney, the Deputy County Attorney may perform all of the duties of the County Attorney as prescribed by law and may serve as County Prosecutor; may investigate or direct the investigation of cases before the County; prepare misdemeanor and felony criminal cases, try cases and advise County Departments including the Sheriff's Office; Such other duties as may be assigned. At this time we are unable to process applications online. To apply, submit a Big Horn County general job application, resume, and legal writing sample to Attn: Human Resources, PO Box 908, Hardin, MT 59034. For application, go to the Human Resources tab on bighorncountymt.gov, or call or email the Big Horn County Human Resources Department.

Deputy City Attorney – Prosecution: The City of Missoula Attorney's Office prosecutes misdemeanor offenses and municipal code

violations committed in the City of Missoula. The average caseload for a prosecutor is 200 + active cases. The Deputy City Attorney will provide a full range of legal services related to municipal government prosecution operations and represent the City in criminal proceedings before the courts. Duties require a high degree of independence and initiative to maintain a significant case load and address complex legal issues. The City Attorney's Office currently has two prosecution positions open. One opening is a vacancy position and the other opening is a newly created, expansion position. For a complete position description and to apply visit: https://bit.ly/MissoulaCA

Civil Deputy County Attorney: The County Attorney's Office is seeking a Civil Attorney to join their team. This position will Performs complex and responsible civil legal work in the office of the Missoula County Attorney. Provides legal counsel, policy guidance, and representation for local government departments, agencies and boards and serves as primary legal advisor. See the full listing and apply at https://bit.ly/MissoulaCivil

Deputy County Attorney: Flathead County seeks a Deputy County Attorneys, primarily assigned to criminal prosecution duties and to providing legal services to County governmental agencies. Assignment to a particular area of service will, to some degree, be based upon the individual's training, experience and specialization. Familiarity and experience with prosecution of both felony and misdemeanor cases is desired. Familiarity and experience with cases involving juvenile crime and dependent neglect is desired. Individuals must also have some background and training for civil litigation with regard to governmental law. Apply by email to shouser@flathead.mt.gov

Criminal Deputy County Attorney: The Gallatin County Attorney's Office seeks an attorney to join our team of experienced prosecutors. Duties include prosecuting misdemeanor and felony criminal matters in Justice and District Courts. The Gallatin County Attorney's office has new leadership with a modern vision. Join us as we build a gold standard for prosecution in Montana. Salary for Criminal Deputy County Attorneys ranges from $80,963 to $105,585 based on experience. The County provides excellent benefits including health, dental, vision, discounted gym memberships and ski passes to Bridger Bowl. Please apply atonline. https://www.governmentjobs.com/careers/gallatinmt/jobs/4202748/criminal-deputy-county-attorney?keywords=attorney%27&pagetype=jobOpportunitiesJobs

Deputy County Attorney: Lincoln County is seeking a deputy county attorney to join our team. Responsibilities include prosecuting criminal offenses in justice court and district court, providing legal advice to various county departments, and appearing in civil matters including involuntary commitments and youth in need of care cases. We are a small but fast-paced office with professional and knowledgeable support staff, an excellent work environment, competitive salary, and a great benefit package that includes health insurance provided by the county. Applicant must submit a current resume or CV, as well as a writing sample and two letters of reference. To apply or to obtain a complete job description email mboris@libby.org.

Deputy County Attorney - Criminal: The Cascade County Attorney's Office seeks an attorney to perform complex legal, professional and administrative work. Under policies and procedures established by the Cascade County Attorney, the Deputy County Attorney (Criminal) initiates and prosecutes criminal cases through final disposition and provides legal counsel and advice on matters of criminal law and performs other related duties as required or assigned. Must be able to pass background check and meet and maintain implemented or required security approvals for employment with the Cascade County Attorney's Office. Apply at www.cascadecountymt.gov/employment

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BILLINGS: Solo condominium office space, unique view, space for paralegal/secretary and one associate, reception area, and parking. Separate office heat and lights, coffee bar, professional setting, 1645 Parkhill Dr. Perfect for retired semi-active attorney or beginning lawyer. Possible purchase rent-option, 3-5-year term, rent negotiable. Availability is flexible. Call Sam Rankin for details and with confidentiality. 406-855-3013. sam@srankinlaw.com.

OFFICE SPACES FOR LEASE: 2 Office Spaces for lease in downtown Missoula near the courthouse. One space available immediately and one in early 2024. Both spaces are approximately 156 sq. ft. (12 x 13) and have a large window. Wi-Fi, kitchen, and conference room privileges are included. The monthly rent is $500. Parking is not included, but long-term metered or leased parking is available through the Missoula Parking Commission. Please call Patti (406) 543-6929 if interested.

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BANKING EXPERT: 34 years banking experience. Expert banking services including documentation review, workout negotiation assistance, settlement assistance, credit restructure, expert witness, preparation and/or evaluation of borrowers' and lenders' positions. Expert testimony provided for depositions and trials. Attorney references provided upon request. Michael F. Richards, Bozeman MT 406-581-8797; mike@mrichardsconsulting.com.

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FORENSIC DOCUMENT EXAMINER: Trained by U.S. Secret Service and U.S. Postal Inspection Crime Lab. Retired from the Eugene, Oregon, P.D. Qualified in state and federal courts. Certified by the American Board of Forensic Document Examiners. Full-service laboratory for handwriting, ink and paper comparisons. Contact Jim Green, Eugene, Oregon; 888-485-0832. Website at www.documentexaminer.info.

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