An aerial photograph of Missoula, Montana, taken during the "golden hour" of sunset. The sun is a bright, glowing orb just above the horizon, casting a warm, orange and yellow light across the sky and the city below. The city of Missoula is spread out across a valley, with a river winding through it. In the background, a range of mountains is visible under the colorful sky. The overall mood is peaceful and scenic.

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MEET US IN MISSOULA FOR 2021 ANNUAL MEETING

See pages 15-18 for the tentative schedule. Register at www.annualmeeting.montanabar.org.

BRANDBORG BUZZING OFF TO NEW ADVENTURES AFTER 25 YEARS AT STATE BAR

Longtime legal counsel for the bar Betsy Brandborg has a honey of a new hobby — and she sees a lot of similarities between the hive and the world of lawyers.

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UNIFORM TRUST DECANTING ACT

Newly enacted legislation from 2021 Legislative Session gives trustees limited authority to transfer trust assets

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MILLER HONORED WITH ABA AWARD

Salish and Kootenai Tribal Defenders Office managing attorney cited for work establishing tribal holistic defense program, the first of its kind in the nation.

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Bar reaffirms commitment to public education efforts

"Democracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard for democracy, therefore, is education."

--Franklin D. Roosevelt

As with many of you who grew up in the 1970s and '80s (yes, I'm aging myself), I learned about the fundamental principles of our democracy — the social contract, separation of powers, checks and balances, the Constitution, the rule of law — in elementary and middle school, primarily through the Schoolhouse Rock videos that were so popular at the time. Who can forget that forlorn vetoed bill slumping on the steps of the U.S. Capitol? At the National Park Service law enforcement academy, I refreshed my civics education by learning about my role — as well as the role of prosecutors, defense attorneys, and the judiciary — in upholding constitutional rights. But not until I became an officer of the court did the importance of a public civics education crystallize.

In 2018, the State Bar of Montana (SBM) Board of Trustees reaffirmed the mandate of SBM's constitution to "safeguard a forum for the discussion of effective action concerning the subjects pertaining to the practice of law... and relations of the bar to the public" by including in its 2018-2020 strategic plan

the goal to develop programs, educational aids, and resources to aid the public in understanding the judicial system and the rule of law and to build confidence in public institutions. In support of this goal, the Trustees voted to support the High School Mock Trial Competition, which teaches students about the roles of attorneys and the court in our society, as well as engages the next generation of legal practitioners. This past March, Montana's Second Annual High School Mock Trial Competition was held virtually and was a resounding success, and the third annual Competition will be held in March 2022.

Recently, SBM's Board of Trustees, officers, staff, and stakeholders attended SBM's strategic planning meeting with the task of setting a course for the organization. Chris Newbold of ALPS expertly facilitated the lively and thoughtful discussion, the work product of which is a draft plan for 2021-2023 that will focus in part and again, on SBM's role in educating the public about our democracy.

Specifically, over the next two years, SBM will continue to safeguard that forum for public education about the rule of law as a crucial underpinning

MORE EDUCATION, PAGE 28



KATE McGRATH ELLIS

The State Bar will be reaching out to local bar associations around the state, as well as other educational and non-profit organizations engaged in public education. We also actively seek out and welcome your input and expertise.

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CAREER MOVES

Dickson joins the Silverman Law Office in Bozeman as a senior associate

Silverman Law Office, PLLC is proud to welcome Grant Dickson to the firm as a senior associate attorney in its Bozeman office.



Dickson

Dickson brings over a decade of private practice experience with law firms in Washington, D.C., Nashville, and Bozeman where he has worked on a wide array of regulatory and corporate matters, including

clean energy issues, providing counsel on general business and operational matters, corporate governance, contracts, mergers and acquisitions, and real estate matters ranging from ranch sales to residential homes to commercial leases.

Originally from Nashville, Tennessee, Dickson received his B.A. in English and German from Washington & Lee University in 2002 and his law degree from Vanderbilt University Law School in 2007. When he is not working, he skis, hikes, and chases trout all over Montana and Yellowstone.

His practice with the Silverman Law Office will focus primarily on corporate and real estate transactional matters. You can reach him at 406-582-8822 or grant@mttaxlaw.com.

Damrow joins SCL Health as Corporate Counsel

Peter Damrow recently transitioned from his busy civil defense litigation practice to go in-house with SCL Health, a nonprofit healthcare system with a variety of hospitals, clinics, and outpatient facilities throughout Montana, Colorado, and Kansas.

Damrow will support SCL Health's operational functioning and will provide regulatory, transactional, and other support for other system attorneys, care sites, and SCL Health care providers.

Damrow will support the SCL Health system as a whole but will remain based out of Montana at St. Vincent Healthcare in Billings.

Damrow is a third-generation Montanan and earned his Bachelor of Arts degree in Sociology/Criminology from the University of Montana in 2011. Damrow graduated from the University of Washington School of Law where he earned



Damrow

his Juris Doctorate in June of 2016. During law school, Damrow served as a Managing Editor of the Washington Law Review and was inducted into the Order of Barristers upon his graduation.

Damrow is the son of a reputable health care provider, and his law practice has always encompassed aspects of healthcare. He enjoys spending time with his wife, Talia, their daughter, Reina, and their malamute, Suka, at his family's cabins up in Seeley or on the Missouri River.



Sommers-Flanagan



Van Kley

Upper Seven Law focused on social justice

Upper Seven Law is a Montana-based nonprofit law firm dedicated to holding the powerful accountable. The firm's mission is to take smart risks and invest the time necessary to build foundations for long-term accountability work, based on the belief that creativity and innovation in law are essential to advancing social justice and public interest objectives. To advance its mission,

Upper Seven engages in litigation and education, often partnering with other firms and organizations.

Executive Director Rylee Sommers-Flanagan founded Upper Seven in February 2021. A fifth-generation Montanan, Sommers-Flanagan grew up in Missoula and spent her summers in Absarokee, where her family continues to run a cattle ranch. She most recently served as Deputy Chief Legal Counsel to former Gov. Steve Bullock. She graduated from Stanford Law School in 2016, and from Emory University in 2011. She also has a creative writing degree from the University of St. Andrews in Scotland. After law school, she clerked for the Honorable Sidney R. Thomas, Chief Judge of the U.S. Ninth Circuit Court of Appeals, and for Judge Ellen Segal Huvelle and Judge Thomas F. Hogan, of the U.S. District Court for the District of Columbia. She was the Supreme Court Assistance Project Fellow for the Public Citizen Litigation Group in Washington, D.C., and a fellow for the D.C.-based class action firm Cohen Milstein Sellers & Toll. She now lives in Helena.

Litigation Director Constance Van Kley joined Upper Seven in July 2021. Van Kley represents individuals and organizations in state and federal matters, focusing on government and corporate accountability. She graduated from the University of Montana School of Law in 2017, finishing first in her class and serving as co-Editor-in-Chief of the Montana Law Review. Following graduation, she clerked for the Honorable Sidney R. Thomas, Chief Judge of the Ninth Circuit, and for Judge Dana L. Christensen, of the U.S. District Court for the District of Montana, before working in private practice. She lives in and works from Missoula.

As a generalist nonprofit firm funded primarily by donations, Upper Seven pursues matters that might be too novel, risky, or low-paying for more traditional firms. Upper Seven is happy to accept referrals for this type of work and hopes both to improve access to justice and to create opportunities for

testing innovative legal theories. Rylee and Constance are also happy to explore ideas for collaboration. More information is available at uppersevenlaw.com.

PUBLICATIONS

Zellmer is lead author of water law treatise's sixth edition

Sandi Zellmer, law professor in the Blewett School of Law, is the lead author on the sixth edition of the only concise



Zellmer

treatise on water law, "Water Law in a Nutshell."

Released this year, the new edition adds dozens of recent decisions and key statutory changes. Virtually every principal case in all of the leading water law casebooks

is cited, making it an excellent aid for students and practitioners all across the country. The book addresses evolving areas like equity and inequities in the access to clean water, public recreational access and use, interstate allocations, instream flow protection, groundwater-surface water conflicts, federal water development, takings claims and public interest concerns.

HONORS

ABA award honors Miller for tribal holistic defense program

The American Bar Association Government and Public Sector Lawyers Division (GPSLD) has recognized Ann Marie Miller of Pablo with its 2021 Dorsey Award.

Miller, managing attorney of the Confederated Salish and Kootenai Tribes' Tribal Defenders Office, was honored for her work establishing the office's holistic defense program. Miller worked with the Center for Holistic Defense and the Bronx Defenders to develop and implement the program, the first formalized tribal holistic defense model in the nation.

The Dorsey Award honors an outstanding public defender or legal aid lawyer.

Understanding that traditional tribal justice systems tend to view problems in their entirety and engage the community in their solutions, Miller implemented holistic defense services such as cultural mentoring, driver's license restoration assistance, civil pro se clinics, a sobriety support group, Salish language classes, and community service projects for clients to work off fines. She also worked with Tribal Defenders Office psychologists to develop a case management tool that



Ann Marie Miller

measures resiliency factors and level of risk to reoffend for a Native American population. In addition, Miller created the Flathead Reservation Re-Entry Program to provide interdisciplinary, supportive services to people returning from incarceration which significantly reduced recidivism rates.

"Public lawyers work hard every day to improve our communities and ensure that our governments function effectively," said Steve Vieux, chair of the ABA Government & Public Sector Lawyers Division. "We are proud to highlight the outstanding achievements of our national award winners, lawyers who exemplify public service at its finest."



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Congratulates

Our founding firm members, Mike Milodragovich and Lon Dale, on each achieving 50 years of law practice. They both graduated from the University of Montana School of Law in 1971 and independently began their legal careers in Missoula. In May of 1975, Lon and Mike made the bold decision to open their own law firm. Over the intervening years the firm they began has grown into one of the most active, respected law firms in the State. During their 50 years of practice, Mike and Lon have achieved the highest peer ratings in their field, tried countless jury trials, and established legal precedent through their appellate court practice. Their dedication to the legal profession, their clients, their community, and their law firm is immeasurable and truly appreciated.



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ATTORNEYS



Crow Tribal Court Chief Judge Dennis Bear Don't Walk in the tribal courtroom. (Photo by Alexis Bonogofsky courtesy of Crow Tribal Court)

Know the differences and overlaps between tribal, state, federal law

Continuing her series on tribal legal systems in the state of Montana, Kathryn Seaton (KS) of Montana Legal Services Association sat down with Chief Judge Dennis M. Bear Don't Walk (JBDW) of the Crow Tribal Court and had a discussion about tribal law, its sources, and use in tribal courts.

KS: How would you define tribal law, particularly as compared to federal Indian law?

JBDW: Tribal law is understood to mean the body of rules established by a tribe to govern its people and its territory. Federal Indian law is established by non-Tribal authorities (i.e. the U.S. Congress and Supreme Court) that

governs the relationship between the Tribe and federal or state governments. Of course, there may be some overlap between the two, e.g. tribal laws defining the Tribe's relationship with other governments, Supreme Court precedent applying in tribal court, etc.

KS: Are there times when state law would apply in a tribal forum?

JBDW: It depends on the Tribe. Here, the Crow Law and Order Code (CLOC) § 3-1-104 (4) specifically identifies that state law does not apply in any proceeding, except when: a) a provision of the tribal code provides otherwise, or b) both parties agree and stipulate it applies, with the consent of the Court.

KS: That is a unique provision compared to other tribal codes I've seen. Have you had many cases where parties stipulate to state law applying?

JBDW: Yes, I see it happen most often in the context of contract disputes. However, even if the parties agree in the terms of the contract that state law governs, the attorney must still cite the appropriate provision of tribal law that authorizes it to apply in this forum. Assuming that state laws, rules, and jurisprudence apply in tribal court in the exact same manner as in state court is disrespectful to the tribe, tribal lawmakers, and tribal court. It increases the burden on the judge, who will have to

decide whether to fish out the proper citation by making inquiries of the attorney regarding applicable law, or simply dismiss the matter. For me, it may depend on whether counsel's failure to research or cite tribal law appears willful, or is an honest first-timer mistake.

KS: Another confusion is around the U.S. Constitution. Some attorneys are not aware that the Constitution does not apply to or constrain tribal governments. Can you talk about why that is?

JBDW: It comes down to the fact that tribes are separate sovereign governments, existing before the United States was established. Tribes, like other sovereign governments, have the inherent right and authority to make their own laws and be ruled by them. Applying the U.S. Constitution to a tribe, would be an infringement on its sovereignty and right to self-determination.

KS: Are there constitutional constraints on tribal courts?

JBDW: Of course. It's not a lawless state. Our Tribal Constitution identifies the authority of and constraints on each branch of our government. Tribal law also defines and constrains the Court's authority, and certain federal laws apply to the tribal court, like the Indian Civil Rights Act (ICRA), which protects those constitutional rights people most commonly think of, such as due process, notice, property rights, privacy rights, etc. The Crow Tribe also incorporated ICRA into its constitution and tribal code.

KS: In terms of due process, the Ninth Circuit has found that the guarantee of due process under ICRA in the tribal court context are not necessarily coterminous with U.S. constitutional limits. See *Randall v. Yakima*

Nation Tribal Court, 841 F.2d 897, 900 (9th Cir. 1988). It seems like this might create an advocacy opportunity for attorneys.

JBDW: There is an advocacy opportunity there, but the first thing an attorney should do is look at the tribal code. Sometimes tribal law specifically addresses the issue, such as what constitutes due process. There may not be a need to look to foreign authority if the tribal code clearly defines the contours of that right. If it isn't clearly addressed in the tribal code, you can also look to tribal traditions and customs. Here, the Crow Law and Order Code identifies that tribal traditions and customs are considered tribal law, even if they are uncoded.

KS: If the court is going to apply tribal tradition and custom in a case, practically speaking, how does the tradition or custom get established?

JBDW: We don't have any hard and fast rules. Basically, however a party believes they can prove a tradition and custom and introduce it into the record as evidence. I've seen one case where an attorney was going to establish tradition and custom via an expert witness. There are also printed resources about the history, culture, and traditions of the Crow Tribe. I could see those being introduced as evidence, depending on the qualifications of the author. It's an area that is wide open with opportunity for advocates to see what works.

KS: We've discussed different sources of law that may apply in a tribal court forum. Where do you suggest advocates start when doing legal research on a tribal law issue?

JBDW: At Crow, start with the Law and Order Code. If it does not directly

CROW TRIBAL COURT

Learn more about the Crow Tribal Court at <https://www.crowtribalcourts.org/>.

The Court's Local Rules are available at <https://www.crowtribalcourts.org/local-rules.html>.

The Court's updated COVID-19 Policies can be found at <https://www.crowtribalcourts.org/public-notices.html>.

The Crow Legislative Bills, referenced in the article, can be found at <https://www.ctlb.org/crow-legislative-bills-clb/>.

address the issue, it may reference other sources of authority that apply. That said, the code has not been officially updated since 2005. So, practitioners who want to ensure they are looking at the most current version of tribal law, must review Crow Legislative Bills (CLBs) passed since 2005, for the existence of legislation that amended the portion of the code they are using. Both the Code and CLBs are available to the public on the Tribal Legislature's website. If I want to double check the currentness of a tribal statute, I do a term search on the CLB page to see if the Tribe passed any amendments to that section after the laws were last codified in 2005.

KS: Thank you for your time, Judge!



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Uniform Trust Decanting Act gives trustees limited authority to transfer trust assets

By E. Edwin Eck

Montana's adoption of the Uniform Trust Decanting Act ("the Act") provides trustees limited statutory authority to transfer trust assets from one trust (the "first trust") to a new or modified trust (the "second trust") without court approval.¹ This transfer of assets is called "decanting" because it is like pouring wine from one bottle to another and leaving the residue (unwanted trust terms) behind. Prior to Montana's adoption of the Act, Montana had no statutory authority expressly permitting trust decanting. Now, with the adoption of the Act, trustees have the assurance they can make limited modifications to existing irrevocable trusts without the expense of a court filing. In addition to providing an overview of decanting limitations, the article briefly summarizes selected procedural provisions and also includes some drafting suggestions.²

There are many reasons why a trustee considers trust modifications. Three examples follow.

Example One. A trust instrument restricts trust investments to U.S. Government bonds. The trustee desires to diversify trust investments to permit investing in corporate bonds, equities, and other assets, some of which are likely to provide a greater return to the trust and its beneficiaries.

Example Two. A trust instrument includes, or omits, a provision that might affect taxation. The trustee desires to modify the trust to achieve better tax treatment.

Example Three. A trust instrument might provide that a trustee may make distributions of trust principal to assist any of the settlor's children start a new business if, in the trustee's unlimited and unreviewable discretion, the trustee believes the new business is feasible. During the term of the trust, one of the children becomes ill and incurs medical expenses that the beneficiary is struggling to pay. The trustee desires to modify the trust to permit distributions for "health purposes" as well as the distributions set forth in the original trust instrument.

Generally, the Montana Uniform Trust Code reflects the traditional rule that a court must approve modifications to an irrevocable trust.³ The Uniform Trust Decanting Act marks a major departure from this traditional rule. Subject to some exceptions, the Act assumes that the terms of a trust are deemed to include a decanting power if the trustee is not the settlor⁴ and if the trustee has discretion to distribute principal.⁵ The Act permits such a trustee to modify an irrevocable trust without consent or approval of a court or the beneficiaries.

The Act balances the benefit of permitting modifications without a court order with the concern that modifications must be limited so that a rogue trustee does not make changes contrary to the settlor's intent, or probable intent if the settlor had anticipated some current circumstance. This balancing results in a somewhat complex act.

Overview of Decanting Limitations

The Act imposes the following limits on decanting:

One. Trustees cannot undertake decanting in a manner that would result in violations of their fiduciary duties, including the duty to act in accordance with the purposes of the first trust.⁶ In decanting a trust, the trustees must not disregard the settlor's intent. Rather, the decanting must better effectuate the settlor's broader purposes.

Two. Depending upon provisions in the trust instrument, trustees are classified as having **limited** distributive discretion or **expanded** distributive discretion. The scope of a trustee's decanting power depends upon this classification. One set of rules applies to trustees with limited distributive discretion over the principal of the first trust. Their ability to decant is limited. A second, more lenient set of rules, applies to trustees with expanded distributive discretion.

Three. All decanting is subject to additional specific restrictions found in Mont. Code Ann. §§ 72-39-210 through 72-39-216.

1 H.B. 293, the Uniform Trust Decanting Act, was cosponsored by Rep. Bill Mercer of Billings and Sen. Steve Fitzpatrick of Great Falls. The Act will become effective Oct. 1, 2021. On that date, it will apply to trusts, whenever created, that have a principal place of administration in Montana. Also, the Act will apply to trusts governed by trust instruments providing that Montana law governs the trust for the purposes of administration or construction. Mont. Code Ann. § 72-39-104.

2 The author relies on the Act as promulgated by the Uniform Law Commission and the Commissioner's comments on the final Uniform Trust Decanting Act, which can be found on the Uniform Law Commission website. See <https://www.uniformlaws.org/view-document/final-act-with-comments-92?CommunityKey=5b248bac-9251-47fb-bad8-57a23f3df540&tab=librarydocuments>

3 See Mont. Code Ann. §§ 72-38-410 through 72-38-417.

4 One must be an "authorized fiduciary" in order to exercise the decanting power. Mont. Code Ann. § 72-39-201. By definition, a settlor is not an "authorized fiduciary." Mont. Code Ann. § 72-39-102(3)(a).

5 Even if the trustee currently does not have discretion to distribute principal, the Act permits decanting in a limited circumstance. Mont. Code Ann. § 72-39-209 authorizes decanting to a special needs trust even though the first trust instrument does not give the trustee discretion to distribute principal or income. See also Mont. Code Ann. § 72-39-205(1)(b) concerning the court's appointment of a "special fiduciary" and its power to exercise the decanting power. See Comment under section 9, Uniform Trust Decanting Act, p. 31-32.

6 Mont. Code Ann. § 72-39-201(1).

Limited Distributive Discretion and Expanded Distributive Discretion

The Act relies upon well-defined concepts found in the Internal Revenue Code to distinguish between trustees whose authority over principal is “limited” and those trustees who have “expanded” distributive discretion. A limited discretionary power is a power limited by an “ascertainable standard” as defined in I.R.C. § 2041(b)(1)(A) or I.R.C. 2514(c)(1) or by a “reasonably definite standard” as defined in I.R.C. § 674(b)(5)(A) and the Treasury regulations associated with these sections.⁷ By contrast, a trustee who has “expanded distributive discretion” has distributive powers that are not limited by an ascertainable standard or a reasonably definite standard.⁸

Limited Distributive Discretion. If the trustee has limited distributive discretion over principal, the second trust must grant beneficiaries of the first trust **beneficial interests “substantially similar” to their beneficial interests in the first trust.**⁹ Thus for example, if the first trust required that a trust be distributed when the beneficiary reaches age 35, a second trust delaying the distribution to age 40 would not grant the beneficiary a beneficial interest substantially similar to the beneficiary’s interest in the first trust.

Although the second trust thus preserves beneficial interests, the second trust may have different administrative provisions. For example, a trustee with limited distributive discretion may:

1. change the trustee or trustee succession provisions;
2. add investment advisors, trust protectors, or other fiduciaries;
3. change the powers of the trustee;
4. divide a trust into more than one trust; or
5. consolidate trusts.

The Uniform Law Commission’s comments acknowledge that permissible changes may have “incidental” effects on beneficial interests.

For example, changing the trustee from one person to another could impact how the trustee exercises discretionary distribution authority, but is not a material change because the trustee’s discretion is subject to the same standard and the trustee is subject to fiduciary duties.¹⁰

Expanded Distributive Discretion. If the trustee has expanded distributive discretion over principal, the second trust may include different administrative provisions, such as those available to a trustee with limited distributive discretion. Additionally, **the second trust may include different dispositive provisions, so long as the second trust does not:**

1. include as a current beneficiary¹¹ a person who was not a current beneficiary in the first trust;

2. include as a presumptive remainder beneficiary¹² or successor beneficiary¹³ a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust; or

3. reduce or eliminate a vested interest.¹⁴

Subject to these restrictions, the restrictions in Mont. Code Ann. §§ 72-39-210 through 72-39-216, and the trustee’s fiduciary duties set forth in Mont. Code Ann. § 72-39-201(1), the second trust may:

- (1) alter or eliminate rights that are not vested interests;
- (2) change the standard for distributions;
- (3) add or eliminate a spendthrift provision;
- (4) extend the duration of a trust (subject to Mont. Code Ann. § 72-39-216);
- (5) change the jurisdiction of the trust and the law governing the administration of the trust (subject to Mont. Code Ann. § 72-39-210(5));
- (6) eliminate, modify, or add powers of appointment;
- (7) eliminate (but not add) one or more current beneficiaries;
- (8) make a current beneficiary a presumptive remainder beneficiary or a successor beneficiary;
- (9) eliminate (but not add) one or more presumptive remainder and successor beneficiaries; or
- (10) make a presumptive remainder beneficiary a successor beneficiary, or vice versa.

This non-exclusive list of examples is contained in the Uniform Law Commission comments.¹⁵

Trust for beneficiary with disability. Even if the trustee does not have expanded distributive discretion, or for that matter, any discretion over principal or income, the Act permits a trust to be decanted to modify the interest of a beneficiary with a disability.¹⁶ For example, when the beneficiary has a disability, it may not be in the beneficiary’s interest to receive mandatory distributions. Rather, it may be in the beneficiary’s interest to restructure the trust as a special needs trust so that the trust does not adversely affect the beneficiary’s qualification for governmental benefits. Provided the settlor is not the trustee, Mont. Code Ann. § 72-39-209 authorizes the trustee to exercise a decanting power to create a special needs trust.

Additional Limits on Decanting

Whether a trustee has expanded or limited distributive discretion, the Act imposes further limits on decanting.

- **Wholly charitable trusts.** Such trusts cannot be decanted under the Act.¹⁷
- **Protection of Charitable Interest.** If the first trust

⁷ Mont. Code Ann. § 72-39-208.

⁸ Mont. Code Ann. § 72-39-102(11).

⁹ Mont. Code Ann. § 72-39-208(3) and (4).

¹⁰ Comment under section 12, Uniform Trust Decanting Act, p. 43.

¹¹ “Current beneficiary” is defined in Mont. Code Ann. § 72-39-102(9).

¹² “Presumptive remainder beneficiary” is defined in Mont. Code Ann. § 72-39-207(1)(b).

¹³ “Successor beneficiary” is defined in Mont. Code Ann. § 72-39-207(1)(c).

¹⁴ Mont. Code Ann. § 72-39-207(3)(c).

¹⁵ See comments under section 11, Uniform Trust Decanting Act, Final Act with Comments, p. 40.

¹⁶ Mont. Code Ann. § 72-39-209.

¹⁷ Mont. Code Ann. § 72-39-103(2).

contains a “determinable charitable interest,”¹⁸

- the Attorney General may represent and bind the charitable interest;¹⁹
- the second trust cannot diminish that interest, change an identified charitable organization, or change the charitable purpose²⁰; and
- the second trust must be administered under Montana law unless the Attorney General consents to administration by the law of another jurisdiction or the court approves.²¹

▪ **Trust limitation on decanting.** A trustee cannot exercise a decanting power if the first trust instrument expressly prohibits such an exercise.²² Further, a trustee’s exercise of a decanting power is subject to any express restriction in the first trust instrument.²³ A provision in the first trust instrument prohibiting trust amendment or revocation, or a spendthrift provision, however, does not preclude the exercise of the decanting power.²⁴

▪ **Increase in trustee compensation.** A trustee cannot exercise a decanting power to increase the trustee’s compensation unless all of the qualified beneficiaries of the second trust agree or the increase is approved by the court.²⁵ A change in compensation that is incidental to the exercise of the decanting power, however, is permitted.²⁶ For example, a trustee with expanded distributive discretion could decant a first trust requiring distribution when the beneficiary reaches age 35 to a second trust delaying the distribution to age 40. Although the trustee will receive compensation for administering the trust an additional five years, the increased compensation is incidental to the delayed distribution age.

▪ **Relief from liability and indemnification.** A second trust may not relieve a fiduciary from liability for breach of a trust to a greater extent than that permitted under the first trust. Further, a second trust instrument may provide for indemnification of the trustee of the first trust only if indemnification was permitted under the first trust.²⁷

▪ **Removal or replacement of authorized fiduciary.** A decanting power may be used to modify a provision in the first trust instrument granting a person a power to remove or replace a trustee if:

- the person holding the removal power consents and the modification applies only to that person;
- the person holding the removal power and the qualified beneficiaries of the second trust consent and

the modification grants a substantially similar removal power to another person; or

- the court approves the modification and the modification grants a substantially similar power to another person.²⁸

▪ **Tax-Related Limitations.** The Act imposes limitations on the decanting power that are necessary to avoid disqualifying a trust for particular tax benefits, including:

- the marital deduction,²⁹
- the charitable deduction,³⁰
- the annual gift tax exclusion,³¹
- Qualified Subchapter-S trust status,³²
- GST “annual exclusion” gifts,³³
- “qualified trust” status, meeting the distribution requirements of I.R.C. § 401(a)(9),³⁴
- foreign grantor trust status,³⁵ and
- other tax benefits for which the first trust qualified, if the first trust included an express intent to qualify, or is clearly designed to qualify, for the benefit.³⁶

Mont. Code Ann. § 72-39-215(2)(i) permits a decanting power to cause a nongrantor trust to become a grantor trust or vice versa. Further, Mont. Code Ann. § 72-39-215(2)(j) permits the settlor of a first trust to block a decanting to a second trust if the second trust does not contain provisions to “turn off” grantor trust treatment if “turn off” provisions were included in the first trust.

▪ **Duration of the second trust.** Although the second trust may have a term that is longer or shorter than the term of the first trust, any maximum perpetuity or similar rule applicable to the first trust applies to the second trust.³⁷

Selected Procedural Provisions

Notice. The trustee must give notice of the intended exercise of the power 60 days in advance to:

- the settlor of the first trust,
- each qualified beneficiary of the first trust,³⁸
- each holder of a presently exercisable power of appointment over any part or all of the first trust,
- each person who currently has the right to remove or replace the authorized fiduciary,
- each other fiduciary of the first trust,
- each fiduciary of the second trust, and
- the Attorney General if the trust has a charitable interest

28 Mont. Code Ann. § 72-39-214.

29 Mont. Code Ann. § 72-39-215(2)(a).

30 Mont. Code Ann. § 72-39-215(2)(b).

31 Mont. Code Ann. § 72-39-215(2)(c).

32 Mont. Code Ann. § 72-39-215(2)(d).

33 Mont. Code Ann. § 72-39-215(2)(e).

34 Mont. Code Ann. § 72-39-215(2)(f).

35 Mont. Code Ann. § 72-39-215(2)(g).

36 Mont. Code Ann. § 72-39-215(2)(h).

37 Mont. Code Ann. § 72-39-216.

38 “Qualified beneficiary” is defined in Mont. Code Ann. § 72-39-102(20).

18 See Mont. Code Ann. § 72-39-210(1)(a) for a definition of a “determinable charitable interest.”

19 Mont. Code Ann. § 72-39-210(2).

20 Mont. Code Ann. § 72-39-210(3).

21 Mont. Code Ann. § 72-39-210(5).

22 Mont. Code Ann. § 72-39-211(1).

23 Mont. Code Ann. § 72-39-211(2).

24 Mont. Code Ann. § 72-39-211(3).

25 Mont. Code Ann. § 72-39-212(1).

26 Mont. Code Ann. § 72-39-212(3).

27 Mont. Code Ann. § 72-39-213.

The notice must:

- specify the manner in which the fiduciary intends to exercise the decanting power,
- specify the proposed effective date for exercise of the power,
- include a copy of the first trust instrument, and
- include a copy of the second trust instrument.³⁹

The purpose of the notice is to alert those with significant interests in the trust of a proposed exercise of the decanting power, so they can go to court and assert that the trustee has exceeded its authority under the Act or breached its fiduciary duties and that the attempted exercise of the decanting power is ineffective. The court may provide instructions to the trustee, appoint a special fiduciary to determine whether the decanting power should be exercised, approve an exercise of the power, determine that the proposed exercise is ineffective, or determine whether an ineffective exercise can be salvaged.⁴⁰

Saving provision. The Act includes remediation provisions intended to salvage imperfect decantings. Impermissible provisions in the second trust instrument are deleted and required provisions in the second trust instrument are included.⁴¹

Trust for care of animal. Mont. Code Ann. § 72-38-408 of the Montana Uniform Trust Code authorizes trusts for the care of a nonhuman animal under certain circumstances. Ordinarily to decant, there must be a human beneficiary. The Act treats the animal as a person. The protector of an animal trust is given the rights of a qualified beneficiary for the purposes of the Act.⁴²

Drafting Considerations

As noted above, the Act assumes that the terms of a trust are deemed to include a decanting power.⁴³ A settlor, however, may not want a trustee to exercise the decanting power provided for in the Act. By contrast, another settlor may prefer the trustee have more discretion for future trust modification than that provided for in the Act. If a settlor does not want a trustee to exercise a decanting power, the settlor should expressly prohibit such in the trust instrument and include a specific reference to the Act.⁴⁴ If a settlor wants more discretion for future modification of the trust than authorized in the Act, the trust instrument should include provisions authorizing a trustee, a powerholder, or another person to distribute or appoint property in further trust or to modify the trust instrument.⁴⁵

ARTICLE ON NEWLY ADOPTED UNIFORM DIRECTED TRUST ACT APPEARING IN UPCOMING ISSUE

The 2021 Montana Legislature adopted the Uniform Trust Decanting Act and the Uniform Directed Trust Act.

An article detailing the Uniform Directed Trust Act will be published in an upcoming edition of the Montana Lawyer.

Conclusion

The Uniform Trust Decanting Act, in assuming that the terms of an otherwise irrevocable trust include a decanting power, provides needed flexibility and certainty. Subject to specific limitations protecting the settlor's intent and the interests of the beneficiaries of the first trust, trustees are now permitted to make modifications, without court or beneficiary approval. These trust modifications may result in the saving of expense, which should serve the interest of trust beneficiaries.

Ed Eck is a Uniform Law Commissioner. He is Professor Emeritus of the Alexander Blewett III School of Law of the University of Montana. For 15 years, he taught courses on wills, trusts, charitable tax planning, and related tax courses. Subsequent to his retirement from the University, Eck served as Chief of the Office of Consumer Protection of the Montana Department of Justice. That Office oversees nonprofit corporations and charitable trusts. Eck currently practices law focusing on charitable matters and is Of Counsel with Church, Harris, Johnson, & Williams, P.C.



39 Mont. Code Ann. § 72-39-203.

40 Mont. Code Ann. § 72-39-205.

41 Mont. Code Ann. § 72-39-218.

42 Mont. Code Ann. § 72-39-219.

43 Mont. Code Ann. § 72-39-201(3).

44 Mont. Code Ann. § 72-39-211(1)(a).

45 Mont. Code Ann. § 72-39-103(5).

STATE BAR OF MONTANA
ANNUAL 2021
MEETING
MEET US IN MISSOULA



SEPTEMBER 9-11 • Holiday Inn Missoula Downtown
LIVESTREAM: \$125 • IN-PERSON: \$175

Meet us in Missoula September 9-11 for the State Bar of Montana's 2021 Annual Meeting! We expect to offer 12 hours of CLE over three days all at a cost of only \$125 for livestreaming and \$175 for in-person attendees!

Highlights will include a luncheon and keynote from Justice Laurie McKinnon; a breakdown of what the 2021 Montana Legislative Session means for lawyers; three specialty practice area tracks; a Supreme Court oral argument in *Wittman v. City of Billings* (see description on page 18) and much more. The Paralegal Section will also hold a welcome reception for all Annual Meeting attendees on Wednesday, Sept. 8.

We also are working with local health officials and closely watching the ever-evolving COVID-19 landscape. We will be ready to adapt to whatever changes are necessary to make this a safe and enjoyable Annual Meeting. The tentative schedule is on the ensuing pages.

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



SCHEDULE OF EVENTS

WEDNESDAY, SEPTEMBER 8

1:00 to 4:00 PM Paralegal Section Annual Meeting and CLE *

2:00 to 5:00 PM State Bar Board of Trustees Meeting (Including Conference for Members)

5:30 PM Annual Meeting Welcome Reception sponsored by the Paralegal Section

* Events marked with an asterisk will have CLE credit

All events at the Holiday Inn Missoula Downtown unless indicated otherwise

THURSDAY, SEPTEMBER 9

11:00 AM Past Presidents Committee Meeting

Noon to 1:00 PM Kickoff luncheon and Keynote Address* — Hon. Laurie McKinnon, Montana Supreme Court Justice

1:15 to 3:15 PM Montana's New Marijuana Laws: Policy and Practice*

3:15 to 3:30 PM BREAK

3:30 to 4:30 PM Breaking Down the 2021 Montana Legislature: What Does it Mean for Lawyers? *

5:00 to 6:00 PM President's Reception and Art for Justice benefit silent auction for the Montana Justice Foundation; 50 Year pins to be awarded.

6:00 to 8:30 PM Awards Banquet: Honoring winners of the William J. Jameson Award, George L. Bousliman Award, Frank I. Haswell Award, Karla M. Gray Equal Justice Award, and Neil Haight Pro Bono Award.



FRIDAY, SEPTEMBER 10

7:30 AM Breakfast

8:00 to 8:30 AM **State Bar of Montana Annual Business Meeting**

8:45 AM **Law School Update** Dean Paul Kirgis of Blewett School of Law

9:00 to 9:30 AM **Oral Argument Introduction***

9:30 to 11:00 AM **Montana Supreme Court Oral Argument*** *Wittman v. City of Billings*

11:30 AM to 12:45 PM **View from the Bench: Montana Judicial Panel***

1:00 to 4:00 PM **Specialty Practice Area Tracks of CLE ***

Track 1: Criminal Law Section

Track 2: Family Law Section

Track 3: Construction Law

5:00 to 7:00 PM **Local Bar Reception Sponsored by the Western Montana Bar Association** — Reception will be in the *Washington Grizzly Stadium Club* and is open to all Annual Meeting attendees. The Stadium Club is located on the upper east side of the University of Montana's Washington Grizzly Stadium.

SATURDAY, SEPTEMBER 11

9:00 to 11:00 AM **Saturday morning Bonus: Montana Ethics CLE ***

11:00 AM Wrapup of the 2021 State Bar of Montana Annual Meeting

See you in Helena in 2022!



Parker to receive Jameson Award at Annual Meeting

Billings lawyer Mark Parker has been selected the winner of the State Bar of Montana's 2021 William J. Jameson Award, the bar's highest honor.

Parker, president of the State Bar in 2014-15, is a partner at Parker, Heitz & Cosgrove in Billings. He will be presented with the award at the Awards Banquet at the Bar's Annual Meeting in September.

Meanwhile Kayleigh Morine and David Morine were named the winners of the Bar's George L. Bousliman Professionalism Award. The two, longtime coaches of Helena High's Mock Trial team, were instrumental in starting the Montana High School Mock Trial competition, which kicked off in 2019.

Look for profiles of these and other award winners in the October edition of the Montana Lawyer.

Also honored at the Annual Meeting will be members of this year's class of 50-year lawyers:

Ronald A. Bender, Missoula;
Alexander Blewett III, Great Falls;
Jerry Brooke, Fort Benton; Lon J. Dale, Missoula; Harold V. Dye, Missoula;
Norman H. Grosfield, Helena; Channing J. Hartelius, Great Falls; Peter M. Meloy, Helena; Michael J. Milodragovich, Missoula; Robert J. Sewell, Bigfork;



Mark Parker

Kenneth D. Tolliver, Billings; Thomas J. Lynaugh, Billings; Sam E. Baker, Seattle; Roger A. Barber, Whitefish; C. Ed Laws, Billings; Wilfried Royer, Kalispell; Jeffrey W. Sogard, Polson; Leslie S. Waite, Great Falls; John P. Atkins, Bozeman; Gregory L. Hanson, Philipsburg; Robert M. Knight, Missoula; Barry T. Olson, Great Falls; Nick S. Verwolf, Bellevue, Washington; Robert G. Franks, Lincoln, California; Jack K. Morton, Missoula; J. David Penwell, Bozeman; John L. Pratt, Las Vegas; George Rouff, Yuma, Arizona.

Annual Meeting oral argument

As has become tradition, the Montana Supreme Court will hear a live oral argument at the State Bar of Montana's 2021 Annual Meeting in Missoula.

The case is *Wittman v. City of Billings*, in which the owners of a Billings Heights home sued the city over a sewer backup, claiming inverse condemnation. The district court dismissed, holding that because inverse condemnation requires deliberate affirmative action by the municipality to take the property.

The plaintiffs argue that an inverse condemnation claim in Montana does not require proof of negligence or other tortious conduct by the government – only proof that a public use or improvement, as deliberately designed and built, caused a taking or damaging of private property.

Inverse condemnation differs from direct condemnation in that the plaintiff is a property owner seeking damage compensation from a government or utility, rather than a government suing the owner in order to take the property.

The court will hear the argument on Friday, Sept. 10. An introduction to the case will be presented at 9 a.m. with the argument beginning at 9:30 a.m.



SEPTEMBER 9-11

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BUMBLING *INTO RETIREMENT*

BY BETSY BRANDBORG

Longtime State Bar general counsel Betsy Brandborg, now a beekeeper, sees similarities between the hive and the legal world

I am a beekeeper. I got my first set of bees May 2020, in the earlier days of COVID. What surprised me as I bumbled through the first months was how much bees have in common with lawyers. And as the tumultuous events of 2020 unfolded, and lawyers were surprising me with the vitriol of their attacks on democratic institutions, particularly the attack on the judiciary, I started liking what I saw in the community of bees more than what I saw among some lawyers. And that led me to deciding that I should retire so that I can feel free to speak with my own voice, separate from the Bar. So I am.

This is my own commentary, not that of the State Bar.

Beehives are a democracy. The book “Honeybee Democracy” by Thomas Seeley delves into it in fabulous detail. I hadn’t thought that would be the case, or even knew the book existed, when I entered beekeeping. But as I watched my hive, I saw what they were doing and how they were doing it, and I knew I was seeing a community in action.

Bees depend on each other for the success of the hive, succinctly explained in the book’s summary: “Honeybees make decisions collectively — and democratically. Every year, faced with





Betsy Brandborg shows off one of her hives at her home near Helena. Brandborg, who is winding down a nearly 25-year career with the State Bar, is focusing on her new hobby, beekeeping, in her retirement. (Photos courtesy of Betsy Brandborg)



MONTANA DEFENSE TRIAL LAWYERS

Annual CLE Seminar

November 19, 2021 | 6 CLE credits requested (INCLUDES 1 HOUR ETHICS)

Doubletree by Hilton Missoula Edgewater, Missoula, Montana

A limited block of rooms has been reserved for MDTL program participants. Call 406.542.4611 and ask for the MDTL room block rate.

For full schedule and additional information, visit www.mdtl.net.

Seminar Schedule

8:30 - 10:30 am	Why Law Firms Should Care About Retention and Advancement of Women and Millennial Lawyers Susan Blakely, Esq. - <i>LegalPerspectives LLC</i>
10:45 - 11:45 am	What's Happening in Lawyer Regulation (1 ethics credit) Pamela D. Bucy, Esq. - <i>Chief Discipline Counsel, Office of Disciplinary Counsel for the State of Montana</i> Kelly J. C. Gallinger, Esq. - <i>Brown Law Firm</i>
12 noon - 1:30 pm	MDTL Annual Membership Meeting & Elections <i>Lunch on your own if not attending</i>
1:30-2:30 pm	Montana 2021 Legislative Update Gregory F. Dorrington, Esq. - <i>Crowley Fleck</i>
2:30-3:30	New Technologies in Vehicles and Vehicle Accident Reconstruction Stephen Panoff, P.E. - <i>Mechanical Engineer - S-E-A Limited</i> Paul R. Haffeman, Esq. - <i>Davis, Hatley, Haffeman & Tighe, P.C.</i>
3:45-4:45 pm	Phantom Damages and Cold Beer (Impact of Legislative Efforts to Limit Phantom Damages) *Beer/Wine hosted by Alexander Blewett III School of Law Bradley J. Luck, Esq. - <i>Garlington, Lohn & Robinson</i> Ian McIntosh, Esq. - <i>Crowley Fleck</i>

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the life-or-death problem of choosing and traveling to a new home, honeybees stake everything on a process that includes collective fact-finding, vigorous debate, and consensus building.” When a beehive becomes crowded, the older queen leaves with about half the hive’s occupants — a swarm. The swarm’s scout bees search out potential homesites and return to the swarm to share their findings, performing a dance to show where and how far away their choice of site is. That causes other scouts to check out the reported locations. When they return from scouting, they join the dance for the site they prefer. Eventually the scouts come to consensus and the swarm moves to the location they agree is best. They vote.

When a honeybee stings, it dies. So it is not in her best interest, or in the interest of the hive, to sting. Stinging is saved for when the bee or hive is under attack — like a swatting human, or human or bear stealing the bounty of their labor. Bees also recognize faces. So that makes it easy for me to sit unveiled 2 feet away from a hive with bees swirling and watch. My aha moment on the bee/lawyer connection was when I watched a not-bee bug fly into the door of the hive. Guard bees at each hive’s entrance have the job of keeping not-bees or not-of-that-hive bees out. When the rather large bug flew in, five or six guard bees jumped on it and flew it to the ground. And I thought, Wow, some of those bees must have died saving the colony. But no. The guard bees went back to the entrance and about a minute later, the not-bee climbed to the top of a blade of grass and flew away. The community was protected and deadly force was not required. This is in contrast to the behavior I’ve seen among some members of our lawyer community — especially those who make the litigation about themselves.

So what is it that bee society has that we lawyers seem to have forgotten?

That we lawyers are all in this together.

A bee starts its life cycle as an egg, which upon hatching is fed by the nurse bees until it leaves its cell. Her first job is to clean her cell. Then she cleans the cells around her, then she becomes a nurse bee, a guard bee, a scout, or a forager — often

Brandborg leaves lasting legacy at Bar

Montana Lawyer Staff

Betsy Brandborg has been with the State Bar of Montana since 1996. Officially, her title is Bar Counsel, but it’s safe to say she’s played a critical part in every major function of the bar — and more than once.

For an example of the scope of Brandborg’s impact, look at the Montana Supreme Court’s internal operating rule VI on Judicial Rulemaking. “When I first started, the Court and Bar had rules, but no clear path on how to change them or even how to make them. Dedicated lawyers were petitioning the Court to respond to attorney regulation issues, but it was an ad hoc process. Our responsibilities were spelled out in the 1974 Unification Order but the how of it was left to the Bar to work out.”

She knew the process because before working at the Bar, she was a volunteer with the court’s Character and Fitness Commission. “At that time, there were four separate committees within the admission process. When I got the job, the first order of business was to streamline it — and that entailed a full rewrite of the admissions rules, which have been substantially changed several times since.”

Ask her what she feels had the greatest impact and she’s quick to respond, “Roadshows and the New Lawyers’ Workshop. Both are free, and both demonstrate the best of the Bar in action.” As to what she’s proudest of: “Working with the State Bar’s Ethics Committee to review Montana’s Rules of Professional Conduct. We did a full review twice and developed several unique Montana sets of rules to acknowledge the Montana way.”

While, she’s had a hand in drafting nearly every set of Rules that touch lawyers in their practice, she’s quick to point out that none of it could have happened without countless volunteer hours of lawyers and paralegals.

“We have so many amazing lawyers willing to help. I don’t think I ever had a lawyer, judge or justice turn us down when we asked them to give their time. It was inspiring.”

Brandborg couldn’t have imagined when she was hired by George Bousliman, then the Bar’s executive director, that she would stay at the Bar for nearly a quarter century.

“I told George when I started that I might only stay a few years, but every day and project was so different that I wanted to stay and see how the volunteers would make it better.”

“We had an outdated attorney discipline system, and the Bar leaders were committed to creating a structure that could withstand due process challenges. Bar President Molly Shepherd, I and others spent countless hours on that project. That was a sea change for Montana lawyers in 2002.”

After a series of lawyer suicides, she helped create the Lawyer Assistance Program, staffed by Mike Larson. Working to clean up abandoned law practices is among her saddest responsibilities, but even that resulted in a positive — the creation of a handbook and checklist on closing or retiring a law practice.

“Bar President Martha Sheehy (1997-98) really got the ball rolling on Access to Justice, with pro bono coordinator Judy Williams. There was a need, and the volunteers of the Bar stepped up. The challenge is that there is always more that can be done.”

Continuing Legal Education programs? She can’t count of how many she presented or helped organize. “Those were rough,” she says, “but again, always made better by the volunteers and bar member participation and suggestions.”

Ethics calls? “Thousands. But everyone should know that I’m going to burn the phone logs and have no short-term or long-term memory. So it’s all good.”



MERI ALTHAUSER

Meri Althaus is an attorney of 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.

Why so edgy? Maintaining your sanity when dealing with difficult people

If it seems like these days more people than usual are stressed, hard to get along with, or quick to get petty or selfish, you're not alone. A common stressor that comes in high on the list of attorney stressors is dealing with difficult people. I'm surprised each week with the new things folks devote their mental energy to. Did I really go to law school to help people spend three attorneys' time arguing about meeting at the south versus the north end of the Target parking lot?

Why everyone's edginess? In a 2018 study, scientists tasked participants with sorting "bad things" from "good things" in a few contexts, like finding threatening faces, or unethical job proposals. No matter what ratio of good to bad was presented, participants always settled on a certain percentage of bad things: let's say 30%. So, no matter the landscape, we're potentially hard wired to need things to be 30% bad.¹ What an interesting, non-judgmental and brain-sciencey way to explain why someone, who HAS to find 30% bad in their otherwise great day, will

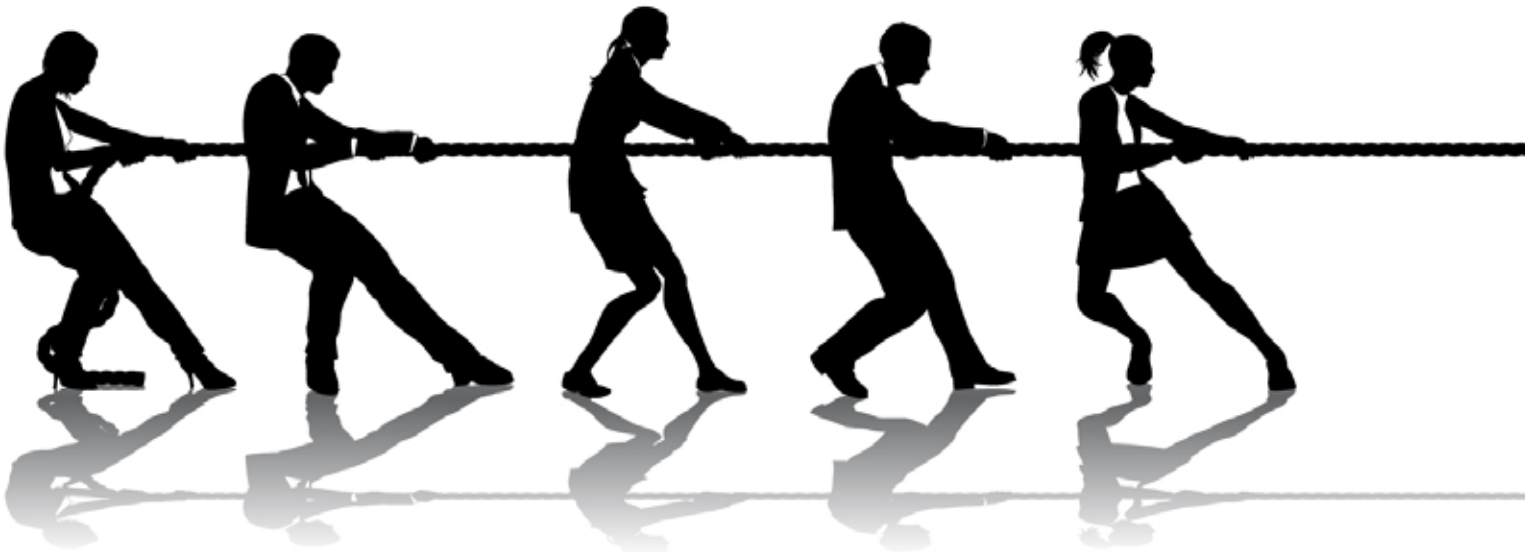
yell at the barista for getting too much ice in their drink!

If remembering this phenomenon is not enough to help remain calm with a difficult person here are a few more tips on how to maintain your sanity while cueing cooperation when people are "difficult."

1. Context Questions. Why is this stressful today? Why is this a bad idea coming from her? Why do you need my help in particular? Context questions may reveal the cause of the anxiety behind the situation. Maybe this is not about the target parking lot and is only a problem because it was a new girlfriend's idea.

2. "How?" How would that work? How would she prove that to you? How would I get the judge to do that? "How" questions put the person making the demands in the shoes of the person tasked with meeting those demands, cuing some empathy and problem solving.

3. "Do you understand?" Maybe you've told someone three times that an option would be too expensive. Rather



Don't forget to take care of yourself after the difficult situation has passed. Make time for exercise, nature, family, or whatever helps you to feel like the stress has been purged.

than repeating the advice, try asking “do you understand how expensive that will be?” This will cue your difficult person to repeat back and digest the advice instead of arguing.

4. “Would it be out of the question?” When an unreasonable demand is made of you, like “please wrap this up by Sunday at 10am,” try “would it be totally unreasonable to try and finish this on Monday?” “Would it be just awful of me to ask that we talk about this at our next meeting, instead?” Nobody wants to be “totally unreasonable” or “awful” so this dramatic reframing may cue them make a reasonable proposal.

5. Deep breaths. When you know how to empathize and de-escalate a difficult person, but it still makes you anxious, take care of yourself by “box breathing” during the conversation. For several breaths, breath in for 5 seconds, hold for 5, out for 5 and hold for 5. Without anyone noticing, this will oxygenate your blood and activate the vagus nerve (your calming, anti-fight-or-flight nerve) so you can continue exercising your de-escalation skills without getting

agitated yourself.

6. Flush the bad vibes. Most importantly, don't forget to take care of yourself after the difficult situation has passed. Make time for exercise, nature, family, or whatever helps you to feel like the stress has been purged. We are not meant to handle a difficult situation then move straight on to the next task. You would never sprint a 5K then directly sit down at your desk to write a brief unless you wanted to be sore the next day and turn in a pretty crappy brief. Just like lactic acid from exercise, stress manifests physically with stress hormones, changes in brain chemicals, and rises in blood pressure that need to be physically flushed out in order for you to feel relief and maintain your physical and mental health. So find an activity that helps to bring a feeling of relief to flush the stress out and be sure to schedule it after your day of problem solving!

1 One of many theories and reasons! From the book “Everything is @#\$\$@#, a book about hope” by Mark Manson.

CHRONIC STRESS PILOT PROJECT

Meri Althaus is developing a pilot project aimed at curing the legal profession in Montana of chronic stress, and she is seeking input from Montana attorneys. Please contact her at meri@forward-legal406.com or 406-325-7100 to participate in an interview or focus group, or to hold a workshop on resiliency for your law firm.





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Planning ahead can minimize problems for solos who face an extended absence

Given how difficult it can be to try to take a planned absence, such as a long vacation or maternity or paternity leave, it's no wonder that having to cope with the consequences of an extended unplanned absence, perhaps due to the sudden onset of a serious health issue, can result in a crisis mode response. In short, an extended absence can be problematic to say the least. The good news is that it needn't be this way. Regardless of the reason behind an extended absence, the accompanying headaches some solos experience can be minimized with a little proactive planning.

The place to start is to find another lawyer willing to act as your backup attorney. If your practice is comprised of several practice areas, you may need to have more than one backup attorney. For some solos, this person may be the same person who has already agreed to assist in the winding up of your practice in the event of your death or disability. Now, understand that a backup attorney's responsibilities during your absence does not include maintaining your practice. A backup attorney is only there to assist any of your clients with an unforeseen legal emergency. Keep this in mind as it may make the process of finding a backup attorney a bit easier.

Beyond just naming a backup attorney there are several other things you might do in terms of proactive planning. Consider providing notice of the existence of and reason for a backup attorney in your fee agreements so that clients are aware that you have taken steps to protect their interests in the event of an emergency. Maintain a Current Office Procedures manual that outlines your calendaring system, conflict system, active file list, open and closed file systems, accounting system, and any other key system. This can help a backup attorney come up to speed as quickly as possible in the event of an emergency. Of utmost importance is always keeping critical systems such as the calendar and conflict systems current and making sure that all files are thoroughly

documented and kept current.

With the above in place, preparing for a planned absence is relatively straight forward. Here are six key things you will need to take care of:

1) All clients will need to be notified as far in advance as possible. This notification should include the name and contact information of your backup attorney and a brief explanation of the limited role of a backup attorney. Think about notifying clients verbally as well as in writing to make sure no one falls through the cracks. This will also give your clients the opportunity to ask questions or express any concerns. Of course, depending upon the nature of your practice, courts and professional contacts such as lenders or realtors may also need to be notified.

2) Prepare a case status summary for each open file. If ever called upon, your backup attorney will be most appreciative.

3) Create a master list of active client names that includes contact information, the type of matter, and where and how each file can be located and accessed. Commit to making sure your calendar is kept current, then let your backup attorney know how to quickly find and access both this list and your calendar. Also make sure you have ready access to both during your absence.

4) Make arrangements for the collection of your mail, acceptance of service, payment of your bills, and the processing of payments received.

5) Decide how and under what circumstances someone can reach you in the event of an emergency and share that information with whoever might need it.

6) Finally, just before leaving, place an out-of-office sign on the door and change your voicemail and email out-of-office messages as called for noting if or when a response can be expected.

Depending upon the circumstances behind an unplanned absence, the time you have to work through these six steps

MORE RISK, PAGE 28



Mark
Bassingthwaighte

Since 1998, Mark Bassingthwaighte, Esq. has been a Risk Manager with ALPS, an attorney's professional liability insurance carrier. In his tenure with the company, Mr. Bassingthwaighte has conducted over 1,200 law firm risk management assessment visits, presented over 400 continuing legal education seminars throughout the United States, and written extensively on risk management, ethics, and technology. He is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School



Court seeks comment in proposed changes to Rules for Lawyer Disciplinary Enforcement

The Montana Supreme Court has opened a 30-day comment period for revisions it is considering to rule 26(A) of the Rules for Lawyer Disciplinary Enforcement.

According to the order in case No. AF 06-0628, the revisions clarify the point at which a tendered admission is no longer confidential and correct a cross reference.

Under the proposed changes, conditional admissions shall remain confidential until:

(a) the Supreme Court issues an order approving or modifying the Adjudicatory Panel's recommendation; or

(b) the Commission on Practice enters an order imposing public discipline as provided in subsection D of the rule.

The order including the proposed changes is posted at www.montanabar.org under "Recent Court Orders."

Comment period on Rules of

The Court has opened a 30-day comment period for proposed revisions to of the Montana Rules of Civil Procedure and the Rules of Appellate Procedure.

According to the order in cases No. AF-07-0157 and AF 07-0016, the proposed changes would remove direction to the court in M.R. Civ.P. Rule 58(e) that is

more appropriately located in the Rules of Appellate Procedure. The proposal also would eliminate administrative difficulties that Rule 58(e) poses by placing premature appeals in a suspended status; and more clearly advise litigating parties as to the disposition of appeals that are prematurely filed in the Supreme Court.

The orders for the two comment periods including the proposed changes are posted at www.montanabar.org under "Recent Court Orders."

Comments in both cases can be filed with the Supreme Court by Friday, Sept. 3.

EDUCATION FROM PAGE 4

of a free society. Supporting the High School Mock Trial Competition is still a big part of fulfilling this goal, but it also includes educating a wider swath of students, as well as the public at large, on these fundamental principles, including the role of the Constitution, separation of powers principles, and the importance of a fair and independent judiciary.

To enhance this effort, SBM will be reaching out to local bar associations

around the state, as well as other educational and nonprofit organizations engaged in public education. We also actively seek out and welcome your input and expertise. I cannot tell you how many members who have participated in the High School Mock Trial Program have commented on how rewarding it is to share their knowledge and understanding of the legal system with others.

As Justice Sandra Day O'Connor stated, "[i]t's just critical that if we are going to survive as a nation, that all our citizens know and understand the fundamental beliefs that caused the

formation of this country and stand at the bottom, the bedrock foundation, for the things in which we most strongly believe." To this end, in the not-so-distant future, look for SBM and its partners in your community — either in person or virtually — fulfilling its mission to serve the public and their attorneys through education about our legal system that underpins those fundamental democratic beliefs.

Kate McGrath Ellis is an attorney with the Montana Auditor's Office. Her term as State Bar of Montana president runs through September 2021.

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may be far shorter; but they remain the key items you should try to accomplish. Of course, it's the possibility of having no one available to assist you with your practice if you ever have to take an extended unplanned absence that underscores the importance of naming a backup attorney long before his or her services might be needed.

If you happen to be a solo lawyer who has employed one or more staff, things should be a bit easier because someone familiar with your practice would be available to handle the day-to-day administrative functions of your practice during your absence. This person would also be

able to assist your backup attorney, as necessary. Here, the proactive planning piece includes identifying the person you wish to have in charge during your absence, putting together a list of instructions for this individual, and introducing this individual to your backup attorney in order to establish a baseline working relationship. In addition, make certain all staff are on message with what clients are to be told about your absence and make arrangements to assure staff continue to receive regular paychecks.

Even if you have no staff, you might consider temporarily hiring a staff person, if the circumstances surrounding your absence allow for it. Yes, a step like this will take some advance planning and require time for any necessary training;

but it is doable, particularly if you previously took the time to develop and maintain an office procedures manual as recommended above.

In conclusion, I will readily admit that many solos do have long and successful careers without ever needing the help of a backup attorney. And I can appreciate that following through on some of the initial proactive planning steps may take some time; but I encourage you to not let either truth be what prevents you from committing to doing so. As I see it, it's all about making it possible to take care of you and your support systems by way of a planned absence and your practice and clients if you are ever forced to deal with an unplanned absence. That's one heck of a good reason if you ask me.

BUMBLING

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all of these, over time.

Some thriving beehives are decades old. The products of the hive last millennia — viable honey was found in the pyramids. In the law community, laws made by our predecessors are what we follow or work to change. Societal adjustment is not unique to our species. Honeybees came to the U.S. with the colonists in the 1600's, so they are not native to this land, but they've adapted and because they thrived, we benefited. The fruits of our labors, the output of our creative work is not just us. We have a responsibility to act for the future generations. If we act for the benefit of generations ahead, the impact of our actions will be valued, even if our names are not remembered.

How do I see lawyers, law and society in this? Lawyers are the guard bees. Lawyers are autonomous supporters of our democratic republic. We have a level of autonomy in our structure of separated powers that allows us to challenge the system, when required, without the system coming back at us, unless we break our laws.

Lawyers resolve matters, sometimes collaboratively, sometimes not. Lawyers do not need to sting to resolve a challenge. We believe what we do is in the best interest of a system, generally. The rule of law: problem solving using words, not weapons.

So, here is another story about bees that I've found relevant. A mentor and I collected a wild hive in a blown-down tree behind our house this last winter. We brought the bees to our apiary, and they recovered nicely because we had the queen. When I checked the hive on July 1, all was well. When we returned from a quick trip on July 5, they had absconded. What had I done wrong? Nothing, according to my mentor. "Some bees don't like to live in boxes."

Lawyers don't like being boxed in either. But this may be contributing to a malady of loneliness in the bar and in our society. Some people are more like wasps than bees. Wasps don't die when they sting. They attack. It's personal. At the State Bar, we have created programs to try to address some of these issues

— to strengthen the community, build collegiality and relationships. But one of the things I've come to realize is that we can create all the programs in the world, but we can't always fix what ails people. Some people's exoskeletons are too tough and their anger is too deep. Their anger is not specifically about you or me. Their perception of victimization controls their realities. For example, some staggeringly misinformed citizens and lawyers participated in a Jan. 6 insurrection. Other lawyers created litigation challenging the 2020 election results with spectacularly poor results. Our society is at a tumultuous crossroads. I believe we have a strong foundation and our society can thrive — if the lawyers engage as they pledged to do when they became lawyers. The actions we collectively and individually take and our leadership on the critical issues we face will help determine what our state and country will look like for future generations. Our unique Montana language in paragraph 14 of the Montana Rules of Professional Conduct is particularly relevant in this time:

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. All lawyers understand that, as officers of the court, they have a duty to be truthful, which engenders trust in both the profession and the rule of law. The Rules of Professional Conduct, when properly applied, serve to define that relationship. Trust in the integrity of the system and those who operate it is a basic necessity of the rule of law; accordingly truthfulness must be the hallmark of the legal profession, and the stock-in-trade of all lawyers.

Maybe not ALL lawyers understand, but they should. Which is why we are given the constitutional authority to self-regulate and we are specifically empowered to call each other out. Per paragraph 13 of the Preamble, "Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves."

With law and beekeeping there is always more to know, another layer of

research. Mentors are critical and allow us to learn wisdom from those who have more experience. There are many generous mentors in the beekeeping world, as there are in the lawyer world. We never stop learning the hard way, but we can avoid some of the hard knocks by seeking the wisdom and experience of others. I have been the grateful beneficiary of so many good people — lawyers and beekeepers — and all I needed to do is be willing to ask.

These COVID times have given many of us time to reflect on what we can learn from this pandemic and what is important moving forward. I am already working part time, trying to keep my hours to 10 per week for the bar. That isn't working so well, but I'm OK with it. Another point I've reflected on is that it is important to pay attention to all aspects of your health: mental, spiritual and emotional. No one else can do this for us. We are not going to be able to provide our best for others if we are not honest about needing to take care of ourselves as well. And the other point is that it is perfectly OK not to expect myself to be doing two or three or more things competently at the same time. This is new for me. I worked while raising children. This meant that my life nearly always felt that for two steps forward I was sliding three or more steps back. That's not the case these days. And I am looking forward to more days when I can take two steps forward and stay there. It's a nice feeling.

The bees remind me that there is a time for new workers in the hive. And that this can be a benefit, not a loss. This is my time to move on and create opportunity for the next generation of lawyers who have vision and leadership for creating a more just society that works for the benefit of all.

I am still figuring out retirement. I will continue to volunteer for the bar, answering questions and helping when asked. We have an enthusiastic, intelligent and engaged Board; a solid executive director and competent staff, so I have peace of mind as I buzz away.

I want to thank each and every bar member with whom I've worked for your trust in me, in the organization and for this opportunity to serve. It has been my sincere pleasure. Thank you.

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ATTORNEY POSITIONS

Medical Legal Partnership Attorney:

Montana Legal Services Association is looking for a Staff Attorney to be based in MLSA's Helena office, serving clients through the Montana Health Justice Partnership. This attorney works with healthcare teams at Community Health centers across Montana to screen for health-harming legal needs. The pay range we're offering is \$55,000 to \$65,000, depending on experience. Apply to hring@mtlsa.org.

Associate Attorney: Boone Karlberg P.C., an established AV-rated Missoula law firm, is seeking an articulate and ambitious associate attorney to join our litigation team. The position involves working alongside our experienced attorneys to represent the firm's clients in civil litigation matters in both state and federal courts. Qualified candidates must have outstanding analytical and writing skills, a strong work ethic, and dedication to exceptional client service. Candidates must possess knowledge of Montana law and be admitted to practice in Montana by September 2021. All interested candidates must send a resume, cover letter, writing sample, undergraduate/law school transcripts, and references, to Anna-Maria Murray at ammurray@boonekarlberg.com.

Deputy City Attorney/Prosecutor:

Under the direction of the City Attorney, investigate, prepare and prosecute misdemeanor criminal cases and assist the City Attorney in the full range of legal services related to municipal government operations, including preparation of legal documents, giving advice to City elected officials, departments, staff, boards and commissions, and representing the City before courts, administrative agencies and boards, and arbitrators.

Deputy City Attorney (Criminal)

The City of Billings City Attorney's Office is seeking a Deputy City Attorney who will perform a variety of professional duties and a full range of legal services related to municipal criminal prosecution. The successful applicant will prepare and prosecute misdemeanor criminal cases in Municipal Court and represent the City of Billings in criminal proceedings before all other courts, administrative agencies and boards as assigned. Submit city of Billings application, cover letter, resume and three writing samples online at www.billingsmt.gov or to City

of Billings, Human Resources, 210 N. 27th Street, Billings, MT 59101.

Prosecuting Attorney: Yellowstone County Attorney's Office is seeking a Senior Deputy (\$68,054.83 to 102,082.24 DOQ) or a Deputy County Attorney (**County Attorney bargaining unit currently under collective bargaining negotiations. Starting salary is anticipated to increase. Currently-\$64,000) + longevity and benefits. Duties include routine to complex criminal prosecution. Senior Deputies may act as lead counsel on major felony prosecutions. Related duties as required. See www.co.yellowstone.mt.gov/human_resources/ for application requirements.

Estate/Probate: Doney Crowley P.C. seeks an experienced estate and probate attorney to join our team in either our Helena or Red Lodge office to work with our established clientele. The ideal candidate will enjoy a team atmosphere, and have at least 3 years of experience in complex estate planning and probate matters. Experience and an interest in business or property transactional matters also a plus. Alternately, the firm would consider lateral transfers or attorneys seeking senior or of counsel positions. Salary DOE, with generous benefit package including health insurance, 401K, opportunities for a flexible schedule, and more. Interested individuals should send a cover letter and resume to: ATTN Sara Carpenter, Firm Administrator; Doney Crowley P.C.; PO Box 1185, Helena, MT 59624; scarpenter@doneylaw.com

Litigation Associate: Gordon Rees Scully Mansukhani, a national law firm with offices in all 50 states, has an immediate opening for an Associate to work in our growing Missoula, Montana office. The ideal candidate will have two - four years of general defense litigation experience, and experience in commercial, professional liability, and/or employment litigation is preferred. Asbestos defense and appellate experience are a plus. The candidate must be licensed to practice law in Montana. Apply by email to nhuey@grsm.com with "Missoula Associate" in the subject line.

Managing Attorney: Earthjustice seeks an attorney to lead and oversee the work of its Northern Rockies Office, providing leadership for a team currently comprised of eight staff members. The Managing Attorney manages, develops, and implements

regional strategies that align with organization-wide strategic plans and programmatic and litigation priorities. They also drive efforts to build and maintain effective working relationships with clients and partners, as well as with the news media, government officials, and donors. The Managing Attorney will be based in Bozeman, and report to a Vice President of Litigation based in San Francisco. Submit resume and expression of interest to: Chris Spagnola at cspagnola@thinkingahead.com and Jessica Martinez at jmartinez@thinkingahead.com.

Land Use Attorney: The Montana Association of Counties (MACo) is seeking a Land Use Attorney. This position provides advice, consultation, and training to counties and special districts on a wide range of civil legal matters and land use issues, in an effort to reduce exposure to potential legal action. This position also provides general legal assistance for the Executive staff of MACo and the risk sharing pool trustees of the health care, property and liability, and workers compensation trusts. This position has extensive contacts with MACo and Trust members, MACo staff, County Attorneys, County Elected Officials, and state officials. Apply to mmccarthy@mtcounties.org.

Corporate Attorney: PARSONS BEHLE & LATIMER is a regional law firm that has a national expertise in numerous practice areas. The Firm is committed to maintaining its traditional strengths, values and client service while remaining at the forefront of the legal community in Utah, Nevada, Idaho and the Intermountain Region. The firm's Boise, ID and Missoula, MT offices have an immediate opening for a transactional Of Counsel or Associate attorney. Requirements are: 2 - 7+ years corporate/real estate/transactional experience; excellent written, verbal, and interpersonal skills. member in good standing of a State Bar and be able to become a member of the Idaho Bar within a ten month period. Apply to DKoski@parsonsbehle.com.

Associate Attorney: Busy Billings civil defense firm looking for motivated associate attorney candidates to join our Billings office. 2021 graduates, judicial law clerks, and experienced associate attorneys are invited to apply. We provide an excellent starting salary, four weeks of paid annual leave, exceptional legal staff support, paid

health insurance, 401(k) with employer match, a lucrative associate incentive program, and exposure to a broad range of civil and insurance litigation. Candidates must possess exemplary analytical, research and writing skills, the ability to follow instruction and independently manage time, and a willingness to swiftly progress to independent handling of cases. Must be licensed in Montana, or sitting for the July 2021 Montana Bar Exam. If you are interested in joining our firm, please send a resume, cover letter, current writing sample, and a law school transcript to tmahlen AT hglaw DOT net. Applications are confidential. Apply to tmahlen@hglaw.net.

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Tax Associate Crowley Fleck PLLP seeks a full-time associate to join our Tax, Trusts & Estates Practice Group in our Billings, MT office. Candidate Criteria: Successful applicant must have a J.D., strong academic record, and license or willingness to become licensed in Montana. Strong background in accounting, finance, business and/or LLM in Tax preferred, but not required. Competitive salary and benefits for region. All applications will be held in confidence. Please send resume, cover letter, law school transcripts, and writing sample to Tiffani Swenson at tswenson@crowleyfleck.com

Associate: Crowley Fleck PLLP seeks a full-time associate to join our Bozeman, MT office. Candidate Criteria: Successful applicants should have 3 – 5 years of legal experience. Applicants must have a good standing reputation in the legal community and be licensed or willing to be licensed in Montana. Competitive salary and benefits for region. All applications will be held in confidence. Please send cover letter, resume, law school transcripts, and writing sample to Tiffani Swenson at tswenson@crowleyfleck.com

Intake Attorney: Located in Billings, Montana or Helena, Montana Crowley Fleck PLLP seeks a part-time Intake Attorney to work with the firm's General Counsel team and Intake Department. Candidate Criteria: Successful applicants must have a J.D., a strong academic record, and license or willingness to license in Montana. Applicants must have a good standing reputation in the legal community. Competitive salary and benefits for region. All applications will be held in confidence. Please send resume, cover letter, law school

transcripts, and writing sample to Tiffani Swenson at tswenson@crowleyfleck.com

Litigation Associate, 2-4 years:

Located in Billings, Montana. Crowley Fleck PLLP seeks a full-time associate with 2-4 years of experience to join our Litigation Practice Group in our Billings, MT office. Candidate Criteria: Successful applicants must have a J.D., a strong academic record, and license or willingness to license in Montana. Deposition and hearing experience preferred. Competitive salary and benefits for region. All applications will be held in confidence. Please send resume, cover letter, law school transcripts, and writing sample to Tiffani Swenson at tswenson@crowleyfleck.com

Litigation Associate, 0-2 years:

Located in Billings, Montana Crowley Fleck PLLP seeks a full-time associate with 0-2 years of experience to join our Litigation Practice Group in our Billings, MT office. Candidate Criteria: Successful applicants must have a J.D., a strong academic record, and license or willingness to license in Montana. Competitive salary and benefits for region. All applications will be held in confidence. Please send resume, cover letter, law school transcripts, and writing sample to Tiffani Swenson at tswenson@crowleyfleck.com

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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@dpcmt.com. www.dpcmt.com. 406-899-0522.

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