MONTANA LAWYER
DECEMBER/JANUARY 2020/2021

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Preparation and practice — and lots of it —are crucial for having an effective oral argument

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VOL. 46 ISS. 2

IN THIS ISSUE

NEW THIS ISSUE

New comic debuts. "Jest Is for All," a comic strip by Massachusetts based lawyer Arnie Glick, debuts in this issue of the Montana Lawyer.
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Preparation and practice are crucial to having an effective oral argument. Second in a two-part series by Matthew Cochenour and Stuart Segrest on appellate advocacy.

1099 FORMS IMPORTANT FOR LAWYERS & CLIENTS

These forms for reporting various types of incomes are among the most important tax documents and should not be taken lightly.

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LAW FIRM ACCOUNTING

If you were stressing about the books instead of enjoying the holidays this year, check out these tips.

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After a trying 2020, we look to a stronger future

Well, what a year.

As we end 2020 and turn the calendar, we close the books on a historic and trying year for all of us, particularly for those most closely impacted by the COVID-19 pandemic. So many of our fellow citizens have been affected and too many have lost someone close to them. Our deep condolences go out to each family, including those in our bar, who have lost loved ones.

The ongoing global pandemic has changed much of how business is conducted the world over. It also has challenged the legal profession. We are proud of the way our fellow attorneys, paralegals, judges and support staff have responded to the crisis, remaining steadfast to the promise of equal justice under the law by maintaining court operations and ensuring that the third branch of our government continues to function.

In fact, everywhere we turn, we see innovation and new thinking that we hope will have a positive and lasting impact in the legal sector. In a large state like Montana, the opportunity for remote delivery of legal services has never been stronger and offers real promise to help bridge the continuing access to justice gap for too many of our fellow Montanans. The traditional norms that have governed law offices have been replaced with more flexible work environments that, perhaps, hold promise for better attorney well-being.

At the State Bar of Montana, we have continued to adapt, both by making changes internally for the health of our staff and externally to deliver more programming and continuing legal education remotely. In fact, since the pandemic forced a change in operations in March 2020, we've hosted over 5,000 of you for our remote CLEs and programs. In 2021 we will continue to offer remote options and we will make additional changes to our online presence to meet the increased demand for nontraditional engagement and participation.

Through diligence and creativity, the finances of the State Bar of Montana also remain strong and the organization is financially healthy. We consider ourselves fortunate in these difficult times.

At the end of the day, perhaps most importantly, 2020 reminded us of the importance of family and friends, and that we are all stronger when we pull together. It also reminded both of us that we are very fortunate to work for an outstanding membership of women and men committed to our clients, to our profession and to each other.

So, here's to the next chapter. We wish you and yours a healthy, happy and prosperous 2021.

Kate McGrath Ellis, President.

John Mudd, Executive Director.

Kate McGrath Ellis is an attorney with the Montana Auditor's office

John Mudd is the executive director of the State Bar of Montana

MONTANA LAWYER

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MOULTONBELLINGHAM PC

ATTORNEYS

Continuing our tradition of superior legal representation, we are pleased to welcome our two newest associates, Bobbi Owen and Ryan Warner.

Bobbi is a Montana native, growing up on a cattle ranch in Carter County and attending high school in Broadus. After high school, she enrolled at Carroll College, where she graduated *summa cum laude* in 2015 with a B.A. in political science. In 2018, she obtained her J.D. from the University of Wyoming College of Law, graduating with honors and *Order of the Coif*. While in law school, Bobbi served on the staff of the Wyoming Law Review, worked as a legal writing teaching assistant, and participated in UW's Energy, Environmental, and Natural Resources Law Clinic.

Following law school, Bobbi clerked for the Hon. Nancy D. Freudenthal in the United States District Court for the District of Wyoming for a one-year term. Thereafter, she worked as an Assistant Attorney General in the Wyoming Attorney General's Office before joining Moulton Bellingham in the fall of 2020.

Ryan was born in Great Falls and raised near Sun River, Montana, where he graduated from Fairfield High School. He attended the University of Montana where he graduated in 2013 with a Bachelor of Arts degree in Political Science. After earning his undergraduate degree, Ryan joined the Montana Army National Guard where he serves as an Ordnance Officer.

Ryan later attended the Alexander Blewett III School of Law at the University of Montana where he earned his Juris Doctor degree in 2020. While in law school, Ryan interned at the Yellowstone County Attorney's Office and the U.S. Attorney's Office in Billings.

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3 new attorneys join MLSA

Montana Legal Services Association recently announced it has hired three new attorneys.

Alexandra House joined MLSA as a domestic violence attorney. House received her J.D. from Tulane University School of Law where she also received a certificate in International and Comparative Law. While at Tulane, she worked with the Criminal Justice Clinic where she advocated for clients at various stages of the justice system. She also interned with the Innocence Project, the Bozeman Office of the Public Defender, and Hogan Lovells in Paris. She received her undergraduate degree from the Wharton School of the University of Pennsylvania.

Bridgitt Erickson graduated from Creighton University Law School in Omaha, Nebraska, and then served as an assistant state prosecutor in Omaha before being appointed Platte County Attorney in Nebraska. Erickson continued in government practice with Montana state agencies until 2014 when she was named to the Federal Register of Administrative Law Judges and narrowed her practice to administrative law. She serves as MLSA's public benefits attorney focusing on social security, disability, and Medicaid/Medicare issues.

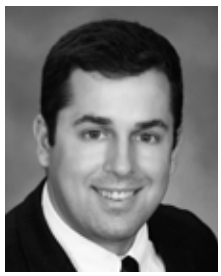
Jacob Johnson joined MLSA as an EJW Elder Justice Fellow, with a focus on providing legal advice and representation to elder victims of crime, fraud, and abuse. He received his J.D. from Indiana University - Bloomington's Maurer School of Law in 2011. Prior to joining MLSA, he worked as an appellate public defender, administrative law judge, and as law clerk for the Honorable James Reynolds in the 1st Judicial District in Helena.

Brown Law Firm welcomes Burke, Ames as associates

The Brown Law Firm, P.C., with offices in Billings and Missoula, welcomes **Nathan Burke** as an associate in the Billings office and **Alex Ames** as an associate in the Missoula office.

Burke grew up in Missoula and graduated from Montana Tech in 2016 with a Bachelor of Science in environmental engineering. He attended the University of Montana's Blewett School of Law where he earned his Juris Doctorate in May 2019. While attending law school, he wrote for and served as an editor for the Public Lands and Resources Law Review. He also competed in National Environmental Moot Court and served as a board member for both the Outdoor Recreation Law Group and the student chapter of the Montana Trial Lawyers Association. Burke is licensed to practice law in both the state and federal courts of Montana. His areas of practice include insurance coverage and civil defense litigation. In his spare time, Nathan enjoys hiking and skiing, growing indoor plants, and reading.

Burke



Ames

Ames grew up in Rapid City, South Dakota, and received his bachelor's degree from Montana State University in 2015 where he graduated with honors. He earned his Juris Doctorate from the Blewett School of Law in May 2020, with a certificate in Federal Indian Law. He interned with the Brown Law Firm during his third year of law school. Ames is admitted to practice law in both the state and federal courts of Montana. His practice focuses on civil defense litigation. In his spare time, Alex enjoys all of the wonderful outdoor opportunities Montana has to offer. He is an avid fly fisherman, backpacker, hunter, and skier, and is a member of the Westslope Chapter of Trout Unlimited and Backcountry Hunters and Anglers.

Boone Karlberg welcomes associates Casey, Stursberg

Boone Karlberg P.C. has announced two new associates of the firm, William T. Casey III and Rebecca R. Stursberg.

William T. Casey III was born and raised in Kennesaw, Georgia. He earned an undergraduate degree from the University of South Carolina, where he was a member of the 2011 National Championship baseball team. Will attended law school at the University of Montana, graduating with honors in 2019. During law school, he was a member of the National Trial Competition Team and the recipient of the International Academy of Trial Lawyers Award for Distinguished Achievement in Trial Advocacy. After law school, Will clerked for Judge Sam E. Haddon, United States District Court for the District of Montana. Will is an avid outdoorsman and spends his free time fly fishing, hunting, and skiing.

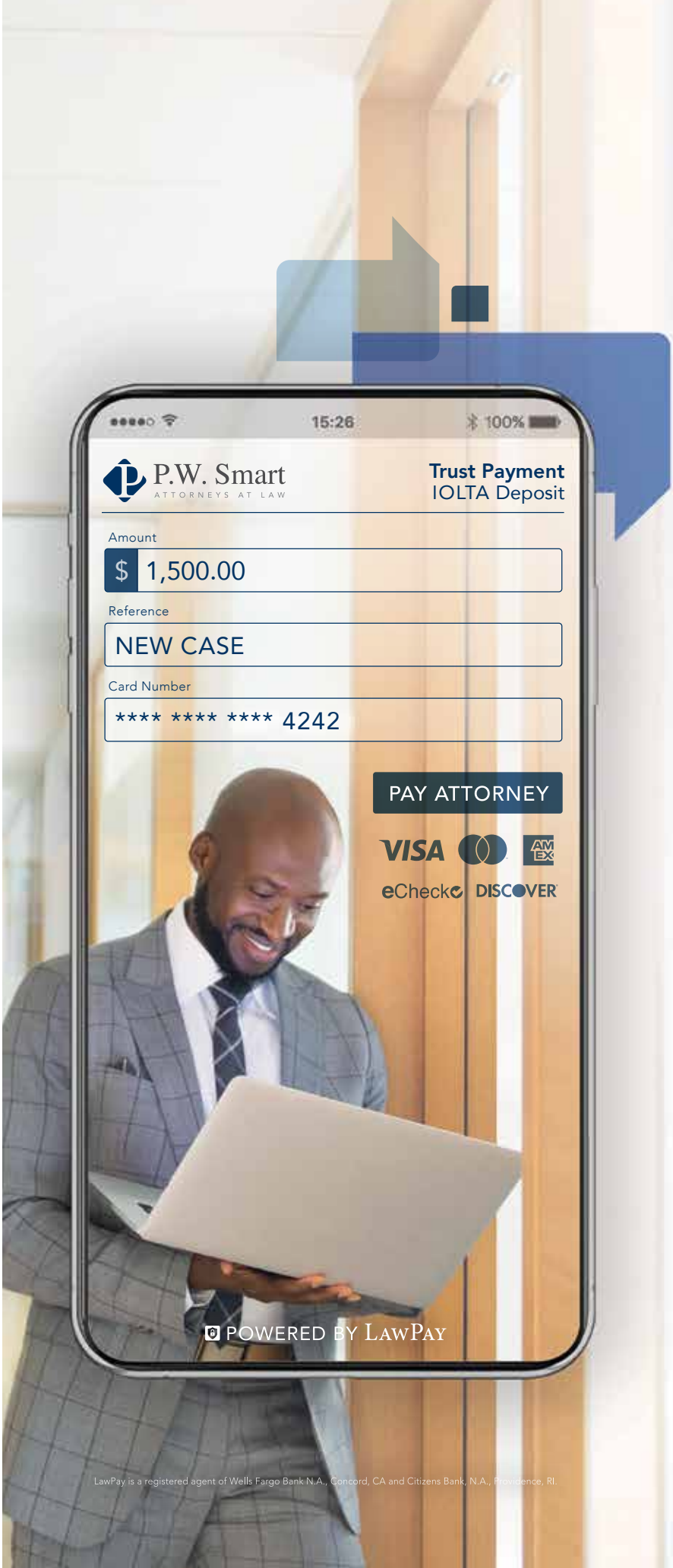
Casey

Stursberg

Rebecca L. Stursberg was born and raised in New York City. She attended college at the University of Michigan, where she earned a B.A. in English literature in 2010. Following a cross-country road trip, Rebecca ended up in Missoula, fell in love with the community and life in the Rocky Mountain west, and decided to stay. She attended the University of Montana School of Law, where she worked as an editor on the Montana Law Review, a teaching assistant, and a research assistant. After graduating with honors in 2019, Rebecca clerked for Justice Beth Baker of the Montana Supreme Court. In her free time, Rebecca enjoys hiking, skiing, biking, and cooking with her family and friends.

Sorena Joins Stacey & Funyak as litigation associate

Billings-based firm Stacey & Funyak is proud to welcome Morgan M. Sorena to the firm as a litigation associate where she will continue her career focusing on the trial practice of civil litigated matters on behalf of both plaintiffs and defendants. Sorena has represented a wide range of clients including disputes involving personal injury, products liability, insurance disputes, employment related matters, securities litigation, construction defect claims, medical malpractice, and class actions.



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After graduating from Billings West High School, Sorena graduated from the University of San Diego cum laude in 2013 with a degree in International Relations and International Business. She then graduated from the University of Notre Dame Law School cum laude in May of 2016 where she was selected to the Journal of Law Ethics and Public Policy and became a published author. She also was selected to serve on the Moot Court Team for the 7th Circuit Court of Appeals where she wrote, filed and argued a matter before the 7th Circuit. While in law school, Morgan interned for the Honorable Roger Benitez for the Southern District of California as well as the California Attorney General's Office.

Sorena

After graduation, Sorena returned to San Diego where she passed the California Bar and worked at the law firm of Neil Dymott handling primarily medical malpractice litigation. She then accepted a job with the international law firm of Duane Morris LLP working in their litigation department in San Diego. Knowing that she would return to Montana to practice law in 2018, Morgan passed the Montana Bar and eventually left San Diego and began practicing law in Connecticut and New York. Before moving back to Montana, she was an associate at Klafter Olsen & Lesser LLP, a plaintiffs' firm handling significant class action and personal injury litigation throughout the United States including working on the class action filed as a result of the Flint, Michigan, water crisis which recently was publicly reported as involving a $600 million settlement with the State of Michigan.

Sorena's husband, Matthew, is a music therapist and they along with their dogs, Moose and Mud are very happy to be back in Montana.

Bridger Law welcomes Alvey as its newest attorney

Bridger Law is pleased to introduce its newest attorney, **Jackson Alvey**.

Alvey's practice includes civil litigation, bankruptcy, family law and business advisement. He works with businesses and individuals seeking to protect their rights, and he endeavors to find the best solutions for his clients.

Alvey

During law school, Alvey worked as a law clerk for a bankruptcy law firm and also worked as an extern for the Utah Bankruptcy Court. Prior to law school, Jackson learned the value of hard work through jobs in landscaping, construction, and building maintenance.

Alvey is a 2019 graduate of the University of Utah's S.J. Quinney College of Law and a 2016 graduate of Brigham Young University. When not working, he enjoys backpacking, running, and reading about western U.S. history.

Alvey is fluent in Spanish and specializes in legal translation.

Uda Law Firm welcomes Williams, Chandler

Uda Law Firm, P.C. in Helena has announced the addition of two associates to the firm, **Colson R. Williams** and **Lowell Chandler**.

Williams joins the firm after practicing as a Deputy District Attorney in Umatilla County, Oregon. In 2018, Williams graduated from the University of Richmond School of Law in Richmond, Virginia. While in law school, Williams gained valuable experience interning for the Appalachian Trail Conservancy and Capital Region Land Conservancy. Additionally, he served as Vice President of the law school's Environmental Law Society. Prior to law school, Williams received his Bachelor of Science in Business Administration in Economics from Oklahoma State University in Stillwater, Oklahoma, in 2015. Williams's practice will focus on renewable energy law.

Williams

Chandler

Chandler joins the firm after serving as a law clerk to the Honorable Chief Justice Mike McGrath of the Montana Supreme Court. Chandler graduated with honors from the University of Montana School of Law in 2019. He also received certificates in Environmental Natural Resources Law and Natural Resource Conflict Resolution. While in law school, he served as the Publication Editor of the Public Land & Resources Law Review and twice competed in the National Environmental Law Moot Court Competition. Chandler is proud to be a "double Griz," having received his Bachelor of Science in Geography with honors from the University of Montana in 2012. Chandler's practice will focus on renewable energy law.

Rasmusson opens civil plaintiffs practice in Missoula

Eric Rasmusson opened Rasmusson Law Offices in Missoula in January 2020, where he represents injured and disabled people in workers compensation, personal injury, Social Security disability, wrongful death, and medical malpractice cases.

Rasmusson grew up in Helena and began higher education at Montana State University in the early 1980s. Wanderlust led him to take a few years away from college before "gap" years were a thing. In Scottsdale, Arizona, he worked at a law firm and attended paralegal school in Phoenix at night. He finished his undergraduate work at the University of Montana and earned his J.D. at the UM School of Law in 1992.

Rasmusson

After law school, he operated his own general practice law firm for several years before joining a Missoula law firm where his focus was on representing plaintiffs in civil disputes.

You can reach him at 401 N. Washington St, Missoula MT 59802, 406-721-2729, and Eric@Rasmussonlaw.com.

Scrimm retiring as Labor & Industry chief administrative judge

David Scrimm, the Department of Labor & Industry's Chief Administrative Law Judge for the past 15 years, is retiring from state government on Dec. 31.

During his tenure, the Office of Administrative Hearings handled 15,000 unemployment insurance cases and 2,400 cases involving collective bargaining, discrimination, wage and hour, and professional licensing issues. Scrimm personally presided over almost 900 of those cases, many of which were cases of first impression, involving complex regulatory issues. Under his guidance, OAH has been recognized as one of the best unemployment insurance appeals programs in the country garnering several national awards.

Scrimm

"The work has always been challenging and I've been blessed to work with a lot of great people who I will deeply miss." Scrimm said.

Prior to joining DLI in 2005, Scrimm was an assistant attorney general for the Montana Department of Justice and the Department of Environmental Quality. He is a graduate of the University of Montana School of Law and holds a bachelor's degree in Earth Sciences from Montana State University

"I'm going to get to spend more time with my wife, Lainey, learn how to catch a few more fish and explore other professional opportunities" he said.

HAVE NEWS TO SHARE?

The Montana Lawyer welcomes news about Montana legal professionals including new jobs, honors, and publications. Send member submissions to editor@montanabar.org. Photos should be at least 200 ppi by two inches wide for head and shoulders shots. Email or call 406-447-2200 with questions.

Abbott, Levine appointed to judicial positions in 1st, 3rd Judicial Districts

Helena lawyer Chris Abbott was appointed in November to an open First Judicial District judge seat.

Abbott replaces the Honorable James P. Reynolds, who retired effective Oct. 2. He is an assistant attorney general with the Montana Department of Justice, Agency Legal Services Bureau, where he has worked since 2017. Before that, he was an attorney with the Office of the State Public Defender for 10 years.

Abbott was OPD's Public Defender of the Year in 2009, and he received OPD's Peer Recognition Award in 2012, Outstanding Criminal Advocate award in 2013.

Abbott is a 2006 graduate of the University of Washington School of Law, where he was named to the Order of the Coif.

Abbott is subject to Senate confirmation during the 2021 legislative session. If confirmed, he will serve for the remainder of Judge Reynolds' term, which expires in January 2023.

The annual salary for the position is $136,896

Great Falls lawyer Michele Reinhart Levine has been appointed to an open Eighth Judicial District judge seat.

She replaced the Honorable Gregory G. Pinski, who retired effective Oct. 2.

Abbott

Levine

Levine, a 2012 graduate of the University of Montana's Blewett School of Law, is a partner at the Great Falls firm Linnell, Newhall, Martin & Schulke, where she has worked since 2012, mostly in workers' compensation and personal injury cases. She also has criminal law experience from an internship with the Missoula County Attorney's Office, and environmental law experience as a legal clinic student with the Montana Department of Environmental Quality.

Before law school, Levine served three terms in the Montana House of Representatives representing Missoula. She received her bachelor's degree from Carroll College in Helena in 2002 and a master's degree from the University of Montana in 2006.

The Eighth Judicial District covers Cascade County.

Lawyer disciplinary system changes adopted

The Montana Supreme Court has adopted numerous changes to the Montana Rules for Lawyer Disciplinary Enforcement.

In all, the changes affect 23 of the 35 rules in the MRLDE. Many of the amendments reflect changes in terminology or clarification of language, but there are also several substantive changes.

One significant is the reintroduction of the concept of private admonitions for minor infractions of ethical rules where recurrence is not likely and there has been little or no harm to the client, the public or the profession. Under the proposed change, a request for a private admonition must be initiated by the ODC and must be approved by a Review Panel, which will deliver the private admonition if approved.

The Commission on Practice, in collaboration with the Office of Disciplinary Counsel and other stakeholders, petitioned the court for the changes in May 2020, and the court adopted them after seeking comment from bar members.

The MRLDE has been amended several times since the ODC's creation in 2002. In its petition, the commission said it believed the new changes for further refinement and clarification of the process were appropriate and in the best interests of the court, the lawyer discipline system, and the stakeholders in the Montana legal system.

The changes were to take effect Jan. 1, 2021.

The original petition including the proposed changes, as well as the new MRLDE, are posted at www.montanabar.org under "Recent Court Orders."

APPOINTMENTS

The Montana Supreme Court has announced the following appointments to court boards, commissions and committees:

SENTENCE REVIEW DIVISION: The court reappointed the Honorable Dan Wilson of the 11th Judicial District to a three-year term on the Sentence Review Division. Wilson's term will run through Dec. 31, 2023.

DISTRICT COURT COUNCIL: The Montana Judges Association has elected 10th Judicial District Judge Jon Oldenburg and 11th Judicial District Judge Amy Eddy to three-year terms on the District Court Council. Judge Eddy replaces former 18th Judicial District Judge Holly Brown, whose term on the council ended in June 2020. Judge Oldenburg was re-elected to his seat on the council. Their terms end June 30, 2023.

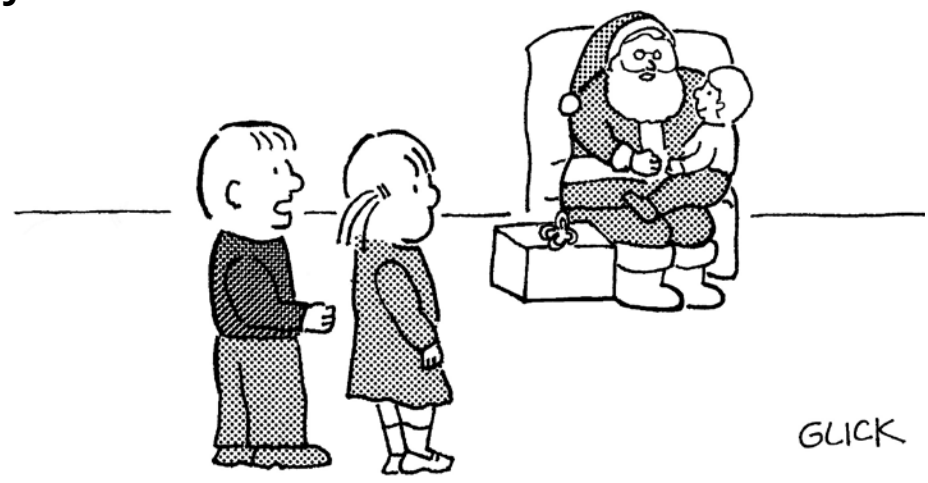
UNIFORM DISTRICT COURT RULES COMMISSION: Judge Eddy was also reappointed to a four-year term on the Uniform District Court Rules Commission. The term will expire on Oct. 1, 2024.

JUDICIAL NOMINATION COMMISSION: The Montana Supreme Court has reappointed Billings attorney Elizabeth Halverson to a four-year term on the court's Judicial Nomination Commission. Her term will run through Jan. 1, 2025.

COMMISSION ON COURTS OF LIMITED JURISDICTION: Brian Smith has been appointed to the commission as the division administrator of the Office of the State Public Defender. Smith replaces Peter Ohman following Ohman's appointment as an 18th Judicial District judge.

ACCESS TO JUSTICE COMMISSION: The court reappointed Montana state Rep. Katie Sullivan of Missoula to a three-year term on the commission, replacing former Rep. Kimberly Dudik. The court also reappointed state Sen. Terry Gauthier, Fourth Judicial District Judge Leslie Halligan, Yellowstone County Justice of the Peace David A. Carter, Helena attorney Aimee Grmoljez, and Chouteau County Clerk of Court Rick Cook to the commission. Their terms will run through Sept. 30, 2023.

JEST IS FOR ALL



"He knows if we've been bad or good. What I need is a copy of his Privacy Policy to find out who he shares this information with."

The State Bar of Montana offers Fastcase legal research as a free benefit for Active Attorney and Paralegal Section members. You can access it by logging in at www.montanabar.org.

Fastcase announces release of COVID-19 Case Alerts

Fastcase has announced a new COVID-19 Case Alerts email service.

The daily digest of new civil opinions, selected pleadings, breaking news, and analysis of legal issues is available free to attorneys using Fastcase through the State Bar of Montana.

"This is a dangerous and fast-changing pandemic, and it's more important than ever for firms to be ahead of the curve when advising clients," said Ed Walters, Fastcase CEO and co-founder. "There is no excuse for missing key developments, especially now."

To subscribe to COVID-19 Case Alerts, log in to Fastcase through www.montanabar.org and look under Apps & Tools.

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Go to **tinyurl.com/y9otjked** to Learn more about using Boolean operators on Fastcase.

IRS 1099 form triggers taxes for clients and lawyers

By Robert W. Wood

Lawyers and clients should care about IRS 1099 forms. These forms allow computer matching of Social Security numbers and dollar amounts paid and received, so IRS collection efforts are streamlined and automated. In most cases, 1099 forms report income, so if you receive a 1099 form in the mail, open it and check the numbers. You may not be able to change it, but you will usually need to report it on your tax return.

As we will see, one exception is 1099 forms that report gross proceeds to lawyers, a category that a surprising number of lawyers may not understand. Errors in reporting do occur, of course, so if you believe a 1099 form is wrong, you may be able to get the issuer to correct or undo it. But that is usually tough unless it is truly an error.

For example, suppose that you receive a 1099 form that says a company paid you $100,000, but you can prove that the company actually paid you only $10,000. You hope the company would correct that kind of error. But if you cannot get the company to correct it, you must report the $100,000 and explain that you actually received only $10,000.

Unfortunately, in my experience, most "please fix my 1099 form" requests fall on deaf ears. Often that is because the issuer believes it issued the form correctly. Also, many 1099 form reporting issues that seem like errors really are not. Suppose you are a plaintiff, and you net $60,000 from a legal settlement when your lawyer collected $40,000, a 40% contingent fee.

You will usually receive a 1099 form for the full $100,000, even if your lawyer was paid directly by the defendant and you only saw $60,000. Arguing about that after the fact is nearly always a waste of time. The only time you have any bargaining power about how 1099 forms will be issued is before you sign a settlement agreement.

Failing to report a 1099 form on your tax return (or at least explain it) will get you an IRS notice. Thus, if you receive a 1099 form, report it, even if you are claiming that the money should be tax free. Report it even if some of it really went to your lawyer and you are entitled to a tax deduction for legal fees.

Ideally, if you are a plaintiff or a lawyer, you or your client should think about the forms before you sign a settlement agreement. In some cases, you might be able to steer the defendant to completely avoid a 1099 form. That would be appropriate if a portion of a settlement is fairly attributable to physical injuries, physical sickness, and emotional distress.

Even if it is certain that you will receive a 1099 form, there are different boxes on the forms that signal different things to the IRS. You should consider what the boxes mean, and you may want to make it explicit that the defendant should record the payment in one box instead of another. What difference does a box make?

Boxes on 1099 form

Isn't one box on a 1099 Form as good as another? Not really, as we will see. Concern about 1099 forms causes some clients and some lawyers to prefer separate checks, one for the funds payable to the client, and one for funds paid to the attorney directly. That way the attorney receives a 1099 form for only the attorney fees, and not also for the client's money. And the client may think he can sidestep tax on the legal fees that way.

But let's look at the realities and the different boxes on a 1099 form before you decide. The most common version used is 1099-MISC form, for miscellaneous income. But to discuss it, we also must also talk about the newest one, 1099-NEC. Up until 2020, if you were paying an independent contractor, you reported it on form 1099-MISC, in box 7, for nonemployee compensation.

Self-Employment Tax

In other words, Form 1099-NEC reports a payment for services. For 2019 and prior years, putting income in box 7 of a 1099-MISC form usually tipped the IRS off that this person should not only be paying income tax but also paying self-employment tax. Self-employment tax is equivalent to both halves of the employer and employee payroll taxes that apply to wages, which are reported on Form W-2.

Self-employment tax can add a whopping 15.3% on top of income taxes. That 15.3% applies up to the wage base of $137,700, with 2.9% tax thereafter on any excess over the wage base. There is no limit on that 2.9%, even if you earn millions. In short, self-employment tax is nothing to sneeze at. Up through 2019, if you were paying someone on a Form 1099, the main choice was between box 3 and box 7. Box 3 is for other income, a more neutral category compared with box 7.

Because of the self-employment tax, most payees would rather receive amounts reported in box 3 compared with box 7. Sometimes you can specify (such as in a legal settlement agreement). Otherwise, the payer of the money generally picks whatever reporting he thinks is best and issues the 1099. For payments in 2020 and later years, the IRS has a special form for independent contractors. Maybe the gig economy finally got to the IRS.

New Form 1099-NEC is specifically for paying independent contractors. Starting in 2020, do not use Form 1099-MISC for that purpose. Use Form 1099-NEC instead. I am guessing that in early 2021, there could be considerable confusion about Form 1099-NEC, and there might even be some disputes. What happened to Form 1099-MISC now that box 7 was essentially made into a whole new tax form?

Other Income or "Gross Proceed Paid to an Attorney"?

For 2020 and subsequent-year payments, your choices on Form 1099-MISC are more limited. Most payments are recorded in box 3, as other income. For lawyers settling cases, though, "gross proceeds paid to an attorney" is the most important category. Many lawyers may not see Form 1099 that arrive at their office, but they should be aware of this important box on the form, and what it means for their taxes.

It impacts their clients too. Up through 2019 payments, IRS form 1099-MISC Box 14 was for gross proceeds paid to an attorney. That means the payments you received in 2019 that were reported in early 2020 were on these 2019 forms. For payments in 2020, they will be reported in January of 2021 on a new version of Form 2020-MISC.

For 2020 payments, good-old Form 1099-MISC still exists. Gross proceeds paid to an attorney for 2019 and prior years was Box 14. But now, it is reported in Box 10 of the new 2020 Form 1099-MISC. This box is only for reporting payments to lawyers. It turns out that there are numerous special

Form 1099 rules for lawyers.

Why is the gross proceeds paid to an attorney category so important? For one thing, gross proceeds reporting for lawyers is not counted as income to the lawyer. Any payment to a lawyer is supposed to be reported, even if it's all the client's money to close a real estate deal. Case settlement proceeds count as gross proceeds, too.

Say that a lawyer settles a case for $1 million, with payment to the lawyer's trust account. Assume that 60% is for the client and 40% is for the lawyer as a fee. The lawyer is sure to receive a Form 1099 reporting the full $1 million as gross proceeds. The lawyer need not report the full $1 million as income, because it is not.

In fact, the lawyer can simply report as income the $400,000 fee without worrying about computer matching, since gross proceeds do not count as income. The client isn't so lucky. Unless the settlement is a non-income settlement (compensatory damage for personal physical injuries) or a capital recovery, the client in this example will receive a Form 1099-MISC (probably in Box 3) for the full $1 million.

The client must then figure out how to deduct the $400,000 in legal fees. Not all legal fees are deductible, and it is harder to find a way to claim them in many kinds of cases since 2018. In any event, apart from the very good deal that gross proceeds reporting is for lawyers, in other ways lawyers are disadvantaged when it comes to 1099 forms. Lawyers receive and send more 1099 forms than most people, in part because of tax laws that single them out.

Lawyers, IRS Audits, & 1099 forms

Lawyers make good audit subjects because they often handle client funds, and many also tend to have high incomes. Since 1997, most payments to lawyers must be reported on a Form 1099. Of course, the basic Form 1099 reporting rule (for lawyers and everyone else) is that each person engaged in business and making a payment of $600 or more for services must report it on a Form 1099.

The rule is cumulative, so while one payment of $500 would not trigger the rule, two payments of $500 to a single payee during the year require a Form 1099 for the full $1,000. Lawyers must issue 1099 forms to expert witnesses, jury consultants, investigators, and even co-counsel when services are performed and the payment is $600 or more. A notable exception to this $600 threshold rule is payments to corporations for services.

However, the rule that payments to a lawyer must be the subject of a Form 1099 trumps the rule that payments to a corporation need not be. Thus, any payment for services of $600 or more to a lawyer or law firm must be the subject of a Form 1099. It does not matter if the law firm is a corporation, limited liability company, limited liability partnership, or general partnership.

The size of the law firm also does not matter; it might have one lawyer or thousands. This affects law firms as 1099 forms issuers and receivers. A lawyer or law firm paying fees to co-counsel or a referral fee to a lawyer must issue a Form 1099 regardless of how the lawyer or law firm is organized. Moreover, any client paying a law firm more than $600 in a year as part of the client's business must issue a Form 1099.

Although many payments to lawyers can and should be reported as gross proceeds paid to an attorney (box 10, starting with the 2020 form), not all payments to an attorney should be reported that way. For example, a payment of legal fees to the lawyer should probably be reported in box 3. However, many parties seem to opt for gross proceeds reporting even then.

Some businesses and law firms prefer to issue 1099 forms at the time they issue checks, rather than in January of the following year. For example, if mailing out thousands of checks to class-action recipients, you might prefer sending a single envelope that includes both check and 1099 form, rather than sending a check and later doing another mailing with a 1099 form.

Joint Payees and 1099 forms

Lawyers are often joint payees, and the IRS has extensive provisions governing joint checks. Most of these rules mean that lawyers receive the forms along with their clients when legal settlements are payable jointly to lawyer and client. In general, two 1099 forms, each listing the full amount, are required.

Many lawyers receive funds that they pass along to their clients. That means firms often cut checks to clients for a share of settlement proceeds. When a plaintiff law firm disburses money to clients for legal settlements, should the firm issue a 1099 form to its own client? Some firms issue the forms routinely, but most payments to clients do not require it. Even so, there is rarely a 1099 form obligation for such payments.

The reason is that most lawyers receiving joint settlement checks to resolve client lawsuits are not considered payers. In most cases, the settling defendant is considered the payer. Thus, the defendant generally has the obligation to issue any 1099 form necessary. If lawyers perform management functions and oversight of client monies, they become payers required to issue 1099 forms, but just being a plaintiff's lawyer and handling settlement money is not enough.

Conclusions

Every tax return must be signed under penalties of perjury. That makes tax returns themselves the most important tax form of all. They are not to be taken lightly. Still, as many vast numbers of important tax forms are there are, it is hard to think of many that are more important or pivotal to our tax system than the little 1099 form that most of us see many of every year.

Whether you are paying money or receiving money, consider these forms at tax time and throughout the year. And remember, not everyone is likely to agree on how and when the forms should be issued. There are hundreds of pages of IRS regulations about 1099 forms, and we have only scratched the surface here. Differences of opinion are common, even among seasoned tax professionals, so plan ahead.

Lawyers receive and send more 1099 forms than most people, in part because of tax laws that single them out.

Stressed over books instead of enjoying the holidays? Here are some tips to fix that

By Tanyaa Kilham

Year-end is typically a time for reflection, but many firms spend hours trying to finalize their books instead of celebrating and enjoying the holidays. I would like to share a few tips to make your year-end bookkeeping less stressful and costly for you.

1099 reporting

Lawyers tend to send out and receive more 1099 forms than most individuals due to stricter tax laws. Basically any person engaged in business making a payment of $600 or more for services must report it on Form 1099. That means each investigator, consultant, expert witness, etc. that you paid more than $600 will need to be presented with this form. By the end of November you should have a list of 1099 recipients (https://www.irs.gov/forms-pubs/about-form-1099-misc) that you will need to send out W-9 forms for. Completed W-9 forms should be received by year end to ensure adequate time to prepare and issue 1099s by the Jan. 31, 2021, deadline.

Complete reconciliation

Your checking accounts, trust account, savings accounts, credit card accounts and any loan activity should be reconciled monthly. If you have not kept current on your reconciliations, now is the time to make sure they are complete. Track down any errors and make correcting entries to ensure that at tax time you are not scrambling to locate errors that are keeping your accounts from balancing.

Year end is also the time to ensure that your IOLTA trust account is in compliance. Mismanaging a trust account can have horrible consequences on your law career and could potentially lead to disbarment, and most lawyers receive little to no training on how to manage a trust account properly. It is important to know how a trust account works so you do not run into issues. The trust account should never be comingled with your operating account or borrowed from for any reason. Bank fees and credit card processing fees are the responsibility of the firm and should be paid from the operating account.

As part of the reconciliation process, you should also run a work in progress report so you can invoice and pay yourself for any fees earned prior to year-end as well as to review any items that should be written off. Then perform your final three-way reconciliation for the year, (which should be completed at regular intervals - I suggest monthly) ensuring that the client ledger account, the general ledger account and the bank statement balance all agree. This is also a great time to send each client a ledger report of their transactions that occurred during the year.

Collect outstanding payments

If your bookkeeping is up to date, then tracking your accounts receivable and billing will be much easier. Run an accounts receivable report from your general ledger to see all past-due invoices and outstanding amounts and start collecting. Current clients that are 30 to 60 days past due will give you your highest return on time and energy invested in the collection process. This may also be a good time to consider billing your current clients every two weeks so you can receive some of that money sitting in the trust account.

For clients that are 60 to 90 days past due, identify if you have been receiving regular payments from them, and if those payments have stopped. Now is a great time to call each of your clients. If you do not have a consistent billing schedule it is possible that they are not aware of how much they owe. This is a wonderful time to talk about setting up a payment plan or offering a discount for full payment on their balance. Accepting credit card payments may also help ensure faster payment. For any accounts receivable considered uncollectible, write the balances off as of Dec. 31.

Going forward, take some time to look at your processes and systems. Are you asking for and getting a retainer? Is the retainer large enough? Do you have a retainer policy in place to request replenishment when the retainer balance

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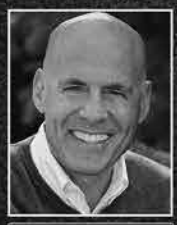

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funds are low? Are you billing regularly? Is time entry current and do all timekeepers understand how critical timeliness is for billing and collection? Are you monitoring and following up on non-paying and slow-paying clients? Do you have a collection process in place?

Review your financial statements

As a business owner you need to stay on top of your finances and manage your firm's cash flow on a recurring basis. You should also have a vision for your firm's future and a plan on how to make that vision a reality (i.e. a budget). Having a profitable law firm is more than being able to pay your monthly obligations on time, it is also having adequate capital and cash flow to fund the firm for the foreseeable future. There are three basic financial statements that can help you see how your firm is doing: the income statement, the balance sheet and the statement of cash flows.

- **Income statement:** This statement is all about your net income or "bottom line." Obviously you want to know how much income you produced, but this statement provides additional value beyond income. Compare your prior year revenue and expenses. How does this compare to the current year? How much of your income was derived from client fees versus reimbursed client expenses? Is revenue trending down or are expenses trending up year after year? Take a look at your expenses, paying particular attention to large expenses or irregularities. Are there ways to cut some of these expenses back and add more to your bottom line?
- **Balance sheet:** This statement is also known as the statement of financial position and it provides a snapshot of your business for a specific period of time. If you want to project your firm's annual growth compare your current assets less current liabilities to last year's numbers. Check your client trust liabilities against your IOLTA account. To avoid professional reprimand, these two accounts should match exactly. Much like the income statement, do a yearly or monthly comparison and look for any irregularities and material variances. Are there negative balances in accounts that should not have negative balances? A big issue in most firms is receivables – keep an eye on this number and remain focused on your collections. What does your working capital (current assets less current liabilities) look like? How liquid is your firm (current assets divided by total liabilities)? Do you have enough money to pay your immediate bills?
- **Statement of cash flows:** Cash is king. Have you ever asked yourself why you have no cash even though you are making money? This statement can provide the answers to where your cash comes from and where it goes. This statement is broken down into three categories: operating activities, investing activities and financing activities. The statement of cash flows provides a short-term outlook which is helpful when it comes time to manage bill payments, deal with unexpected repairs and replacements and fund payroll.

There are of course a number of other reports that your firm may find useful such as a Budget to Actual report, Trust balance report, Client report with transactional activity, Timekeeper reports, Attorney compensation reports, Contingency cost reports, and more.

Prepare a budget

Now that you have a clean set of books, use that to your advantage. Make a realistic budget and stick to it. Cut expenses where you can, look at your staffing levels, salaries and benefits, technology needs, CLE and training, and capital expenditures. Look at your expenses such as rent, utilities, website hosting, bookkeeping and accounting services, insurance, software fees, advertising and marketing to see if there are areas to save.

Project your revenue by looking at how many cases are likely to close in the next year? How many matters are in the pipeline? How much additional capacity do you have to take on new clients? Do you need to increase your rate? Don't forget to compare your actual revenue and expenses to your budget to see how you are preforming, and don't be afraid to make adjustments to your budget as the months pass.

Visit your tax preparer

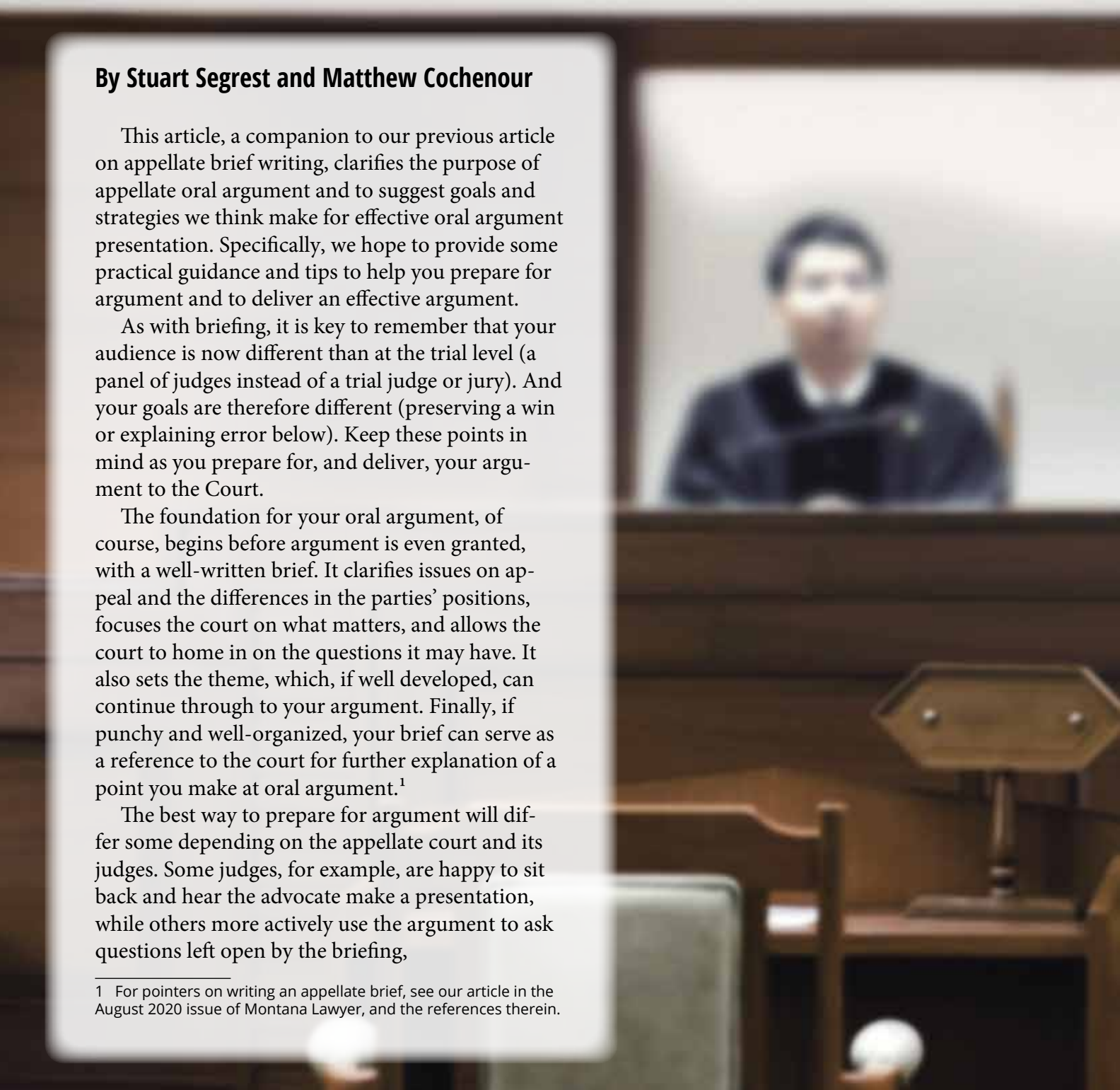
If you feel like you are now buried under a mountain of non-billable work, hiring an experienced legal bookkeeper is often more efficient and cost effective than trying to do it all yourself. A bookkeeper will also ensure that your reconciliations and other day-to-day financial tasks are kept current saving you expensive fees at the CPA's office.

Your bookkeeper should know the ins and outs of your business and be able to liaise with your tax preparer and present a clean set of records saving you additional time and headaches looking for pertinent financial date your tax preparer may need.

When you meet with your tax preparer they will likely ask for the following documents: prior year tax returns, current balance sheet, income statement, and business related expenses. Be prepared to discuss deductions such as the business use of your home and charitable contributions if appropriate, as well as the deductions hiding in plain sight like your bookkeeping and accounting fees. Also inquire about ways to reduce your taxable income as well as plan for the future by considering retirement plan contributions such as a 401(k) or Roth IRA. Now take a big breath and celebrate the fact that you are ready for tax time.

Tanyaa Kilham is the owner of The Legal Accountant, a virtual firm offering bookkeeping, accounting and CFO services exclusively to solo to small law practices in the Pacific Northwest. Tanyaa is a certified QuickBooks Online ProAdvisor, a LeanLaw Accounting Pro, and certified in Xero and Clio. She can be reached at 406-203-5845 and tanyaa@thelegalaccountant.com.

GETTING READY FOR ORAL ARGUMENT



By Stuart Segrest and Matthew Cochenour

This article, a companion to our previous article on appellate brief writing, clarifies the purpose of appellate oral argument and to suggest goals and strategies we think make for effective oral argument presentation. Specifically, we hope to provide some practical guidance and tips to help you prepare for argument and to deliver an effective argument.

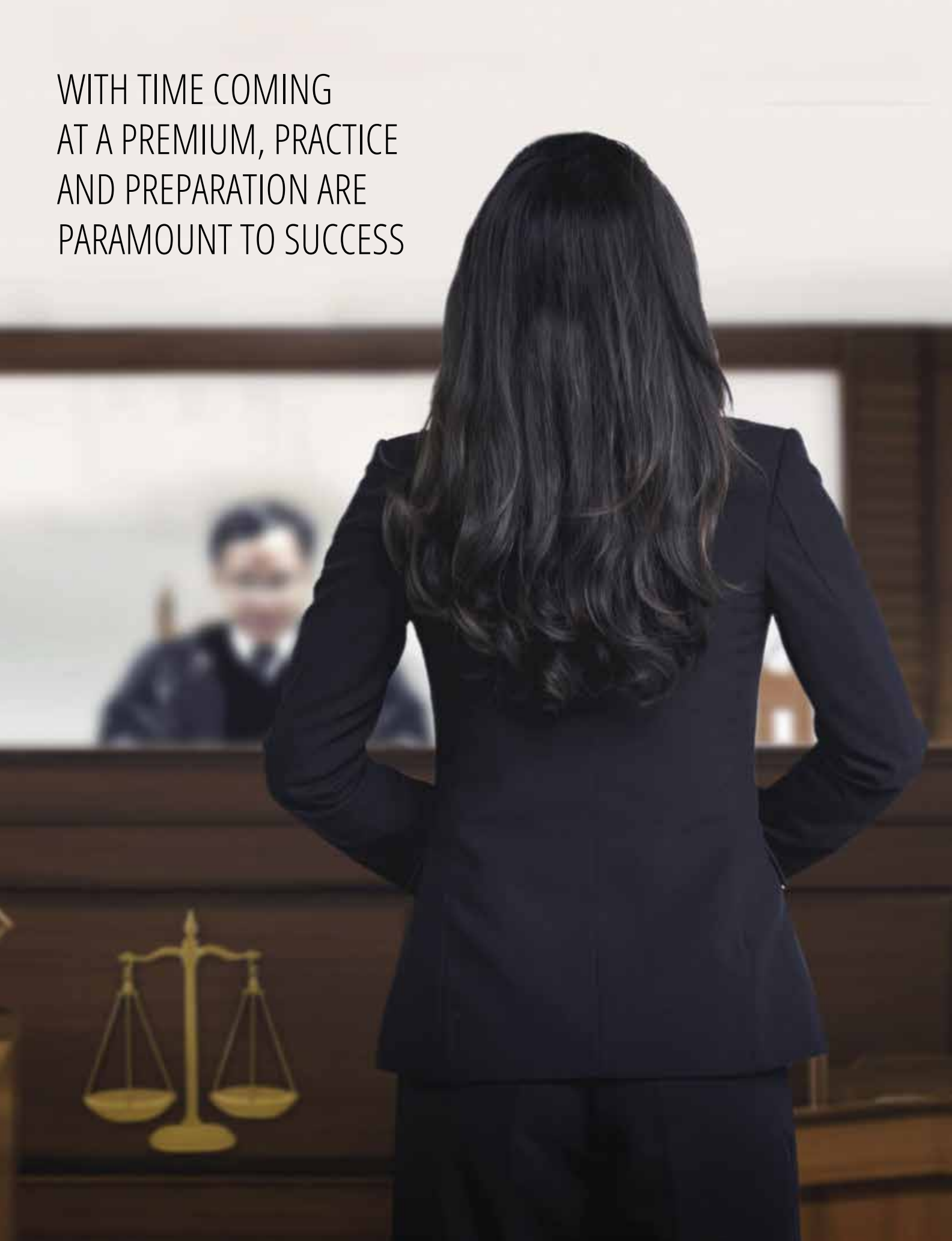
As with briefing, it is key to remember that your audience is now different than at the trial level (a panel of judges instead of a trial judge or jury). And your goals are therefore different (preserving a win or explaining error below). Keep these points in mind as you prepare for, and deliver, your argument to the Court.

The foundation for your oral argument, of course, begins before argument is even granted, with a well-written brief. It clarifies issues on appeal and the differences in the parties' positions, focuses the court on what matters, and allows the court to home in on the questions it may have. It also sets the theme, which, if well developed, can continue through to your argument. Finally, if punchy and well-organized, your brief can serve as a reference to the court for further explanation of a point you make at oral argument.[1]

The best way to prepare for argument will differ some depending on the appellate court and its judges. Some judges, for example, are happy to sit back and hear the advocate make a presentation, while others more actively use the argument to ask questions left open by the briefing,

1 For pointers on writing an appellate brief, see our article in the August 2020 issue of Montana Lawyer, and the references therein.

WITH TIME COMING
AT A PREMIUM, PRACTICE
AND PREPARATION ARE
PARAMOUNT TO SUCCESS



to test the parameters and implications of a particular rule, or to push the advocate on weak points. As discussed below, one strategy to determine what a court may be looking for is to watch or listen to prior arguments on similar topics.

Whatever the particulars, oral argument is an opportunity for you to discuss your case face-to-face (in person, or as is common these days, virtually) with the judges who will decide your case. As Justice Ruth Bader Ginsburg put it when discussing her first argument before the U.S. Supreme Court, once she took the podium the nine justices were her "captive audience" with nowhere to go during her argument time.[2] But the time you have with your "captive audience" is limited, ranging from 10 to 20 minutes in the Ninth Circuit to 30 or 40 minutes in the Montana Supreme Court. Given this short time frame, preparation is essential. As we discuss next, prior to argument you need to have your theme, key points, and affirmative arguments down cold.

Preparation

When preparing for argument, you must master two categories of information: (1) affirmative arguments or points you hope to make; and (2) answers to potential questions from the court.

To make the most of your argument time, we suggest you develop a preparation schedule and stick to it. We recommend devoting two to four weeks for preparation, if possible, depending on the complexity of the case and your oral argument experience. No doubt some might balk at dedicating this much time to a single argument considering other matters on your docket, or your client's inability or unwillingness to pay for this much preparation. But remember Chief Justice Roberts' response when asked whether clients always paid for that much preparation: "Sometimes I have to write down bills. But I long ago decided that telling the court, 'I don't know because the answer to that question wasn't in the budget,' was not what I wanted to say."[3]

2 *See* https://www.law.columbia.edu/news/archive/memoriam-ruth-bader-ginsburg-59.

3 David C. Frederick, *Supreme Court and Appellate Advocacy*, 72 (3d ed., Thomson Reuters 2019).

What follows is our recommended "best practice" approach to prepare for argument. If your time is more limited, or your resources scarce, then undertaking what preparation you can manage (one moot instead of two, e.g.) will still be beneficial.

A. Reread briefs, cases, and the record.

Begin by refamiliarizing yourself with the case. Time has passed since you briefed the matter, and it is important to get back up to speed.

First, reread all briefs (including amicus briefs) at least once. For the parties' briefs, we recommend you read each brief two to three times if possible, once very closely. While reading, keep a list of the possible questions that occur to you. At this point, it is more important to jot down questions; don't necessarily worry about answering each question yet (though if you think of an answer feel free to include it with the understanding that your answer will be refined as you prepare).

Next, reread the major cases cited in the briefs. You don't need to read all 60 cases cited, at least initially. Instead focus on the substantive cases. If there is time later, you can read or skim the minor cases (i.e., those cited for minor or procedural points, such as the elements of summary judgment, etc.). As to the key cases, read each case two to three times if possible. Again, as with the briefs, as you read these cases add to your list of potential questions.

After you have reviewed the briefs and cases, turn to the record. Review the important record documents and transcripts that are relevant to the issues on appeal. As with cases, focus on the relevant documents first. Later, if you have time, review the more tangential portions of the record. As you review—you guessed it—add questions to your list. It can also be helpful to create a list of relevant document or record citations that may come up at argument, especially for record-intensive issues. This checklist should name the individual document, briefly describe the relevant information, and include the record cite.

B. Create potential question list and practice answering out loud.

The next step is to create a combined question list that you can use to craft, and hone, your answers. Compile the questions you jotted down while reviewing the briefs, cases, and record into a single list. As you compile and review, add to the list any other questions you think the court may ask, or points you need to clarify from the briefing (i.e., points you want to make even if the court doesn't ask a specific question).

Once you have your list, separate the questions into two groups by importance. The first group is those questions you must know the answer to, such as the specifics of your legal theory, what specifically you want the court to decide, and the factual circumstances relevant to the main issues. If you are the appellant, this should include the specific relief you are seeking, including the steps necessary to effectuate that relief (remand, vacatur, etc.). This "must know" group should include the 10 to 20 hardest questions for your position. A good place to gather these questions is from the other side's brief, the relevant cases, and areas you feel are underdeveloped or otherwise lacking in your brief. These are the questions that give you pause when you think about them, or that are difficult to answer succinctly. The second group of questions are those that are that are relevant but not critical to the case (i.e. all the others you jotted down).

Once collected and grouped, prepare answers to these questions, beginning with the first group of "must know" and hardest questions. Your initial answers may be narrative in form, but refine the answer down to a few bullet points. You may find that there is no good answer to some questions. For these, come up with the best answer you can and workshop with others if possible. Often the limits of your answer will come up at the moot and can be workshopped there. And sometimes the best answer is to punt. Admit the issue is a hard one, give your best answer (which sometimes is an admission to preserve credibility), and tell the court why you win despite the problem with that particular issue (perhaps because the court shouldn't reach the issue, or you win for a different reason).

Now that you have your questions

and best answers in bullet-point form, it will be tempting to practice by silently reading the questions and answers to yourself. While this can be useful, it is critical to practice answering these questions out loud, especially the hardest questions. One useful tool to get you speaking out loud is to create note cards with questions on one side and answers on the other. Then go through the cards, answering each out loud before checking the answer. Others prefer to go over their working outline in question and answer form, or to workshop the questions with another lawyer (or non-lawyer for that matter). You can even deliver your argument while driving around town or while going for a hike. Whatever method is used, the key is to practice answering the questions out loud. Make sure you begin this exercise prior to your first moot. That way your answers will flow better, and you are less likely to get off track during the moot. Moreover, the panelists can better assess your answers when given succinctly, instead of in narrative, roundabout fashion (more on moots below).

C. Create your opening, outline, and binder.

There are some advocates, usually very experienced and skilled, that can present an oral argument without notes and seemingly extemporaneously. For the rest of us, we need an outline and likely also a binder of relevant material. Here we provide some advice on how to create an opening, outline, and podium binder.

Your opening should be short — less than two minutes — and should set out your theme, why you win, and a roadmap of the main points you hope to make. It should also include a sentence or two articulating the legal test or standard you want the court to apply. One effective method is to introduce your argument serially: "We win for three reasons. First ...., Second ...., and Third ..." This method provides a succinct preview and may prevent the court from interjecting with a question before you finish your opening. Even if you are respondent, it is helpful to have an opening, though you should maintain flexibility to address pressing questions or concerns that arose during the opening argument.

Before crafting the remainder of your outline, we suggest making a checklist of the few key points you need to make in bullet-point fashion. These should flow from your roadmap. The number of key points will vary based on complexity and the number of issues, but keep these points as succinct and focused as possible.

Use these key points to create topic headings for the body of your outline. This should be an actual, pared-down outline, not something to read from. Under each topic include a few points that frame your argument, including applicable cites and quotes. But remember: less is more. The outline should be sparse enough that you can locate the relevant topic quickly in response to a question, and to facilitate reordering based on the opening argument. Avoid reading to the court. You are having a conversation, not giving a speech, which means eye contact and agility. Even if you don't get many questions, a discussion with eye contact is more impactful than a canned presentation.

Once your outline is drafted, turn to your podium binder. It should contain the order appealed from, other relevant orders, the briefs, relevant statutes, case summaries, cases, and the list of important record citations you created earlier. Other documents may be useful depending on the issues (such as jury instructions) but don't overdo it. Include a table of contents or tab the documents (or both) so you can quickly locate material. Some cases are straightforward enough that a binder isn't necessary, at least not at the podium, but it is good to have a binder if needed, even if it's left on counsel table and not taken to the podium. Importantly, do not over rely on your binder. You should know the record well enough that most questions can be answered from memory without needing to look up a specific document or transcript cite (which takes precious time and can get the argument off track).

Moot Courts

In the final two to three weeks before the argument, most of your time will be spent preparing for the moot courts. A moot court is an interactive practice exercise designed to simulate as closely as possible the experience of an actual oral argument. In a moot, the advocate argues the case to a panel of "justices" and responds to the justices' questions. While nothing can substitute for the actual argument, a moot provides a close approximation because it requires an advocate to stand up in front of other attorneys, give an opening, and present affirmative arguments while answering questions in a way that both advances the client's interests and addresses the panelists' concerns.

In choosing the moot-court panelists, an advocate should find several[4] good lawyers who will actively participate by putting in the time to read the briefs and important cases and, crucially, will ask hard questions during the moot. While some panelists prefer to listen to an argument and discuss questions later with the advocate, it is essential for the advocate to hear questions in the moot and have an opportunity to respond within the practice session. Of course, there is always time for discussion after the moot.

Some advocates prefer to have the same number of panelists as judges on the court. While that is manageable for a three-judge panel, it can be difficult to find seven to nine lawyers who will devote the time necessary for a moot. There is also the risk, with too many panelists, that some may refrain from asking questions to avoid seeming impolite, which defeats the purpose—hearing and responding to questions within the context of the moot. An alternative approach, if you have that many lawyers willing to help you, would be to have different panelists on each moot so that you have "fresh eyes" each time. This can identify overlapping questions, which may highlight concerns that justices will have. Finally, if possible, include some panelists who are familiar with the area of law and some who are not given that appellate judges often have varying depths of knowledge in any particular area of law.

Ideally, an advocate will conduct two moots, one approximately a week to 10

4 We recommend three to five per moot for most cases, including some lawyers who have not previously worked on the case.

days before the argument and a second more formal moot a few days before the argument. While the first moot is sometimes referred to as an informal moot, "informal" does not mean unstructured or unprepared. Rather the moot is only informal in comparison to the formal moot or to the oral argument itself.

In general, with both moots, you and the justices will stay in your respective roles throughout. You should stand up, say "May it please the Court," give a short opening that succinctly encapsulates why you should prevail and provides a roadmap of what you hope to discuss. You then begin presenting your affirmative arguments and focus on answering the justices' questions as they come up. In an informal moot, an advocate should have the opportunity to fully present an opening before the justices begin their questioning. Similarly, justices should allow counsel to finish answering a question before firing off additional questions. While the moot is designed to simulate oral argument, it is important for the advocate to work through and articulate answers to questions so that when a particular question comes up in the actual argument, the advocate will be prepared. In some instances, if genuinely unsure how to answer a question, the advocate can break out of the role to discuss possible answers. Relatedly, there is no rigid timekeeping. The point is to hear what questions the justices have and work through the answers to those questions. Dispensing with a timing requirement allows the advocate to focus on answering as many questions as the justices can ask.

A formal moot differs from the informal moot in a few ways. You should dress the part and wear courtroom attire, and you should use your prepared outline and podium binder. While you should not put time constraints on questioning, it can be helpful to keep track of time so that you are aware of how quickly your allotted time passes and can measure how effective you have been in making your affirmative arguments. Finally, all the participants should maintain their roles throughout, and you should resist breaking character, even if it means struggling with questions and answers.

It can be valuable to record the moot so that you can review questions and critique your performance. It can also be helpful to have someone take notes during the moot. Following the moot argument, it is helpful to discuss the argument and the case with the panelists, covering what worked and what didn't, and then workshop how to make the argument more effective.

After the first moot, you will have a better sense of which arguments are effective and which are not. You will know what areas troubled the panelists and will likely be armed with a new list of questions to consider. Following the first moot, you should develop answers that address the panelists' concerns, refine your opening and arguments, and if needed, do additional research related to questions that came up during the moot. After the formal moot, any research is generally minimal, and you should spend the remaining days refining and rehearsing arguments and putting the finishing touches on your podium binder.

Between Moots and Argument

Following the moots, you should continue to practice and refine your arguments, striving for ownership of the material and the points you hope to make. During this time, there can often be a sense of exhaustion and uncertainty about what to do next, and it can feel like you're just killing time until the argument. Rather than give in to complacency, though, this can be a valuable time to double check whether any recent decisions have cast doubt on the validity of your primary cases and to refresh yourself on the standard of review, jurisdiction, and the relief requested.

This can also be a good time to watch or listen to archived oral argument from the appellate court (or watch live arguments if possible). Prior arguments can provide insight into local customs of the court. For example, do appellate counsel introduce themselves? In some courts, like the U.S. Supreme Court they do not, but in the Ninth Circuit and the Montana Supreme Court, they do. Similarly, how does the argument begin? In the Supreme Court, for example, counsel say, "Mr. Chief Justice and may it please the Court," whereas in the Ninth Circuit and the Montana Supreme Court, counsel generally begin with "May it please the Court." While these may seem like small things, being in step with local customs starts your argument on the right foot.

Watching oral arguments can also provide some familiarity with the Court and the courtroom, which may help you feel more at ease. You can learn how the Court questions counsel and whether it is typically a "hot" or "cold" bench. Simply by observing a few arguments, you can also learn how rebuttal is handled, where counsel sit, how close you will be to the justices, and other information that can remove some of the unknowns surrounding the argument.

Finally, at least in the Ninth Circuit, it can be helpful to watch live streams of oral arguments in the days immediately before your argument, if possible. Generally, the same panel of judges hear cases for a week at a time and watching these arguments can provide a sense for how particular judges ask questions and interact with advocates. Additionally, the same panel sometimes hears similar cases, and you may find that a case scheduled earlier in the week has issues like those in your case.

Oral Argument

There is a maxim in appellate law that the briefing was about *this* case, but the oral argument is about the *next* case. The foundation for a successful oral argument begins with understanding that the purpose of the argument is not only to answer the questions left over from the briefing but to help the Court understand the ramifications that follow from a ruling in your favor. In other words, you are there to talk about what the Court thinks is important, not what you may think is important. That is not to say that you aren't there to persuade the Court or to argue for your position; to the contrary, your goal is to convince the justices that they should vote for your position because the rule you are advocating is not only right for this case but for future cases. Rather than focusing on the correctness (or incorrectness)

of the lower court's ruling, you should focus on the correctness of the rule you're advocating.

Regardless of whether you are the appellant, appellee, or an amicus, there are some common features to a good argument. Perhaps the most important is a well-prepared opening. In general, the only time when you may have a few minutes of uninterrupted argument is when you first stand up at the lectern — make it count. Following your initial preparation and the moots, you should have a carefully thought-out opening that clearly sets out why the Court should rule in your favor and provides a roadmap of your argument. It can be as simple as saying, "The court below ruled X . That determination is constitutionally invalid for three reasons. First ..." Then after briefly describing your reasons with one or two sentences, turn to the first point and elaborate until the Court asks its first question. The first few minutes of oral argument should not be wasted detailing the procedural path of the case, introducing your clients to the Court, asking about rebuttal time (keep track of your own time or work it out with the clerk or marshal before the argument begins), or discussing anything that does not get right to the point.

The opening is equally important for the appellee; however, because the appellee is going second, there are a couple of options for an opening. First, it may be beneficial to reorient the Court. You can achieve this by presenting an opening like that described above, perhaps setting out the two or three reasons why the decision below fits comfortably within constitutional parameters. Another option is to immediately address concerns that came up during the appellant's argument. Under this approach, you might say something like, "A lot of the discussion has been about X . That is not an issue in this case because . . ." or "May it please the Court. I'd like to start by addressing Justice Brown's question . . . ." If there are no follow-up questions, you can then transition into an opening that sets out the roadmap for your argument.

Notwithstanding the importance of a well-rehearsed opening, an oral argument is not a lecture, an oration, a speech, or a performance. Indeed, your primary task at oral argument is to answer the justices' questions in a way that both advances your affirmative arguments and alleviates any concerns the Court may have about your position. Many advocates, however, seem to go to great lengths to avoid questions from the Court. But while evading eye contact or talking nonstop may make questioning difficult, it does you no favors with the Court and it removes an opportunity to persuade. In short, the Court's questions are not an interruption of your argument, they are the point of your argument. The best advocates welcome questions because they offer insight into the Court's concerns and provide an opportunity to directly address them. When answering questions, if the question calls for a yes or a no response, there's no need to beat around the bush. Answer with a yes or no, and then go on to elaborate and provide context if necessary, or transition back to your argument.

What about the dangers underlying hypothetical questions or questions that ask for concessions? Admittedly, for the unprepared advocate these types of questions are fraught with peril. Even the most prepared advocate should answer carefully — no one wants to read a court opinion that resolves the case based on a concession made at argument. As an initial matter, there is no getting away from hypotheticals; remember the argument is not just about this case but the next case (and the case after that). Justices use hypotheticals to test the rule you're advancing and to determine whether there is any limiting principle. And this is the key to understanding how to answer hypothetical questions: knowing your theory of the case and your limiting principles removes some of the danger these questions pose and gives you the freedom to concede points that don't jeopardize the case.

For example, in the recent U.S. Supreme Court personal jurisdiction case, Ford Motor Company v. Montana Eighth Judicial Dist. Court, No. 19-368, Ford's theory was that specific jurisdiction over a defendant is lacking unless the defendant's forum-related conduct was at least a but-for cause of plaintiff's claims. With this theory, Ford's counsel could answer hypotheticals ranging from products liability cases involving automobiles, to airbags, to personal computers — counsel simply had to keep clear whether the hypothetical was dealing with causation or not. If there was causation, then jurisdiction might be present; if there was no causation, then jurisdiction was not present. Regardless of whether the Court ultimately finds this argument persuasive, Ford had a clear principle that it could use to address the Court's questions.

As another example in the criminal context, let's say your theory of the case is that a warrant is not required for a search or seizure unless the defendant maintains exclusive control over the area searched or the item seized. For a hypothetical involving a warrant, you must simply ask yourself, "does the defendant have exclusive control over this?" If the answer is yes, then officers would be required to get a warrant; if the answer is no, then no warrant would be required. If you know your theory, then you have a framework within which to answer the Court's questions that advances your affirmative points.

Finally, a few comments about rebuttal arguments. Keep it short; in most cases, three to five minutes is plenty of time to make an effective rebuttal. Also, because you are rebutting the other side's argument, it is generally difficult to prepare a rebuttal argument in advance. Thus, you must listen carefully to the respondent's argument and pay attention to any cues from the Court. As far as what to argue in a rebuttal, there are primarily three different approaches. One is to emphasize your strongest argument even if it is on a minor issue. The underlying rationale is that the Court leaves the argument convinced that your position is correct. The second approach is to thematically rebut the respondent's argument by returning to your overarching theory of the case and reemphasizing the affirmative points

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Argument
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that you hope the Court credits. The final approach is to focus on the one or two most damaging points that the respondent made and tick off the reasons why those arguments are wrong or not persuasive, including correcting the record if necessary.

Dos and Don'ts

- Practice your argument out loud.
- Strive for a conversational tone.
- Attend oral arguments in person or watch/listen to archived argument.
- Stop talking immediately when a question is asked, even if mid-sentence.
- Directly answer the question, and then elaborate; if the question asks for a "yes" or "no" answer, answer "yes" or "no" first.
- Don't answer a question by saying, "I'll get to that later in my argument." Answer the question when it is asked.
- Don't avoid hypothetical questions.
- Make eye contact with the court.
- Speak so that you can be heard (i.e., speak clearly, speak into microphone).
- Speak at a measured pace: not too fast or too slow.
- If arguing in an unfamiliar court, make sure you know how to get to the courthouse and the location of the courtroom and arrive early to court.
- If arguing remotely (e.g., Zoom, Vision Net), test equipment and connections before the day of the argument.
- Memorize your opening, but be flexible, particularly if you're the appellee.
- Provide the court a roadmap of your argument in your opening.
- Be able to provide a one-sentence response setting out the relief you want.
- Don't interrupt or talk over a judge.
- Lead with your strongest argument.
- Don't use demonstratives or other visual aids.
- Don't attack the judge below or opposing counsel.

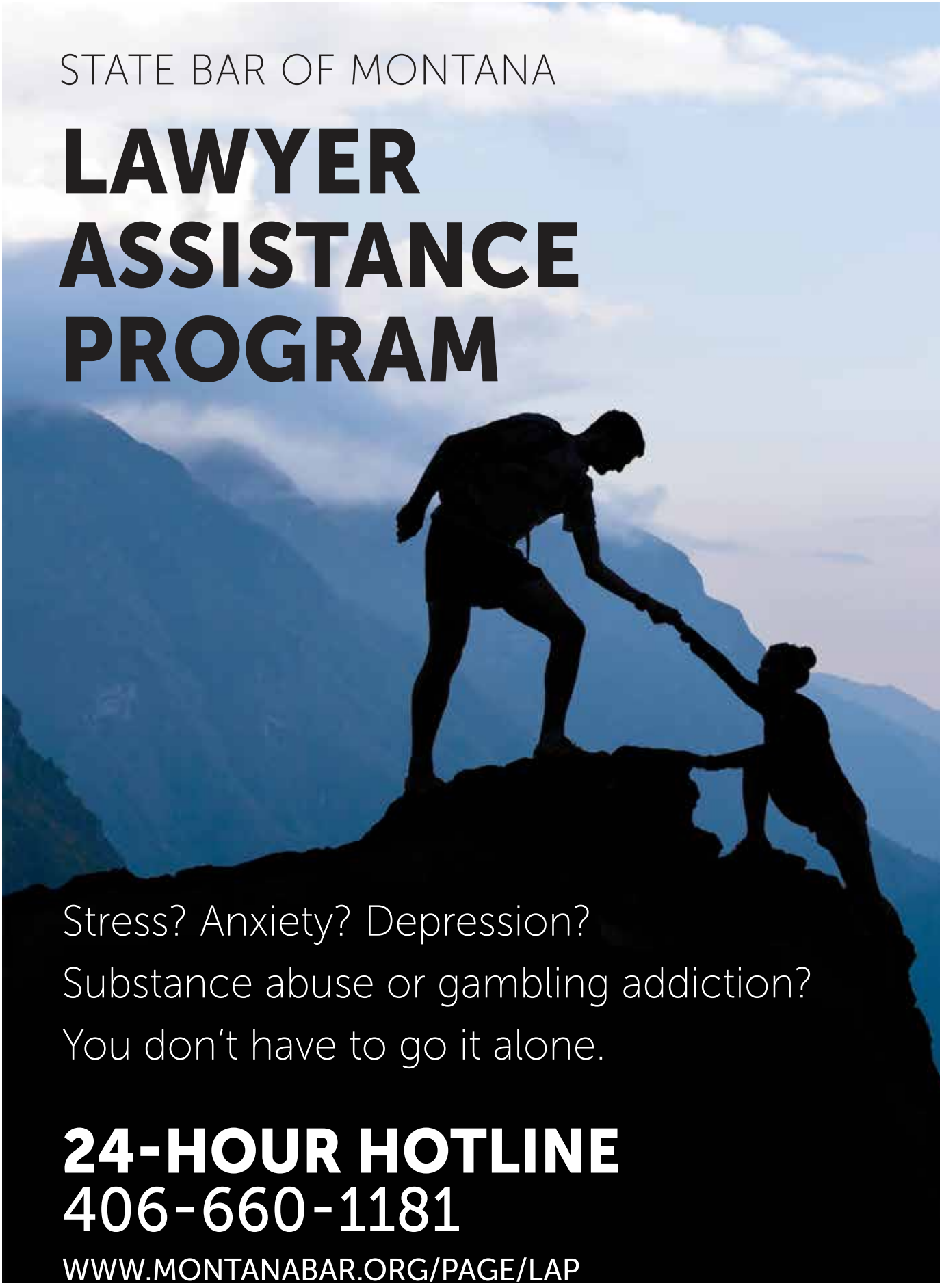
Resources

David C. Frederick, "Supreme Court and Appellate Advocacy" (3d ed., Thomson Reuters 2019)

Antonin Scalia & Bryan A. Garner, "Making Your Case: The Art of Persuading Judges" (Thomson/West, 2008)

http://ca3blog.com/oral-argument/ (tips for telephone oral arguments)

Stuart Segrest is the chief of the Civil Bureau and Matthew Cochenour is the acting solicitor general for the Montana Attorney General's Office within the Montana Department of Justice. Segrest is also a trustee for the State Bar of Montana. This article does not represent the views of the Montana Department of Justice or the State Bar.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Jack Ray Tuholske

Jack Ray Tuholske, one of the country's leading public interest environmental lawyers and a tireless defender of public lands, wildlife and waters, died Oct. 17, 2020, after a 17-month battle with hepatocellular carcinoma. He was 66.

Jack was living proof that if you get up at 4:30 every morning and work your ass off, you really can move mountains. He earned his law degree from the University of Montana, with honors. The results since then speak for themselves: in his 35-year legal career, Jack served as lead or co-lead counsel on more than 200 cases involving natural resources, wildlife protection, public lands management, land use and constitutional law; his cases were argued in federal district and appellate courts across the West, the U.S. Supreme Court, numerous state district courts in Montana, and more than 20 times at the Montana Supreme Court.

Tuholske

Jack's work set important precedents under many federal and state laws. His efforts led to the successful listing of the bull trout under the Endangered Species Act, which not only helped bring this magnificent native species back from near extinction, but also resulted in the protection of more than 19,000 miles of streams and rivers. He represented farmers and ranchers, in conjunction with conservation organizations, to stop coal mining in the Tongue and Powder River basins, ensuring clean water for crops and grazing for generations to come.

Jack's legal work has been recognized numerous times, including the 2010 Kerry Rydberg Award, presented by the University of Oregon Public Interest Environmental Law Conference (and recently re-named the Rydberg-Tuholske Award in honor of Jack's work); the 2009 Gary Holmquist Award, presented by the Montana Wildlife Federation; and the 2002 Justice William O. Douglas Award, presented by the Sierra Club.

But his contributions toward protecting and improving our world went beyond the courtroom. As a teacher, first at the University of Montana and then at Vermont Law School, his passion for the law and for the outdoors was infectious. Jack's proudest professional achievement was that dozens of his students have become public interest environmental attorneys, ensuring that his impact and legacy will live on.

Jack served on the Vermont Law School faculty for 20 years, where he co-founded and directed the Water and Justice Program, pioneered the school's online master's program, and created the Public Lands Management: Montana Field Course, the country's first outdoor experiential education law class. Vermont Law School will create the Tuholske Institute of Environmental Field Studies to advance Jack's work in deep field-based experiential education.

In 2009, Jack taught at the Law Faculty of the University of Ljubljana in Slovenia as a Fulbright Scholar.

Jack imparted his love for the outdoors to his family, and they enjoyed many adventures together – and mishaps, too. Jack is the only guy we know whose wife has been helicoptered off a mountain. Twice.

Jack swam competitively for five decades and helped found the Montana Masters Swimming program; more than a dozen of his Masters swimming records still stand. He also was actively involved in community organizations that promoted competitive youth swimming, and helped lead a coalition of dedicated residents to pass a municipal bond to construct the Splash Montana pool complex in Missoula.

Jack loved his family above all else. He is survived by his loving wife of 41 years, Lilly; sons Oliver, Benjamin and Cascade; and five grandchildren.

Jack loved flowers, but what would have made him really happy is for you to remember him by taking a hike up your nearest hill. However, if you're inclined to make a tangible contribution toward Jack's memory, he requested support for the Jack Tuholske Endowed Scholarship in Environmental Law at the Alexander Blewett III School of Law, c/o University of Montana Foundation, P.O. Box 7159, Missoula, MT 59807; as well as the Northern Plains Resource Council, 220 S. 27th St., Billings, MT 59101.

A celebration of his life will be announced later in 2021.

John Joseph Oitzinger

John Joseph Oitzinger died peacefully in his sleep at the family home in Helena of sudden onset kidney cancer that rapidly metastasized to his lungs at age 81. His wife of 39 years, Sandy, was with him.

John graduated from Fordham University Law School. In law school, John was the very first night law-school Law Review Editor – a big deal. He practiced securities law with Wilke, Farr and Gallaher for 18 years on Wall Street in New York. He then moved to Helena, practicing first as a partner with the Jackson firm and as bond counsel for Montana and Wyoming. Later, he was a partner with Oitzinger and Mullendore, then as a sole practitioner, and with his daughter, Hilary. He inspired several of his progeny who have taken up this charge to protect, uphold, and advance the law in myriad ways. This is a tradition we expect to continue. Finally, he was a Montana Legal Services Association volunteer attorney for many years, advising clients on housing issues. For this work, John was given the Neil Haight Pro Bono Award for 2018.

Oitzinger

He inspired several of his progeny who have taken up this charge to protect, uphold, and advance the law in myriad ways. Two daughters – Hilary as well as Kalispell city attorney Johnna Preble – became lawyers, and grandson Kai Rendino is in law school.

In retirement, John volunteered with Montana Wild in the Spring Meadow Complex in Helena, and there found his bliss among associate volunteers and its devoted staff. Ever the outdoorsman, John connected deeply with Montana as his Last, Best and Forever Place.

A memorial gathering will be attempted at a later time as COVID-19 vaccine becomes available.

Ada Jane Harlen

Noted Helena attorney Ada Jane Harlen died on Saturday, Oct. 24. She was 95.

Ada's 50-year law career began as a legal secretary, included participation in the Montana State Bar Tax and Probate Committee, and culminated with the founding of her own longstanding Helena law firm, Harlen, Thompson & Parish, P. C. She was most proud of her time and service on the Montana State Bar Probate Committee assisting and educating fellow lawyers with Montana's adoption of the Uniform Probate Code in 1969, and being able to practice law with her son, Tom, for 13 years. She

Harlen

remained active in her legal practice well into her 70s.

Ada was born in Chinook, on Nov. 2, 1924. Her parents were Norwegian immigrants who homesteaded in Montana.

Ada married Harry Harlen Jr. April 7, 1946, and moved to Helena. She was a legal secretary for the law firm of Loble, Picotte & Pauly. Rising to office manager, she discovered a love for estate planning, probate and trust administration. In 1960, she decided to take extension courses from Lasalle University in Chicago, and also enrolled at the University of Montana, where she passed her college equivalency exams, so she could enroll as a law student and be seated for the bar exam, passing it in 1969. Over these years, Harry and Ada had three boys, Craig, Steve and Tom.

After several years as an associate, she left the Loble firm to start her own firm in 1978 where she specialized in probate and estate planning. Throughout her long career, Ada prided herself in educating the community on the basics of estate planning and protecting their families.

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ASSOCIATE ATTORNEY: Established law firm in Kalispell, Montana, Hash, O'Brien, Biby & Murray, PLLP, is seeking an attorney with 3 + years of experience. Candidates must be licensed to practice in Montana. Please send letter of interest by email to cmhash@hashlaw.com or by regular mail to P.O. Box 1178, Kalispell, MT 59903-1178. Applications will be kept confidential.

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