MONTANA LAWYER

State Bar of Montana

March 2017 | Vol. 42, No. 5

CHIEF JUSTICE KARLA GRAY

1947 – 2017

Also in this edition:

> Carlson nominated ABA President-Elect

> Security Series: Fortify Your Network

> Employee or Managing Agent: Drawing the Line

> The Latest Health Care Reform Update

> Clearing Up Sovereign Immunity Confusion

MONTANA LAWYER

The official magazine of the State Bar of Montana published every month except January and July by the State Bar of Montana, 7 W. Sixth Ave., Suite 2B, P.O. Box 577, Helena MT 59624. 406-442-7660; Fax 406-442-7763.
E-mail: jmenden@montanabar.org

Montana Lawyer Staff
Publisher | *Christopher L. Manos*
Editor | *Joe Menden*
406-447-2200; fax: 442-7763
e-mail: jmenden@montanabar.org

Subscriptions are a benefit of State Bar membership.

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

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

INDEX
March 2017

Cover Story

Feature Stories

Regular Features

State of Montana Bar Members, Join the ABA at a Special Rate!

One Low Price Opens These Opportunities

ABA BLUEPRINT
Exclusive member savings on tech and support services for your small firm.

ABA INSURANCE
Products including dental, vision and travel priced for your budget.

FREE CLE SERIES
Monthly webinars on ethics and practice-specific topics plus self-study programs.

LAW PRACTICE RESOURCES
Advice on key tech/ethics issues plus training videos and a buyers' guide.

Joining is Easy

Just add your ABA dues to your State Bar of Montana payment »

Questions?

Call the ABA Service Center at 800-285-2221 weekdays 7:00 a.m.–4:00 p.m. MT.

ABA Pricing Exclusive to Montana Bar Members

New Bar Admittee	$0
1–9 years in practice	$125
10+ years in practice	$200
Judge	$95
Military	$95
Senior Lawyer	$125
Inactive	$125

Gaertner joins as associate with McLean, Younkin & Willett firm in Bozeman

Drew Moore Gaertner recently joined the Bozeman law firm of McLean, Younkin & Willett, PLLC, as an associate.


Gaertner

Gaertner received her undergraduate degree in communication, with a minor in sport management, from the University of California, Santa Barbara. She earned her J.D. from the University of Montana School of Law in 2015. Following law school, Gaertner earned a Master of Laws in taxation (LL.M.) from the University of Washington School of Law where she graduated with honors in 2016.

Gaertner's practice emphasizes estate planning, probate and trusts, business planning and transactions, taxation, real estate and commercial law.

Moulton Bellingham in Billings announces new associate, new shareholder in firm

Moulton Bellingham P.C. in Billings has announced a new shareholder, Brandon Hoskins.


Hoskins

Hoskins has been with Moulton Bellingham since 2010. His principal areas of practice include transactions and litigation involving real estate, construction, oil and gas, business, and commercial transactions. He graduated from Billings Senior High School in 2003, from Saint John's University in 2007, with a degree in biology, and from the University of Montana School of Law in 2010. He is a member of the Board of Directors of the Yellowstone Area Bar Association and he is a member of the State Bar of Montana and the American Bar Association. He is admitted to practice before all state and federal courts in Montana.

Uffelman joins trucking industry insurance company as general counsel, chief claims officer

Trevor Uffelman has joined the American Trucking and Transportation Insurance Company, ATTIC, as its general counsel and chief claims officer. ATTIC is a Missoula based risk retention group underwriting cargo and liability risks for the trucking industry. In his new position Uffelman oversees the company's legal affairs and claims operation.


Uffelman

Prior to joining ATTIC, Uffelman was the general counsel of Watkins and Shepard Trucking, a leading nationwide less-than-truckload carrier headquartered in Missoula. Prior to that Uffelman was associated with the Helena law firms Browning, Kaleczyc, Berry & Hoven, PC and Drake Law Firm, PC.

2 associates join Matovich, Keller & Murphy

Matovich, Keller & Murphy, P.C. announces the addition of two attorneys.

Talia G. Loucks joins the firm as an associate working primarily on civil litigation matters. Loucks was born and raised in Friday Harbor, Washington. She attended California Lutheran University and graduated magna cum laude in 2011 with a bachelor's degree in communication and multi-media. Loucks attended the University of Washington School of Law. While there, she was the chief online editor of the Washington Journal of Technology, Law and Arts, was a member of the Technology Law and Policy Clinic, and completed in the Manfred Lachs International Space Moot Court Competition in Washington, D.C.


Loucks

During her time in law school, Loucks also clerked at the Washington State Attorney General's Office, interned with the Issaquah Prosecuting Attorney's Office, and worked at the University of Washington Student Legal services providing low-cost legal representation for UW students.


Brown

Chase E. Brown joins the firm as an associate working on civil litigation matters. Brown was born and raised in Billings. He attended Creighton University and graduated with a bachelor's degree in 2011 in business administration. Brown attended Creighton University School of Law. While there, he served as an associate staff member of the Creighton International and Comparative Law Journal as well as an active Member of the Creighton University Moot Court Board. Throughout law school, Brown interned at the Yellowstone County Attorney's Office, and the Douglas County (Nebraska) Attorney's Office and Shefren Law Offices in Omaha, Nebraska.

Johnson, Garab open new firm in Bozeman

Breeann Johnson and Ali Garab are pleased to announce the opening of their new law firm, Western Roots Law PLLC in Bozeman.

Johnson is a 2010 graduate of the University of Montana School of Law. She previously practiced as Johnson Water & Land Law. At Western Roots Law, she continues to provide experienced, in-depth representation for clients on water and land law issues throughout the state. She is admitted to practice in Montana state courts and U.S. district courts in the District of Montana. She is a member of the Gallatin County Bar Association and the State Bar of Montana's Technology Committee and Indian Law Section. You can reach her at Johnson@WestRootsLaw.com or 406-600-9389.

Garab, a 2008 graduate of the University of Montana School

of Law, is also admitted to practice in Montana State Courts, U.S. District Courts in the District of Montana, and the CSKT Tribal Court. Ali, an experienced litigator, offers a wide variety of services related to civil litigation, including limited scope representation to fit a client's individual needs. She is a member of the Gallatin County Bar Association and provides pro bono legal services through the Montana Legal Services Association. You can reach her at Garab@WestRootsLaw.com or 406-579-9584.

Both Johnson and Garab contract with attorneys statewide to assist in specialized litigation or discrete aspects of a particular matter. For more information contact either Johnson or Garab.

Lowe Law Group opens branch office in Billings; Hensel joins new office

Lowe Law Group is pleased to announce the opening of its Billings branch office on Feb. 27. Lowe Law Group is based in Ogden, Utah, with branch offices in Williston, North Dakota, and Las Vegas. Lowe Law Group focuses on personal injury, medical malpractice, mass torts, and products liability.


Hensel

Lowe Law Group also announces that Craig C. Hensel has joined the firm, and will be practicing in the Billings office. Hensel's practice will focus on representing plaintiffs in personal injury litigation.

Hensel is a graduate of the University of Montana School of Law, and has been practicing in Billings since 1996. Prior to joining the Lowe Law Group, Craig practiced civil litigation with Hall & Evans LLC. He can be reached at craig@lowelawgroup.com.

Hunter joins Vicevich Law in Butte

Vicevich Law, P.C., of Butte is excited to announce that Amanda D. Hunter has joined the firm as an associate attorney. Hunter graduated from the University of Florida in 2010 with a B.A. in History and Sociology. Soon after, she earned her J.D. and a certificate in environmental law in 2013 from S.U.N.Y. at Buffalo. She practiced law in Colorado before moving to Butte in November 2016.


Hunter

Hunter is excited to join the Butte community. The area perfectly blends her passion for history and the great outdoors into a single location. Hunter brings a diverse background with experience working with Legal Aid, the U.S. Navy, in the private sector as well as a law clerk. She is licensed to practice law in the states of Colorado and Montana. Her practice areas include estate planning, probate, tax, and criminal law.

Christensen named to Board of Public Assistance

Gov. Steve Bullock has appointed Helena attorney Amy Christensen to be chair of the state Board of Public Assistance.

Christensen is a founding partner of Christensen & Prezeau, PLLP, in Helena.

The governor also appointed Marianne Roose, a retired Lincoln County Commissioner from Eureka, to the three-person board.

According to its website, the Board of Public Assistance is a quasi-judicial body that provides a forum for citizens to contest actions of the Montana Department of Public Health and Human Services related to public assistance.

Kimmet becomes partner at Karell, Dyre Haney

The following announcement was run with an incorrect headline in the February issue and is being reprinted.

Karell Dyre Haney PLLP, located in Billings, announces that Candace L. Kimmet has become a partner in the law firm.

Kimmet received her Bachelor of Science degree with a concentration in finance from the Wharton School of the University of Pennsylvania in 2007 and her law degree from the University of Pennsylvania Law School in 2010. During law school, she interned with the Honorable Richard J. Sullivan in the Southern District of New York and at a private law firm in New York City.


Kimmet

After graduating from law school, Kimmet worked as an attorney at Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York City, where she was involved in a wide variety of commercial transactions.

Prior to joining Karell Dyre Haney, she clerked for the Honorable Russell C. Fagg, Montana Thirteenth Judicial District. Her practice areas include real estate transactions, business formations, sales and purchases, and secured financing transactions as well as general commercial matters. She is admitted to practice in Montana and New York.

Kimmet can be reached at 406-294-8489, or ckimmet@kdhlawfirm.com.

Bar moves into new offices in Downtown Helena

The State Bar in late February moved into new office space on the Walking Mall in Downtown Helena.

We are now located in the Aspen Court Building, 33 S. Last Chance Gulch, near the Helena branch of the Lewis and Clark Library. Parking is available in the Helena Parking Commission lot at the corner of Broadway and Cruse Avenue (south end of the lot),

Other than the new physical address, all of the bar's contact information is unchanged:

State Bar of Montana, P.O. Box 577, Helena, MT 59624. Phone: 406-442-7660. Fax: 406-442-7763.

Carlson, former State Bar of Montana president, nominated to be president-elect of the ABA

Butte lawyer Robert M. Carlson was nominated Feb. 5 as president-elect to become ABA president in August 2018.

Carlson was president of the State Bar of Montana in 1993-1994. In 2016, Carlson was named the William J. Jameson Award, the highest honor bestowed by the bar.

In an address to the ABA House of Delegates on Feb. 6, Carlson, expressed gratitude for the confidence and support given to him by ABA members and vowed to continue to make a difference and ensure that the ABA is more relevant than ever.

Carlson, who practices law in a small firm — Butte's Corette Black Carlson & Mickelson — said that the ABA has a proven track record of making a difference for practicing lawyers in their everyday work as well as advocating for access to justice, criminal justice reform and independence of the judiciary.

A recording of Carlson's address to the House of Delegates, which came during the ABA's Mid-year Meeting in Miami, is posted in the State Bar News section at **www.montanabar.org**.

Carlson, a former chair of the House of Delegates, has been a member of that body since 1999, during which he has been chair of the Drafting Committee and served on the Rules and Calendar Committee and the Select Committee of the House. He also was a member of the Board of Governors. In addition, he is a former chair of the Standing Committee on Meetings and Travel and served on the Standing Committee on Bar Activities and Services and the Commission on Racial and Ethnic Diversity in the Profession. He is a former state chair of the American Bar Foundation.

In the area of governmental affairs, Carlson was the chair of the ABA Day in Washington Planning Committee from 2014-2016.

In Montana, he serves on the Montana Supreme Court Commission on Character and Fitness in addition to his years of service on the State Bar's Board of Trustees.

He earned both his undergraduate and law degrees from the University of Montana.

Only one Montanan in history has been ABA president — William J. Jameson, who held the post in 1953-54. Jameson was later appointed by President Dwight D. Eisenhower to the U.S. District Court for the District of Montana and served as chief judge from 1965-1968.

Butte's Robert M. Carlson was nominated to be ABA president-elect.

Listen to Carlson speech online

A recording of Carlson's address to the House of Delegates during the ABA's Mid-year Meeting in Miami in February is posted in the State Bar News section at **www.montanabar.org**.

You can also listen to new ABA President Linda Klein's address to the House of Delegates there.

Talia selected to represent Area F on State Bar Board of Trustees

The State Bar of Montana's Board of Trustees selected Mike Talia as the board's new trustee from Area F.

Talia is an active duty Judge Advocate General attorney with the Montana National Guard at Fort Harrison in Helena. He previously served on the Board of Trustees from Area D from 2012 to 2014. He left the board when he moved out of that district to Helena.

Talia, 36, was selected out of a field of eight attorneys who applied for the position. Board members who interviewed the applicants said it was difficult to choose one person from an exceptionally strong field of candidates.

Talia, who said he has been involved in the bar since law school when he was a member of the Student Bar Association, also previously served as president of the New Lawyers Section. He said he was excited to return to being involved.

Area F encompasses Lewis and Clark and Broadwater Counties. Talia replaces Luke Berger, who resigned from his position as trustee and chair of the board when he was recently appointed 5th Judicial District judge.

The term expires in September. Talia must run for re-election this year's bar elections to maintain his position.

Women's Law Section dinner on April 21 will honor women in the legal profession

The Women's Law Section in April will host its annual dinner for the Women's Law Caucus of the University of Montana's Alexander Blewett III School of Law to honor and acknowledge women in the legal profession.

Dinner this year will be hosted in the Payne Family Native American Center on the campus of the University of Montana, Missoula, on Friday evening, April 21. A no-host social hour will begin at 6 p.m. followed by dinner at 6:45.

The dinner is open to anyone interested in honoring the amazing members of the Women's Law Caucus and the profession. Recipients of the Margery Hunter Brown and the Fran Elge Scholarship will be awarded at the event.

Cost for the dinner including appetizers, dinner, and dessert is $35 per person. Please RSVP to tuttylawgropu@gmail.com.

Dues statements mailed to members March 1

Dues statements were sent out to members on March 1. Deadline for payment is April 1.

Section membership is voluntary. Be sure to indicate the sections you wish to join and adjust your total accordingly.

This year, the American Bar Association is offering a special dues rate exclusive to State Bar of Montana members. This is also a voluntary membership. See the ad on Page 3 for details of membership and pricing structured.

Members can pay their dues online at www.montanabar.org. As a reminder, the bar this year has instituted a processing fee for credit card payment. To avoid this fee, mail in your payment in the form of a check, cashier's check or money order.

CLE transcripts will be sent out under separate cover.

Member survey going on now

The State Bar of Montana is currently conducting a member survey. The survey will help us better serve members in our long-term planning process. All those who complete the survey will be entered into a drawing for $100, $75, or $50 gift card.

The survey should take 15 minutes to complete. You can take it at **www.montanabar.org**. The survey will close on March 22.

The Veterans Law Section Needs Attorneys

NO PRIOR MILITARY EXPERIENCE IS NEEDED!

We all need 40 hours/year Pro Bono, and our Veterans have problems not military-related – Family Law, Debt, Estates, etc.

WON'T YOU PLEASE HELP US HELP THEM?

When paying your dues this year, please check the box to **Join the Veterans' Law Section**, and join the volunteers providing Pro Bono assistance to those who have sacrificed so much for us.

It will probably be the best twenty bucks a year you can spend!

Supreme Court Opinion

Assault conviction over baby death reversed

The Montana Supreme Court has reversed the aggravated assault conviction of a Great Falls woman for the 2012 death of her infant daughter.

The Supreme Court ruled 5-2 in February that Jasmine Eskew's confession and admissions made to Great Falls police detectives were coerced and not made voluntarily and therefore should not have been admitted as evidence in the 2014 jury trial in Cascade County District Court.

During a long interrogation the officers repeatedly told Eskew that proper answers to their questions were essential to ensure proper medical care for her daughter. They also told her that upon conclusion of the interrogation she would be reunited with her daughter. Eskew repeatedly denied shaking her baby or inflicting any other injury upon her, but after repeatedly being told that her answers were jeopardizing her daughter's medical care, she told officers that she had shaken her daughter.

The District Court judge determined that the detectives had misrepresented to Eskew that the purpose of the interview was to facilitate medical care for the child, when in reality the purpose of the interview was to facilitate a criminal investigation. However, the District Court concluded that the interview was not unduly coercive.

However, in his opinion for the majority, Chief Justice Mike McGrath wrote that the officers' lies were not about peripheral points but about the fundamental nature of the case and Eskew's part in it.

"This purposeful manipulation broke down Eskew's ability to resist the officers' relentless pressure to tell them what they wanted to hear —that she shook her daughter," McGrath wrote.

A majority of the Supreme Court disagreed, ruling that there is every indication that Eskew underwent the interrogation believing she would be reunited with her daughter at the hospital. The Supreme Court reversed the District Court, holding that the fundamental misunderstanding of what was happening was based upon lies that precluded Eskew from understanding the situation and the significance of her answers to the police. The Supreme Court ruled that the involuntary statements that Eskew made during the interrogation should not have been used in the trial, reversed her conviction, and sent the case back for a new trial.

Justice Laurie McKinnon and District Court Judge Heidi Ulbricht, sitting for Justice Patricia Cotter, dissented. The dissent maintained the trial record supported the District Court's determination that: (1) Eskew was given adequate Miranda warnings; (2) she understood the warnings; and (3) there were no representations by law enforcement that were untrue, contradicted the Miranda warnings, or rendered Eskew's statements involuntary. Further, the dissent recognized that it was the dual responsibility of law enforcement to obtain a history for medical providers regarding the mechanism of injury, particularly when a nonverbal infant has been critically injured, and to conduct a criminal investigation.

Upcoming Oral Arguments

Court to hear case in Missoula over ARCO contamination

The Montana Supreme Court will hear an oral argument on Friday, April 7, in Missoula in a dispute between Atlantic Richfield Company and landowners over contaminated soil from decades of operation of the Anaconda Smelter Stack.

ARCO argues that the plaintiffs' plan to restore their own properties by removing heavy metals left by the smelter is pre-empted by the federal Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as Superfund. The U.S. Environmental Protection Agency has filed a friend of the court brief supporting ARCO's argument.

The landowners counter, however, that the Superfund law does not pre-empt Montana's common law, which they say recognizes that restoration damages constitute the only remedy that affords a plaintiff full redress for the contamination of personal property.

District Judge John Kutzman of Great Falls will sit in place of Justice Jim Rice, who has recused himself from the case.

The argument is scheduled for 9:30 a.m. in the George Dennison T heater on the University of Montana campus, with an introduction beginning at 9 a.m.

Normally, the court hears oral arguments in its courtroom in Helena, but several times a year it travels to other Montana cities to hear arguments.

***Bitterrooters for Planning v. Montana DEQ*, Wednesday, March 29, 9:30 a.m., Courtroom of the Montana Supreme Court, Helena.**

The Montana Supreme Court will hear an oral argument in a dispute between environmental groups and the Montana Department of Environmental Quality over a ground water discharge permit in Hamilton.

DEQ is appealing a 1st Judicial District decision that found that it violated the Montana Environmental Policy Act by not considering the impacts from the construction and operation of a proposed retail and grocery facility as a secondary impact to the issuance of a ground water discharge permit. DEQ argues that the court misconstrued the meaning of "secondary impact" set forth in the Administrative Rules of Montana.

Nominees submitted to governor for Cascade County judge

The Judicial Nomination Commission has submitted the following names to Gov. Steve Bullock for consideration for appointment to the vacant judicial seat in the 8th Judicial District (Cascade County):

- Allen P. Lanning
- John Weston Parker
- Joseph M. Sullivan

The governor must fill the position, which became vacant with the November 2016 election of Justice Dirk Sandefur to the Montana Supreme Court, within 30 days of receipt of the nominees. The person appointed by the governor is subject to Senate confirmation during the 2017 legislative session.

The position also is subject to election in 2018. The successful candidate will serve until January 2021.

The commission's action follows the close of a 30-day public comment period. Before recommending the nominees to the Governor, Commission members interviewed the applicants.

Judicial Nomination Commission members are District Judge Richard Simonton of Glendive; Janice Bishop of Missoula, Karl Englund of Missoula, Elizabeth Halverson of Billings; Hal Harper of Helena; Lane Larson of Billings; and Nancy Zadick of Great Falls.

New Commission on Practice members to be elected

The Montana Supreme Court has ordered elections to be held to replace four attorney members of the Commission on Practice whose terms are expiring April 1.

The names of the top three vote-getters in each election, conducted by a state district judge in the respective Commission on Practice area, will be forwarded to the Supreme Court, which will appoint one to each of the four expiring terms. Elections will close March 31. Elections will be held in the following areas:

- Area B (2nd, 3rd and 4th Judicial Districts – Silver Bow, Deer Lodge, Granite, Powell, Beaverhead, Jefferson, and Madison Counties)
- Area D (12th, 15th and 17th Judicial Districts – Liberty, Hill, Chouteau, Daniels, Sheridan, Roosevelt, Blaine, Phillips, and Valley Counties)
- Area F (10th and 14th Judicial Districts – Fergus, Judith Basin, Petroleum, Golden Valley, Meagher, Musselshell, and Wheatland Counties)
- Area H (7th and 16th Judicial Districts – Dawson, McCone, Prairie, Richland, Wibaux, Carter, Custer, Fallon, Garfield, Powder River, Rosebud, and Treasure Counties).

LawPay Security Series

ABOUT THE SERIES

December/January - Step 1: Identify Your Cyber Assets

February 2017 - Step 2: Strengthen Your Passwords

March 2017 - Step 3: Fortify Your Network

April 2017 - Step 4: Protect Internal Systems

May 2017 - Step 5: Secure Your Sensitive Data

Step 3: Fortify Your Network

Wi-Fi networks make it easy to connect the systems in your practice, both to each other and the outside world. However, they often make it easy for an intruder to gain access to those same systems and the data therein. You can significantly reduce this risk by making a few important changes to your network configuration.

Secure Administrator Access

Start by setting a strong password for administrative access to your wireless router. Many networks are breached because the default password was never changed. You will need to log in to your router's configuration website to reset this password and update the other security options discussed in this tip. For most wireless routers, you access this website by entering "192.168.1.1" or "192.168.0.1" into your browser address bar. (Make sure you are connected to your network first, either via an Ethernet cable or Wi-Fi.)

With administrator access locked down, you should now secure access to the network itself. Most wireless routers today support a primary Wi-Fi network, one or more guest networks, and wired, local network (LAN) ports to connect directly to the router. We recommend that you keep your office devices and staff on the primary Wi-Fi (your "private" Wi-Fi network) or LAN, and use a guest network for any clients or visitors who need internet access.

Enforce Wi-Fi Authentication

Access to all of your Wi-Fi networks needs to be password-protected. For small businesses, the predominant standard is referred to as WPA2-PSK or WPA2-Personal, or just WPA2 (WPA2-Enterprise can provide more flexible authentication options for larger practices with many users, but requires additional configuration, which may require IT services). With WPA2-PSK, a shared password is used to access the network. Use your password manager to generate a different, strong password for both your private and guest Wi-Fi networks.

From your browser, you will need to find the wireless settings section of your router's configuration. For each wireless network, you should:

- Set a network name, or SSID. This is what users will see when they choose from available wireless networks. Clearly differentiate your private and guest network names.
- Choose "WPA2-PSK" for the network authentication method and "AES" for the encryption method. Depending on your router, these may be grouped together or split into two separate options, and they may use different labels like "WPA2-Personal" or "WPA2". Do not use "WEP", "WPA" (without the "2"), or "TKIP" (without "AES" included), as these options are less secure and may be easily circumvented.
- Enter the password you generated for the network, also known as the pre-shared key.

Limit Guest Access

Your guest network is there to keep your clients and visitors separate from your private network — and out-of-reach of your confidential information. If you're not careful, however, you may inadvertently allow your guests much greater access. When configuring your guest network, you may see an option to allow

Security, page 25

'Managing agent' or mere employee?

A practical guide on how to draw the line under MT Rules of Civil Procedure

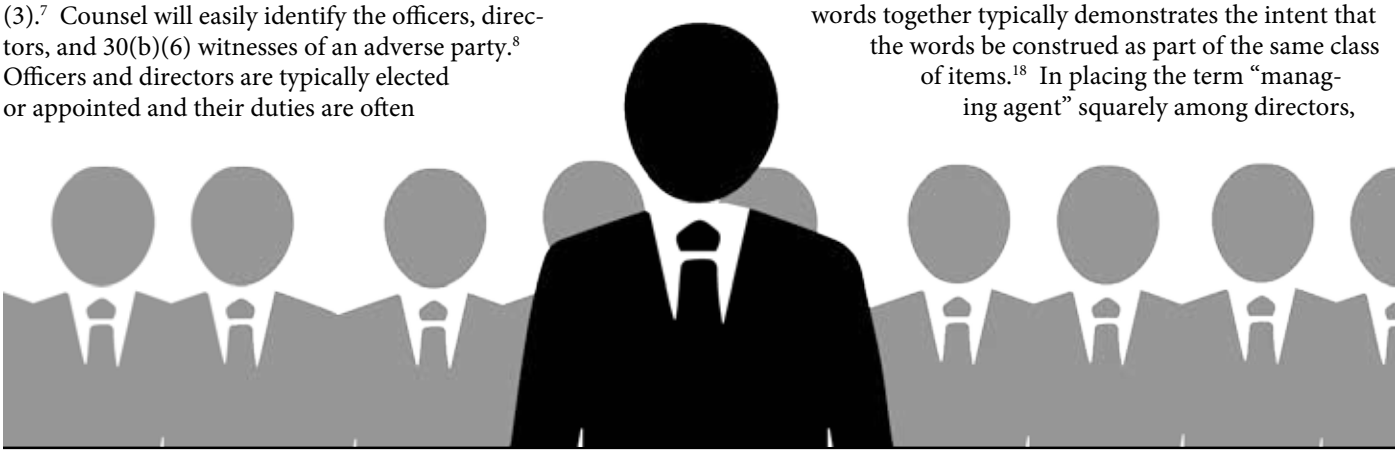
By Mark Feddes
Crowley Fleck

In anticipation of trial, Rule 5 of the Montana Uniform District Court Rules requires that a district court's final pretrial order refer to all portions of depositions the parties intend to introduce at trial.[1] At trial, however, the introduction of deposition testimony as substantive evidence is limited by the rules of hearsay.[2] There are, of course, exceptions to the rule such as when a witness is "unavailable" to testify.[3] Rule 32(a)(3) of the Montana Rules of Civil Procedure provides another independent exception[4] to the rule against hearsay, permitting a party to use "for any purpose" the deposition of an individual who was at the time of his or her deposition an adverse party's "officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4)."[5] Like party admissions, M.R.Civ.P. 32(a)(3) allows for the introduction of deposition testimony irrespective of the witness's availability and willingness to testify.[6]

In designating the deposition testimony of witnesses before trial, the difficulty comes in identifying those witnesses who are managing agents rather than mere employees under Rule 32(a)(3).[7] Counsel will easily identify the officers, directors, and 30(b)(6) witnesses of an adverse party.[8] Officers and directors are typically elected or appointed and their duties are often prescribed by means such as bylaws,[9] and corporate witnesses are designated by the organization to speak on its behalf.[10] Unlike officers and directors, managing agents are not generally elected or appointed and their status is largely derived from an analysis of their actual job functions.

As one court described it, the law defining managing agents is sketchy.[11] The standard for managing agents is uncertain, at least in part, due to the ad hoc, fact-sensitive nature of these determinations. So is counsel left to simply know a managing agent when she sees it, like former U.S. Supreme Court Justice Potter Stewart's innate ability to recognize obscene materials?[12] Not quite. In addition to the textual cues provided in M.R.Civ.P. 32(a)(3), the Montana Supreme Court has articulated at least three factors that are – though indefinite – useful for delineating managing agents. Taking the Montana Supreme Court's guidance along with the application of similar factors by other courts, one can make some generalizations about those individuals who do and do not constitute managing agents.

Initially, there is something to be gained from the words used in M.R.Civ.P. 32(a)(3) as well as their context and order. Looking to its plain meaning,[13] a "managing agent" is an individual with general power involving the exercise of judgment and discretion, as opposed to an ordinary agent who acts under the direction and control of the principal.[14] Much like distinguishing an employee from an independent contractor, the degree of control an employer exerts over an individual in his or her job performance should be a leading consideration in identifying managing agents.[15] Additionally, words – like people – are known by the company they keep.[16] A word's meaning is informed by its neighboring terms[17] and grouping words together typically demonstrates the intent that the words be construed as part of the same class of items.[18] In placing the term "managing agent" squarely among directors,



LawPay®

AN AFFINIPAY SOLUTION

STATE BAR OF MONTANA

Proud Member Benefit Provider

THE EXPERTS IN LEGAL PAYMENTS

The proven payment solution for lawyers.

Managing payments and growing revenue for over 40,000 law firms in the US, LawPay is the only payment solution offered as a member benefit through the Sate Bar of Montana. Developed specifically for law firms, LawPay guarantees complete separation of earned and unearned fees, giving you the confidence and peace of mind your credit card transactions are handled the right way.

TRUSTED BY MORE THAN 35,000 FIRMS

RECOMMENDED BY 46 STATE BARS

ONLY PAYMENT SOLUTION OFFERED BY THE ABA ADVANTAGE PROGRAM

VISA MasterCard DISCOVER NETWORK AMERICAN EXPRESS

LawPay.com/montanabar | 866.376.0950

LawPay is a registered ISO of Merrick Bank, South Jordan UT.

officers, and 30(b)(6) witnesses, it must be assumed that a managing agent is in the same class of employees as officers, directors, and corporate designees.[19] And like the other employees identified in the group, managing agents will possess express or implicit authority to act and/or speak on behalf of the principal organization.[20]

The Montana Supreme Court has also laid out several factors to determine whether or not an employee falls within the managing agent classification. According to the Montana Supreme Court, whether or not one is considered a managing agent depends upon the individual's right of general control, authority, and judgment within his or her department; whether the interests of the individual are identified to be those of the employer; and whether any person of higher authority possesses knowledge about the matters at issue.[21] While not stated as a distinct factor per se, the Montana Supreme Court has also indicated that managing agents will have "sufficient supervisory responsibility."[22] Without application to specific cases, the question remains open as to how these factors should be applied.

Unfortunately for litigators facing this issue, the Montana Supreme Court has only addressed the meaning of "managing agent" under M.R.Civ.P. 32(a)(3) in two cases and, due to the clear managerial role of the employees involved, the Court decided the issue with little analysis in both instances. In *Clark Bros. Contractors v. State*, the Montana Supreme Court held that the State's Chief of Materials Bureau, Head of Location Road Design, and Chief of Preconstruction Bureau possessed sufficient supervisory control over the underlying project to render them managing agents in a construction dispute concerning subsurface conditions and fill materials.[23] After articulating the factors to be considered, the Clark Bros. Court simply stated that the positions "entail sufficient supervisory responsibility to place these individuals within the status of managing agents for the State."[24] In Hart-Albin Co. v. McLees Inc., the Court similarly held that the head of the department responsible for product testing and evaluation as well as the manager of quality control were managing agents in a products liability action.[25] As in Clark Bros., the Hart-Albin Court did not address how the each factor specifically applied to the employees at issue.

Somewhat perplexingly, the Montana Supreme Court stated in *Hart-Albin* that the term managing agent "has been generously construed" under M.R.Civ.P. 32(a)(3). The *Hart-Albin* Court did not cite any cases for that proposition and it is unclear what authority the Court relied upon in making its assertion. *Clark Bros.* and *Hart-Albin* both involved employees who easily fell within the plain meaning of "managing agent" without a generous construction of the term. One possible explanation is that the Court may have conflated the interpretation of "managing agent" under M.R.Civ.P. 32(a) with the Court's prior interpretation of the same term under the Worker's Compensation Act.[26] In applying the term "managing agent" as used in the Worker's Compensation Act, the Montana Supreme Court previously held that term should be liberally construed in determining whether an employee provided timely notice of injury to an appropriate agent (i.e. a "managing agent") of the claimant's employer.[27]

While public policy appears to support a liberal construction of the Worker's Compensation Act,[28] the same does not necessarily hold true in interpreting exceptions to the rule against hearsay. As Judge Learned Hand observed long ago, there is a judicially recognized preference for live testimony at trial.[29] The rationale for this preference is that live testimony gives the jury the opportunity to observe the demeanor of the witness and determine credibility,[30] and transcripts of a witness's prior testimony, even when subject to prior cross-examination, do not offer any such advantage, because all persons appear alike when testimony is reduced to writing.[31] Thus, the Montana Supreme Court's statement concerning a generous construction of the managing agent exception is, at the very least, puzzling.

Regardless of whether or not the term should be generously construed, case law from other jurisdictions is useful for understanding how the managing agent factors typically apply. While it is not technically dispositive, courts generally seem to agree that the first factor should be accorded the most weight.[32] In other words, if the employee is vested with the authority to exercise judgment and discretion in corporate matters, the employee will likely be deemed a managing agent.[33] A managing agent cannot typically act in an inferior capacity or under the close supervision of a higher authority.[34] In analyzing this factor, a realistic appraisal of the employee's activities – not job title – determines the nature of the individual's relationship to the organization.[35] An inability to exercise judgment and discretion in corporate matters is of great significance because it is that authority vested in the individual that justifies binding the corporation to the employee's testimony akin to that of a 30(b)(6) witness.[36] Indeed, it is difficult to imagine a scenario in which an employee could act as a managing agent without the authority to use judgment and discretion in corporate matters.

Next, one must look to whether the interests of the suspected managing agent are aligned with those of the employer.[37] This means that the employee must be a person "who has the interests of the corporation so close to his heart that he could be depended upon to carry out his employer's direction to give testimony at the demand of a party engaged in litigation with the employer."[38] This factor has also been interpreted to mean that the employee can be expected to identify with the interests of the organization rather than with the interests of other parties.[39] Thus, in the case of former officers and directors who refused to appear for their respective depositions upon the pain of sanctions against their former employer, one court held that the individuals lacked a sufficient identity of interest with the defendant company.[40] In this regard, the unity or alignment of interest seems to be less of a means for actually determining the managerial status of an employee and more for protecting fundamental fairness in disallowing an organization to be bound to the admissions of a disloyal or disgruntled employee.[41]

The final consideration in this analysis is whether any person of higher authority in the organization possesses knowledge about the matter at issue.[42] Like the first factor, the third factor again points to those employees who are situated

AGENT, page 28

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

MONTANA CHAPTER

WWW.MONTANAMEDIATORS.ORG

The following attorneys are recognized for

Excellence in the field of Alternative Dispute Resolution

Tracy Axelberg
Missoula

Dee Carestia
Wise River

James Gaitis
Whitefish

Jay Hunston
Whitefish

Michael Lilly
Bozeman

Hank Raucci
Helena

James Regnier
Lakeside

Mick Taleff
Great Falls

William Wagner
Missoula

Gary Zadick
Great Falls

Check your preferred available dates or schedule appointments online, directly with Academy Members - for free.

www.MontanaMediators.org is funded by our members

The National Academy of Distinguished Neutrals is an invitation-only association of over 900 top-rated premier mediators & arbitrators throughout the US, and proud Neutral Database Partner to the national defense (DRI) & plaintiff (AAJ) bar associations. For more info, see www.nadn.org/about

Confusion over sovereign immunity: What is Article II, Section 18 about?

By Anthony Johnstone*

Article II, Section 18 of the Montana Constitution ("State subject to suit") says "[t]he state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a two-thirds vote of each house of the legislature." Lawyers commonly understand this provision to waive the state's "sovereign immunity," except when a supermajority of the legislature confers such immunity by statute. A case challenging the 2015 Montana Legislature's ratification of a water rights compact with the Confederated Salish and Kootenai Tribes, *Flathead Joint Board of Control v. State*,[1] presents an opportunity to clarify the various meanings of sovereign immunity in Montana law, and to confirm which forms of immunity the state constitution does, and does not, address.

Introduction

Two provisions of the compact and its associated administrative ordinance are at issue in the recent case because they purportedly grant the state sovereign immunity without the supermajority vote required by Article II, Section 18. First, the compact waives the tribes' and the state's jurisdictional "immunit[y] from suit, including any defense the State shall have under the Eleventh Amendment of the Constitution of the United States … to permit the resolution of disputes under the Compact by the board."[2] Second, the ordinance establishes a joint water management board and confers upon its members and staff personal immunity "from suit for damages arising from the lawful discharge of an official duty associated with the carrying out of powers and duties set forth in the Compact or this Ordinance…."[3] This latter provision is expressly severable from the rest of the law in case it is invalid.[4]

The *state jurisdictional* immunity in the compact, and the *personal liability* immunity in the ordinance, are each distinguishable from *state liability* "immunity from suit for injury to a person or property" addressed by Article II, Section 18. The compact waives the state's constitutional jurisdictional immunity for enforcement proceedings in state, federal, and tribal courts, and does not create any new tort liability immunity implicating Section 18. The ordinance does not establish state immunity, but recognizes pre-existing common law personal immunities. These varieties of "sovereign immunity" arise from separate sources of law and serve different purposes. To understand how each immunity works, and where they stand in relation to each other and the state constitution, it helps to trace their origins in federal constitutional and state common law.

Sovereign immunity and related doctrines grew from roots in the common law long before Montana statehood. There are two main strands of immunities at play in claims brought against a state and its officers. First, sovereign immunity protects a state from jurisdiction in a court without its consent, and from entity liability for damages in civil suits. It arises from principles of sovereignty in constitutional law, including popular sovereignty, under which the source of the law may not be subjected to the law. Second, personal immunity protects state officers from personal liability for damages in civil suits for actions taken as state officers. It arises from public policy concerns in tort law, under which a fear of civil suits may interfere with an officer's faithful execution of his duties. Personal immunity can be absolute depending on an officer's function, and can be qualified depending on whether the officer acted in good faith. The forms of sovereign immunity that come to Montana law through the Montana Constitution, the legislature, and judicial decisions draw on these various immunities.

I. Constitutional sovereign immunities can protect states from either jurisdiction, or liability, or both

The concept of sovereign immunity arrived in the United States from English law, under which "no suit or action can be brought against the king … because no court can have jurisdiction over him."[5] Such jurisdiction would imply a superior power of courts over the king, which is inconsistent with the supreme power of the king as sovereign.[6] In the Federalist Papers, Alexander Hamilton assured the states that the ratification of the United States Constitution would not alter the sovereign immunity "now enjoyed by the government of every State in the Union," because "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*"[7] Sovereign immunity stands "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[8] The implications of sovereign immunity include both

1 No. DA 16-0516 (Mont.) (docketed Aug. 30, 2016).

2 Mont. Code Ann. § 85-20-1901(IV.I.8).

3 Mont. Code Ann. § 85-20-1902.1-2-111.

4 Mont. Code Ann. § 85-20-1902.1-1-113.

* Principal, Johnstone PLLC and Associate Professor, Blewett School of Law at the University of Montana. This is a condensed version of a paper prepared for Farmers and Ranchers for Montana (FARM), an organization supporting the water rights compact between Montana and the Confederated Salish and Kootenai Tribes. FARM retained Professor Johnstone to analyze the sovereign immunity issues presented by the compact. The views expressed are his own. (Institutional affiliation is provided for identification purposes only and does not constitute institutional endorsement.)

5 1 W. Blackstone, Commentaries on the Laws of England 234-235 (1765).

6 *Id.*

7 The Federalist No. 81, p. 487 (C. Rossiter ed. 1961) (A. Hamilton) (emphasis in original).

8 *Nevada v. Hall*, 440 U.S. 410, 416 (1979) (quoting *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (Holmes, J.)).

jurisdictional and liability immunities.[9]

A. Federal sovereign immunity protects states from both jurisdiction and liability.

The question of whether the states consented to suit in federal court under the new Constitution soon arose in a case brought by a citizen of North Carolina against the State of Georgia.[10] A majority of justices in that case held that Georgia was subject to suit, relying on the text of Article III, Section 2 ("The judicial Power [of the United States] shall extend … to Controversies … between a State and Citizens of another State"),[11] as well as new American principles of popular sovereignty (the people not their governments are sovereign).[12] The states, apparently surprised at the Court's conclusion, within two years ratified the Eleventh Amendment: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[13] Although the Constitution speaks only to suits against states by citizens of other states, the Supreme Court now recognizes general state sovereign immunity against federal jurisdiction[14] and most federal law regardless of the plaintiffs' state citizenship,[15] except when expressly abrogated by Congress and the Constitution.[16] The federal courts' extension of sovereign immunity beyond the text of the Eleventh Amendment has drawn critics,[17] but is well-established.

Sovereign immunity of states under federal law exists independent of state law and is motivated by both jurisdictional and liability concerns. With respect to jurisdiction, sovereign immunity "prevent[s] the indignity of subjecting a State to the coercive process of judicial tribunal at the instance of private parties."[18] With respect to liability, sovereign immunity prevents a state from "the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf."[19] Consistent with these concerns, federal constitutional sovereign immunity has limits. States can consent to suit through powers originally delegated in the United States Constitution such as the federal judicial power of Article III and the congressional civil rights enforcement power of the Fourteenth Amendment, or through legislation or other official waiver of sovereign immunity from suit in state, federal, or tribal courts.[20] Furthermore, state officers acting on behalf of a state remain subject to suit in their official capacity for injunctive or declaratory relief, even when a judgment would have the effect of enjoining or declaring invalid the execution of state law.[21] As described below, sovereign immunity under federal law also does not prevent some damages claims against state officers in their personal capacity, as long as the claim does not result in a judgment against the state treasury.[22]

A. Montana's sovereign immunity also protects the state from both jurisdiction and liability.

Like the Eleventh Amendment, Montana's original 1889 Constitution addressed state sovereign immunity only indirectly. Prior to statehood, the territorial supreme court recognized sovereign immunity against a contract claim in 1868, holding, "unless permitted by some law of this Territory, or of the general government, no citizen of this Territory can sue it."[23] The statehood constitution assumed rather than expressed sovereign immunity in state courts, providing for a Board of Examiners to consider "all claims against the state" before the legislature acted upon them.[24] As the Montana Supreme Court later put it, "the legislature found itself in the unpalatable position of acting as judge, jury, and responsible party in determining and settling such tort claims."[25] In 1963, the legislature limited sovereign immunity by deeming the purchase of liability insurance for either state or local governments to waive immunity to the extent of the insurance coverage.[26] The Montana Supreme Court unanimously reaffirmed the doctrine on the eve of the 1972 Constitutional Convention, citing the legislature's attempts to limit sovereign immunity as evidence of its continued existence.[27]

1. Article II, § 18 concerns only state liability immunity from tort damages.

For a brief period, Montana abolished a form of sovereign

9 *Wood v. Montana Dept. of Revenue*, 826 F. Supp. 2d 1232 (D. Mont. 2011) ("There are two forms of sovereign immunity: (1) sovereign immunity under the Eleventh Amendment, which bars federal lawsuits against states and (2) sovereign immunity under the broader doctrine of state sovereign immunity, which shields a state from liability in both federal and state court, unless it has consented to be sued.").

10 *See, Chisolm v. Georgia*, 2 Dall. 419 (1793).

11 *See, e.g., Chisholm*, 2 Dall. at 450-53 (opinion of Blair, J.).

12 *See, e.g., Chisholm*, 2 Dall. at 469-80 (opinion of Jay, C.J.); *but see id.* at 449 (Iredell, J., dissenting) ("there are no principles of the old law, to which we must have recourse, that in any manner authorise the present suit, either by precedent or by analogy").

13 U.S. Const., Amend. XI.

14 *See, Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996),

15 *See, Alden v. Maine*, 527 U.S. 706 (1999)

16 *See, Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) ("the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment").

17 *See, e.g.,* Erwin Chemerinsky, "Closing the Courthouse Doors," 71 Mont. L. Rev. 285, 291 (arguing "the concept of sovereign immunity was inconsistent with the rule of law," and the Eleventh Amendment only preserves narrow immunity for diversity jurisdiction); *but see* William Baude, Sovereign Immunity and the Constitutional Text, 103 Va. L. Rev. __ (forthcoming 2017) (summarizing several defenses of state sovereign immunity, and offering a novel defense of it as a common-law rule protected as a "constitutional backdrop").

18 *In re Ayers*, 123 U.S. 443, 505 (1887) ("It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests."); *see also,* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 58 (1996).

19 *Alden v. Maine*, 527 U.S. 706, 749 (1999); *see also, Hess v. Port Authority Trans-Hudson Corporation*, 513 US 30, 48-49 (1994).

20 *See,* U.S. Const. Art. III, § 2; U.S. Const. Amend. XIV, § 5. *See also,* Alden, 527 U.S. at 755; *Lapides v. Board of Regents of Univ. System of Ga.*, 535 US 613, 622 (2002) ("This Court consistently has found a waiver when a State's attorney general, authorized (as here) to bring a case in federal court, has voluntarily invoked that court's jurisdiction.").

21 *See, Alden*, 527 U.S. at 756-57; *see also, Ex parte Young* (209 U.S. 123, 159 (1908) ("the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity.").

22 *See, Alden*, 527 U.S. at 757; *see also, Edelman v. Jordan*, 415 US 651, 663 (1974) ("a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.").

23 *Langford v. King*, 1 Mont. 33, 38 (1868).

24 *See,* 1889 Mont. Const. Art. VII, § 20; cf. 1884 Mont. Const., Art. V, § 18.

25 *Pfost v. State*, 713 P.2d 495, 498 (Mont. 1985), *overruled in part, Meech v. Hillhaven West, Inc.*, 776 P. 2d 488, 491 (Mont. 1989).

26 See, An Act Prohibiting the Defense of Sovereign Immunity Where Public Bodies are Insured, ch. 240, 1963 Mont. Laws 748 (codified at § 40-4402, R.C.M. 1947).

27 *See, Kaldahl v. State Hwy. Comm'n*, 490 P.2d 220, 221 (1971) ("The legislature has spoken and we are bound by its enactments.").

immunity through its new 1972 Constitution.[28] Several delegates introduced a proposed provision in the Declaration of Rights: "The State of Montana and its subdivisions shall be subject to the same liabilities as a natural person."[29] The Judiciary Committee referred the proposal to the Bill of Rights Committee.[30] That committee proposed "Non-Immunity from Suit" as new Section 18 to the Declaration of Rights: "The state and its subdivisions shall have no special immunity from suit. This Provision shall apply only to causes of action arising after June 1, 1973."[31] The committee report noted trends in citizen concern, legal scholarship, and 16 state judiciaries that "the doctrine no longer has a rational justification in law."[32] The committee's conclusions found support in the influential Bill of Rights study prepared for the delegates by Rick Applegate, who reviewed modern criticism of the ancient doctrine yet also noted the difficulties presented by abolition.[33] Indeed, the committee found sovereign immunity "repugnant to the fundamental premise of the American justice: all parties should receive fair and just redress whether the injuring party is a private citizen or a governmental agency."[34]

In the floor debate, the delegates focused on tort liability, despite expressing broader concerns about sovereign immunity. Delegate Marshall Murray introduced the proposal by explaining "the doctrine of sovereign immunity, which we are attempting to do away with by this particular provision, really means that the king can do whatever he wants but he doesn't have to pay for it; and we'd like to do away with that doctrine."[35] Delegate Wade Dahood explained how the Supreme Court and legislature both seemed to defer to the other in hesitating to abolish sovereign immunity, even if "it's an inalienable right to have remedy when someone injures you through negligence and through a wrongdoing, regardless of whether he has the status of a governmental servant or not."[36] As debate proceeded, Delegate Otto Habedank proposed, and the convention unanimously approved, a limit on the abolition's scope to "suit for injury to a person or property," which he understood to include tort actions, leaving the legislature "free to make [the immunity waiver] more open if they desire to in the future."[37] Later, the Style and Drafting Committee retitled the provision "State subject to suit," and clarified the scope of "The State of Montana and its subdivisions" to include "The state, counties, cities, towns, and all other local governmental entities."[38] In retrospect, this clarification of the provision's application to tort liability was fateful. It sacrificed the broader principle originally suggested by the text "no special immunity to suit," in favor of a narrower right to recover tort damages from the state treasury.[39]

The People of Montana ratified the new Constitution, including the sovereign immunity provision, described as a "[n]ew provision abolishing the doctrine of sovereign immunity ('the King can do no wrong') and allowing any person to sue the state and local governments for injury caused by officers and employees thereof."[40] The legislature responded to the abolition of sovereign immunity with the Montana Comprehensive State Insurance Plan and Tort Claims Act.[41] At the same time, critics speculated about the fiscal and administrative impacts of governmental liability.[42] In 1974, the Montana Legislature proposed, and the voters ratified, the power to invoke sovereign immunity to state tort liability by legislative supermajorities.[43] Professors Larry M. Elison and Fritz Snyder comment, "[t]he people accepted the proposed change" to sovereign immunity in the ratification of the 1972 Constitution, but "[e]ffective lobbying by tradition-bound politicians and frightened government employees quickly reversed the change.[44] Still, they did so through ratification by 55 percent of voters at the 1974 general election.[45] The ballot language for the amendment explained, "[p]resently the Constitution of Montana provides that the state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to person or property. This amendment would allow specific exceptions to the waiver of sovereign immunity by a two-thirds vote of each house of the legislature."[46] The provision now reads, as amended:

> **Section 18. State subject to suit.** The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a 2/3 vote of each house of the legislature. ~~[This provision shall apply only to causes of action arising after July 1, 1973.]~~

Thus, sovereign immunity, which once arose only in common-law judicial decisions, gained express constitutional status in a

28 *See,* Barry L. Hjort, "The Passing of Sovereign Immunity in Montana: The King is Dead!", 34 Mont. L. Rev. 283, 288 (1973) (Illinois abolished sovereign immunity in its 1970 Constitution, but allowed the legislature to create exceptions).

29 Del. Prop. 30, I Mont. Const. Conv. 124 (Introduced Jan. 26, 1972).

30 *Id*. at 531.

31 Bill of Rights Cmmte. Rpt., II Mont. Const. Conv. 637 (Reported Feb. 23, 1972).

32 *Id*. at 637.

33 *See,* Rick Applegate, "Bill of Rights," Mont. Const. Conv. Study No. 10, 289 (1971-72).

34 II Mont. Const. Conv. at 637.

35 V Mont. Const. Conv. at 1760 (Verb. Trans. Mar. 8, 1972).

36 *Id.* at 1764; *cf.* Mont. Const., Art. II, § 16 ("Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character.")

37 *Id.* at 1761. In narrowing the scope to tort liability, Delegate Habedank noted the waiver would not extend to other forms of liability like contract. *See id.* ("I think there are many instances where there may be some governmental employees [who] do some things in connection with contractual fields that we try to stick the government for where there is a good reason to maintain our governmental immunity in those situations.")

38 VII Mont. Const. Conv. at 2503 (Verb. Trans. Mar. 16, 1972).

39 As Delegate Habedank explained: "Limited as it is, for injury to a person or property, the Legislature is still free to make it more open if they desire to do so in the future. But we at least have assured the people of the State of Montana that they can sue for negligent injury." V Mont. Const. Conv. at 1761 (Verb. Trans. Mar. 8, 1972).

40 *Prop. 1972 Const. for the State of Montana: Official Text with Explanation* (1972), available at http://sos.mt.gov/Elections/Archives/1970s/1972/1972_VIP.pdf.

41 Ch. 380, 1973 Mont. Laws, (codified at Mont. Code Ann. §§ 2-9-101, et seq).

42 *See,* Hjort, 34 Mont. L. Rev. at 297 ("If left unchanged, Article II, § 18 portends, at best, an uncomfortable uncertainty. At worst, the spectre of disaster.")

43 *See, Sen. J. Res. 64, 1974 Mont. Laws 1610*, Const. Amend. No. 2 (approved Nov. 5, 1974).

44 Larry M. Elison & Fritz Snyder, The Montana State Constitution: A Reference Guide 64 (Greenwood Press 2001).

45 Mont. Sec'y of State, "Amendments to the 1972 Montana Constitution," *available* at http://sos.mt.gov/Elections/Ballot_Issues/documents/Constitutional-Ballot-Issues-1972-Current.pdf.

46 Voters' Info. Pamphlet on Prop. Amend. C-2 (1974), *available* at http://sos.mt.gov/Elections/Archives/1970s/1974/1974_VIP.pdf.

backlash against an attempt to abolish it.

2. Article II, § 18 does not affect other forms of liability immunity, or jurisdictional immunity.

Montana courts generally read Article II, Section 18 consistent with its text and history to focus on tort liability against the state itself.[47] The legislature recognizes an arguably broader waiver in statute, including both state tort liability and liability for torts "of its employees acting within the scope of their employment or duties whether arising out of a governmental or proprietary function except as specifically provided by the legislature under Article II, Section 18, of The Constitution of the State of Montana."[48] The legislature also acted to provide immunity from exemplary and punitive damages,[49] and capped governmental liability for tort damages.[50]

Alongside its assumption of liability for officers acting within the scope of their duties, the legislature enacted several forms of what might more accurately be termed personal immunities for legislative, judicial, and certain quasi-legislative executive decisions.[51] These provisions immunize not just the state when sued as an entity, but also immunize state employees when sued in their personal capacities.[52] Relatedly, the legislature "provide[s] for the immunization, defense, and indemnification of public officers and employees civilly sued for their actions taken within the course and scope of their employment."[53] This immunization and indemnification of state officers in their personal capacities exceeds the traditional scope of sovereign immunity under federal law, at least to the extent the personal capacity claims do not clearly seek damages from the public treasury.[54]

The remaining jurisdictional and liability immunity outside of tort claims is not diminished by the Montana Constitution, or subject to Article II, Section 18. Beyond the scope of that provision's tort immunity waiver, the general rule of sovereign immunity applies: "a state cannot be sued in its own courts without its plain and specific consent to suit either by constitutional provision or by statute."[55] The state waives sovereign immunity and consents to suit on certain claims, including contract claims.[56] Where there is no consent to suit, or where the state affirmatively confirms immunity, however, the law recognizes the state's sovereign immunity untouched by the state constitution's limited abolition of tort immunity.

II. Common-law personal immunity, not sovereign immunity, provides liability immunity to state officials.

American courts adapted the doctrine of personal immunities from English common law. For example, the United States Supreme Court recognized judicial immunity as early as 1872 in a case arising from a trial of one of the alleged participants in President Abraham Lincoln's assassination. In holding the trial judge immune from civil suit, the Court cited English law for the absolute immunity of a judge's actions in his official capacity: "This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences."[57] A related "qualified" immunity developed in the common law where "absolute" immunity is unavailable, yet officers act in good faith pursuit of the law. In these cases the Court recognizes that "the general costs of subjecting officers to the risks of trial — distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service," outweigh the benefit of holding even careless public officials liable for abuse of power.[58]

Personal immunities are distinct from sovereign immunity, because they arise from public policy embedded in tort law rather than sovereignty principles recognized in constitutional law. As the United States Court of Appeals for the Ninth Circuit recently summarized:

> As a general matter, individual or "[p]ersonal-capacity suits seek to impose personal liability upon a government official for [wrongful] actions he takes under color of . . . law," and that were taken in the course of his official duties. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). By contrast, official capacity suits ultimately seek to hold the entity of which the officer is an agent liable, rather than the official himself… For this reason, an officer sued in his official capacity is entitled to "forms of sovereign immunity that the entity, qua entity, may possess." *Id.* at 167. An officer sued

IMMUNITY, page 22

47 *Peretti v. State*, 777 P. 2d 329, 332 (Mont. 1989) ("the waiver found in Art. II, sec. 18 extends only to tort actions, and not contract actions, involving injuries to a person or property").

48 Mont. Code Ann. § 2-9-102.

49 *See,* Mont. Code Ann. § 2-9-105.

50 *See,* Mont. Code Ann. § 2-9-108.

51 *See,* Mont. Code Ann. §§ 2-9-111 (Immunity from suit for legislative acts and omissions), -112 (Immunity from suit for judicial acts and omissions), -113 (Immunity from suit for certain gubernatorial actions), & -114 (Immunity from suit for certain actions by local elected executives).

52 *See*, e.g., Mont. Code Ann. § 2-9-112 ("A member, officer, or agent of the judiciary is immune from suit for damages arising from the lawful discharge of an official duty associated with judicial actions of the court.").

53 Mont. Code Ann. § 2-9-305(1).

54 *See, Blaylock v. Schwinden*, 862 F.2d 1352, 1354 (9th Cir. 1988) (in claims seeking indemnification under Mont. Code Ann. § 2-9-305, holding "The eleventh amendment does not wholly bar plaintiffs from federal court, however, because the complaint can be amended to claim only damages from the defendants in their individual capacities. A state indemnification statute does not automatically extend immunity to state officials. Thus, the eleventh amendment does not bar plaintiffs' claim for damages against the defendants in their individual capacities.") (citations and footnotes omitted); *see, Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 317 n. 10 (1990) ("It may be that a simple indemnification clause, without more, does not trigger the doctrine [of sovereign immunity]. Lower courts have uniformly held that states may not cloak their officers with a personal Eleventh Amendment defense, by promising, by statute, to indemnify them for damages awards imposed on them for actions taken in the course of their employment.").

55 *Peretti*, 777 P. 2d at 332; *see also, Wood v. Montana Dept. of Revenue*, 826 F. Supp. 2d 1232 (D. Mont. 2011) (holding a state agency is immune to a federal Family and Medical Leave Act claim in federal court "because the State of Montana has not consented to be sued in state court under like circumstances," outside of the scope of Article II, § 18).

56 Mont. Code Ann. § 18-1-404.

57 *Bradley v. Fisher*, 80 U.S. 335, 349 n. †† (1872); *see also, Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction").

58 *Harlow v. Fitzgerald*, 457 US 800, 816 (1982). Like sovereign immunity, qualified immunity is well established but criticized. *See, e.g.,* William Baude, "Is Qualified Immunity Unlawful?," U. Chi. Pub. L. Working Paper No. 609 (Jan. 9, 2017), *available at* https://ssrn.com/abstract=2896508.

CHIEF JUSTICE KARLA M. GRAY
MAY 1, 1947 – FEB. 19, 2017

A pillar of equal justice

Former Montana Supreme Court Chief Justice Karla M. Gray made a career of shattering glass ceilings for Montana's women attorneys.

Gray was the second woman to serve on the state Supreme Court, and the first to win election to the court. In 2000, she made history by becoming the first woman to win election as chief justice of the Supreme Court.

But as well-known as she was as a groundbreaking female attorney and jurist, the legacy she left as an advocate for access to justice for all Montanans looms just as large.

Gray

Gray died of cancer Feb. 19 at St. Peter's Hospital in Helena. She was 69.

Over the course of her career, Gray devoted countless hours to and was an outspoken advocate for equal justice issues. She was a longtime member of the bar's Access to Justice Committee, dating back to when it was known as the Legal Services Delivery Committee.

As a Supreme Court justice, Gray helped create the court's Equal Justice Task Force. The Task Force served as an umbrella for the entities in the state's Access to Justice community and eventually led to the creation of the permanent Access to Justice Commission.

Gray, speaking at the inaugural Creating Equal Justice in Montana meeting in 2001, said that equal justice under the law is perhaps the most fundamental premise of the United States and can only be achieved if there is access to justice for every person who needs it.

File photo

Former Montana Chief Justice Karla M. Gray is shown presenting the Equal Justice Award to the Honorable Joe Hegel at the State Bar of Montana's Annual Meeting in 2008.

"We have a long way to go to reach the constitutional ideal, because equal justice is an illusory promise, or an inaccessible dream, for tens of thousands of fellow Montanans, our poorest and most vulnerable citizens," Gray said at that meeting. "Each day we delay making this journey is a wasted day and a squandered opportunity. But we will reach the destination because we care and we believe in the importance of reaching that goal."

In 2008, the State Bar of Montana instituted the Karla M. Gray Equal Justice Award in her honor. Gray was also the inaugural recipient of the award.

The award honors a judge from any court who has demonstrated dedication to improving access to Montana courts.

Justice Beth Baker, the current chair of the Access to Justice Commission, worked with Gray early in her career. She said Gray was both a mentor and a friend to her.

"She lived and breathed the principles that justice is for everyone," Baker said in an interview with Montana Public Radio shortly after Gray's death.

Baker noted that Gray was chief

GRAY, page 23

Bennett, Greely remembered

Longtime Montana Attorney General Mike Greely and 2008 Jameson Award winner Gordon Bennett also died recently. See page 24 for obituaries.

ACA: Under the knife

Recap of latest activity in Washington, DC, as Congress, president consider reform of US health care law

By Kristy Buckley

Editor's note: This article is part of the continual effort by the State Bar of Montana Health Care Law Section to keep lawyers informed of current events with respect to the health care industry. The Health Care Law Section intends to provide the Montana Lawyer with continual updates through 2017 regarding Affordable Care Act status and any new potential federal legislation as part of a series on reforming health care reform.

Summary of ACA Relevant Activity

There are three primary areas of recent activity regarding the repeal, replace, and reform efforts for the Affordable Care Act, as follows:

1. Although there are at least two federal pieces of health care legislation that have been proposed, the politicians in Washington, D.C., continue to discuss other approaches. Therefore, it is anticipated that the currently proposed legislation does not represent the "final" legislative effort. Several mixed messages are coming from various sources regarding the potential timeline for ACA repeal and replacement.

2. The Internal Revenue Service issued a statement on Feb. 15 that individual federal income tax returns may be filed with the ACA reporting requirements blank. (Additional information about the IRS statement is included in the final section of this article.)

3. Confirmation hearings are underway for the tri-agencies that implement the components of the Affordable Care Act, namely the Health and Human Services, the Department of Labor, and the Treasury.

a. Tom Price, a Republican from Georgia who sponsored the ACA repeal legislation entitled Empowering Patients First Act of 2015, was confirmed by the U.S. Senate on Feb. 10 as the Secretary of Health and Human Services by a party-line vote of 52-47.

b. Steven Mnuchin, formerly of Goldman Sachs, was confirmed by the U.S. Senate on Feb. 13 as the Secretary of the Treasury by a vote of 53-47.

c. After two delays to his confirmation hearings, Andrew Puzder removed his name from the nomination process Secretary of the Department of Labor (on Feb. 15) and Alexander Acosta was named as the new nominee (on Feb. 16). Acosta is is an attorney and the dean of the Florida International University College of Law. The Senate confirmation hearings for Acosta had not yet been scheduled as of press time.

Health Care Reform 2017 Webinar March 22

The Health Care Law Section is hosting a webinar on the latest in Health Care Reform at noon on Wednesday, March 22. Go to www.montanabar.org for more information or to register.

The IRS Statement on 'Silent' Returns

The IRS issued a statement on Feb. 15 that its automated federal income tax return processing center will not flag returns that are "silent" in the ACA reporting portion as being incomplete. The statement is only informal guidance and does not specifically address whether the IRS will impose ACA penalties on "silent" returns. However, if a return is filed with the ACA portion blank then the IRS system will not reject the return. There is still no "official" guidance on silent returns or any formal "non-enforcement" regime for ACA penalties, both of which would require legislation or regulatory action.

Kristy Buckley is a partner in the Bozeman office of Crowley Fleck PLLP, practicing in employee benefits law. The Health Care Reform compliance team at Crowley is continually monitoring legislative activity. If you have questions about Affordable Care Act compliance or potential new federal legislation, you can contact her at 406-522-4522 or kbuckley@crowleyfleck.com.

Immunity, from page 19

> in his individual capacity, in contrast, although entitled to certain "personal immunity defenses, such as objectively reasonable reliance on existing law," id. at 166-67, cannot claim sovereign immunity from suit, "so long as the relief is sought not from the [government] treasury but from the officer personally." *Alden v. Maine*, 527 U.S. 706, 757 (1999).[59]

Thus, damages claims against the state as an entity are subject to sovereign immunity, conditional on compliance with Article II, Section 18 for tort liability. Damages claims against officers may be subject to personal immunities, either absolute or qualified.

Montana has adopted both forms of personal immunity, absolute and qualified, with its inheritance of the common law.[60] State agencies and their officers enjoy absolutequasi-judicial immunity from damages suits in their discretionary decisions to initiate and adjudicate administrative proceedings.[61] Reiterating the English common law principle, the Montana Supreme Court has explained, "[l]ike judicial immunity, quasi-judicial immunity benefits the public—not the person being sued—by ensuring that quasi-judicial officers exercise their functions unfettered by fear of legal consequences; also like judicial immunity, quasi-judicial immunity extends only to acts within the scope of the actor's jurisdiction and with the authorization of law."[62] Where this quasi-judicial immunity does not apply, an additional layer of common law immunity is provided by qualified immunity, which "operates to shield government officers performing discretionary functions from liability for civil damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[63]

Montana courts consistently distinguish these common-law personal immunities of individuals from constitutional state sovereign immunity, including the state's immunity from tort liability addressed by Article II, Section 18. These "are different concepts and are supported by different considerations of public policy," the latter arising from ancient principles of sovereignty, the former arising from modern tort doctrine's common-law adaptation to the ebb of those ancient principles as applied to public officers.[64] Thus, the "1972 Montana Constitution did not abolish prosecutorial immunity,"[65] or the related quasi-judicial immunity, as these immunities are "separate and distinct from sovereign immunity," and therefore are "unaffected by the language of Art. II, Sec. 18."[66] Because of this distinction, and because "quasi-judicial immunity is not a subject of Montana statutory law,"[67] there is no requirement for the legislature to act under the supermajority requirement of Article II, Section 18 for quasi-judicial immunity to protect state officers otherwise subject to these common-law personal immunities.

Conclusion

Sovereign and personal immunities are a complex inheritance of both constitutional and common law. Article II, Section 18 of the Montana Constitution concerns only one strand of sovereign immunity doctrine, the tort liability of the state. Although there may be good arguments in law and justice for abolition, federal and state courts have long established the sovereign and personal immunities that were untouched by the state constitutional waiver of tort liability immunity. These include the state's jurisdictional immunity from suit without its consent, the state's liability immunity from suit for damages outside tort, and state officers' liability immunity from suit for damages arising from their performance of official duties. Under established law, the state may confirm or waive these other judicially recognized immunities without consideration of Article II, Section 18 or its supermajority rule. In the water rights compact with the Confederated Salish and Kootenai Tribes, for example, the state waives its constitutional sovereign immunity from jurisdiction in federal or tribal court, and confirms certain officers' common-law personal immunity from suit for damages. Recognition of these various sovereign and personal immunities, and their distinct sources and purposes, may help to clarify the resolution of legal problems that arise when a state and its officers land in court.

59 *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015).

60 *See,* Mont. Code Ann. § 1-1-108 ("In this state there is no common law in any case where the law is declared by statute. But where not so declared, if the same is applicable and of a general nature and not in conflict with the statutes, the common law shall be the law and rule of decision.").

61 *See, Koppen v. Board of Medical Examiners*, 759 P. 2d 173, 175-76 (Mont. 1988); *but see, Nelson v. State*, 195 P.3d 293, 296-297 (Mont. 2008) ("Where the administrative function is mandated by statute and, thus, purely ministerial in nature, the administrative entity is not acting in a quasi-judicial manner and is not entitled to quasi-judicial immunity.").

62 *Steele v. McGregor*, 956 P. 2d 1364, 1369 (Mont. 1998).

63 *Rosenthal v. County of Madison*, 170 P.3d 493, 500 (Mont. 2007).

64 *State ex rel. Dept. of Justice v. District Court of Eighth Judicial Dist. In and For Cascade County*, 560 P.2d 1328, 1330 (Mont. 1977).

65 Id.

66 *Koppen*, 759 P.2d at 175; *compare, Rahrer v. Board of Psychologists*, 993 P.2d 680, 684-685 (J. Nelson, specially concurring) ("In my view our creation of the doctrine of quasi-judicial immunity is in direct violation of Article II, Section 18 of the Montana Constitution which abolished governmental immunity from suit absent a 2/3 vote of the legislature.").

67 *See, Koppen*, 759 P.2d at 175; *see also, Rosenthal*, 170 P.3d at 498 ("Although Article II, Section 18, of the 1972 Montana Constitution abolished the concept of 'sovereign immunity,' we have stated that neither the Constitution nor the Montana Tort Claims Act abolished prosecutorial immunity" for quasi-judicial officers).

Gray, from page 20

justice at the time of district court assumption, when the state Judicial Branch was created.

"We now have a centralized system of court operations that wouldn't have happened without her leadership," Baker said.

On the news of Gray's death, Gov. Steve Bullock issued a proclamation calling for flags throughout the state to be flown at half-staff in Gray's honor.

"Chief Justice Karla Gray was a dedicated public servant and determined champion for access to justice in Montana," Bullock's proclamation read. "As the first female chief justice in Montana history, she never set out to be a role model, but her work ethic, humor, humility, and sense of justice have served as an inspiration for countless young lawyers in the state. Montana is forever stronger and more just as a result of her life, her service, and her example."

While Gray was chief justice, Montana's judicial system was restructured with control of the district courts moving from counties to a branch under the Supreme Court.

Gray told Lee Newspapers of Montana in 2008 that the change made the courts run more efficiently and created greater opportunities for judges and others to receive statewide training.

In 1991, Gray became the second woman to serve on the Montana Supreme Court, when she was appointed by Gov. Stan Stephens. She replaced the first woman on the court, Diane Barz, who had resigned.

Gray won election as an associate justice in 1992 and was re-elected in 1998.

In 2000, Gray beat out fellow associate justice Terry Trieweiler to replace Jean Turnage as chief justice. She retired from the court in 2008 after one term as chief justice.

Gray was born on May 19, 1947, in Escanaba, Michigan. She received her bachelor's and master's degrees from Western Michigan University and her law degree from Hastings College of the Law in San Francisco. She was an editor of the Hastings Law Journal.

Gray asked that there be no services in her honor. According to her obituary, she asked that memorials in her name be made to the Montana Justice Foundation or to an organization of the donor's choice.

Memorial donations

Karla Gray asked that memorials in her name be made to the Montana Justice Foundation, P.O. Box 1917, Helena, MT 59624, or at www.mtjustice.org; or to an organization of the donor's choice.

Bennett – district judge, Jameson winner – dies at 94

Gordon Bennett spent the last half of his career keeping legal disputes out of the Helena court he presided over for 18 years. The retired district judge and 2007 winner of the State Bar's William J. Jameson Award, died Feb. 9 at his winter home in Green Valley, Arizona, with his wife of 40 years, Norma, at his side. He was 94.

Having watched business partners, married couples, neighbors and all manner of other relationships disintegrate as a result of litigation during his 18 years on the bench, he paved the way for what has become the widely accepted practice of alternate dispute resolution. In addition to more than 30 years of legal practice, he brought to his mediation work a human understanding of juries and jurors. Armed with insight into how citizens reach complex decisions about judicial awards and settlements, he was able to bring disparate parties together to reach compromise solutions before they went to court. It was not uncommon for parties of a mediated dispute to write to Gordon, thanking him for sparing them the anguish and expense of a court trial.


Bennett

Gordon had two lifelong passions: law and politics. Travel and sailing followed closely.

Gordon Russell Bennett was born July 19, 1922, in Scobey, to which he affectionately referred as the "Athens of Northeastern Montana." He was the third of four children of James V. and Isetta (Stetson) Bennett.

Bennett attended Carroll College in Helena for two years, before he transferred to Carleton College in Northfield, Minnesota. His college education was interrupted by military service during World War II, after which he graduated from Carleton with a BA in economics. A love of learning led him to the University of Missouri, Columbia, where he earned a masters degree in journalism in 1950. He returned to Montana to take a job as a reporter for the Great Falls Tribune. There, as a police reporter, he got a whiff of the law, and knew that his education would not be complete without a law degree. In 1956, he graduated from Georgetown University Law Center in Washington, D.C.

His first legal job was with Stanley Aviation in Denver, where he worked as a contracts administrator for two years before returning to Montana, where he went to work as an assistant attorney general under Forrest Anderson, launching a long career in politics. Highlights of his career in Democratic politics include managing Lee Metcalf's 1966 U.S. Senate campaign and Forrest Anderson's 1968 gubernatorial campaign. He was the Montana director of Lyndon Johnson's 1964 presidential campaign. He also served as an associate solicitor in the Department of the Interior in the Kennedy administration.

He was proud of his work for the Blackfeet Tribal Council before Gov. Anderson appointed him judge in the First Judicial District in Helena in 1970.

He loved his tenure on the bench. His court hosted litigation related to state government, including challenges to the state coal tax and stream access, certification of Colstrip 3 and 4, veterans' preference and workers' compensation. He presided over several cases balancing the constitutional right of privacy with the right to know. Despite his earlier involvement in Democratic politics, he put politics aside when he entered the courtroom and earned the trust and respect of the bar as a fair and impartial judge. In 2007, the State Bar of Montana recognized him with its highest honor, the William J. Jameson Award, for distinguished legal service and professionalism.

During his judicial career, he developed a keen interest in child welfare policy and corrections. He served on the boards of the Intermountain Children's Home, Big Brothers-Big Sisters and the Casey Family Program.

In 1958, he married Suzanne Heineke of Helena. They had two children, J.V. and Sarah. The marriage ended in divorce several years later, and in 1977, he married Norma Tirrell, also of Helena, who survives.

A gathering of friends in celebration of their time together will take place late in the spring.

Memorials to his life of public service may be made to the Montana chapter of the American Civil Liberties Union, United Way of Lewis and Clark County or the Hunthausen Center for Peace and Justice, Carroll College. A lifelong supporter of public education, he also supported "Yes for Helena Schools," the current campaign to pass a school bond for Helena's public schools.

Greely – 3-term Montana attorney general – dies at 76

Michael Truman Greely, "Mike", 76, of Helena a former three-term Montana attorney general, died on Jan. 26 at his family cabin on the Missouri River with his loyal companion, Rudy, by his side.

Greely was born to Myril J. and Laura Lee Greely on Feb. 28, 1940, in Great Falls. Mike graduated from Great Falls High before attending Yale University. After college he taught high school in Oklahoma and served in the Army Reserve, before heading to the University of Montana law school.

After earning his law degree, Greely served as an assistant attorney general under Forrest Anderson and then became a deputy county attorney in Cascade County in 1969. While in Great Falls, he represented the area as both a state representative and state senator. Part of his terms were the first under Montana's new constitution in 1972.

Greely was elected Montana's Attorney General in

GREELY, page 23


Greely

James Patten

Jim Patten was born on Nov. 14, 1929, in Tulsa, Oklahoma, to Lyal and Winifred Patten and spent his childhood there. He attended college at the University of Iowa where he met his first wife, Janne Tyler. A summer job out West during college made him want to move to Big Sky Country, and in 1950 an overnight stop in Missoula gave him the opportunity to check out the University of Montana Law School, where he was accepted after an interview with the dean. After graduating from UM Law in 1953 he worked for the Public Service Commission until 1957, the Montana Motor Transport Association, then as a lobbyist for the Petroleum Association for four legislative sessions in the late '50s and early '60s. These were the days of "watering holes" where lobbyists created relationships with legislators by getting to know them, and Jim had stories to tell. He returned to Helena in 1965, serving as the administrative assistant to Gov. Tim Babcock until 1969 when he was appointed assistant U.S. attorney and moved to Butte. He and Janne raised a family of five children in Billings but were divorced in 1970.

Patten

Also in 1970, Jim married his second wife, Betty Wilcox. Jim's work as a lawyer for Occidental Petroleum relocated them to Washington, D.C., and then Tripoli, Libya. After sailing a boat from the south of France to Corfu, Greece, they spent several vacations exploring the Ionian Islands. London was home next, followed by Scotland, and then Guangzhou, China before a final stop in Bakersfield, California. He once said he preferred the work in Libya over other Occidental locations because of the opportunity to do legal work in the oil fields, in contrast to the London office where they mostly played gin rummy. After Jim retired in 1985 they built a home on the Bitterroot River, and except for a five-year residency in Arizona, called western Montana home.

After Betty passed away in 2010, Jim met his last companion, Rosemarie Neuman, while taking guitar lessons from her. They shared over six years together, traveling to Switzerland, New Mexico, and the Pacific Northwest. Jim tried to improve his guitar playing skills but preferred to listen to Rose sing.

After this fortunate and bountiful life, Jim passed away peacefully on Jan. 30 while residing at Beehive Homes in Missoula. The family is extremely thankful for the wonderful care he received while in Aspen House, as well as the tremendous support offered by the Hospice of Missoula team.

The family is planning a private gathering at a later date.

Gray, from page 20

1976 serving three terms, the last longest serving attorney general in Montana. He ran for governor in 1988 and Montana Supreme Court justice in 1992, losing both elections. He finished his career in private practice, before retiring to the cabin on the Missouri River. He was passionate about fly-fishing and the tranquility of the Missouri River. He also enjoyed golf, crosswords, cribbage and sweets.

He is survived by his wife, Marilyn Greely (Myhre), and his children, Winston Greely, Morgen Heckford (Greely), and Anna Lee Greely.

Memorials in Mike's memory can be made to the Missouri River Watershed Alliance, P.O. Box 11, Wolf Creek, MT 59648; or West Mont Agency, 2708 Bozeman Ave, Helena, MT 59602. To offer condolences or to share a story about Mike please visit www.helenafunerals.com.

Security, from page 11

guests to access your LAN, local network, or intranet. Make sure you do not allow LAN access so that your guests cannot reach office systems that are wired directly to the router.

Physical Security

Keep in mind that wireless routers can typically be reset to their factory configuration with the push of a button or a straightened paperclip. Once reset, the default password is the only defense between an attacker and your network. If possible, keep your wireless router in a locked enclosure or cabinet with the reset mechanism inaccessible.

After completing these steps, you will have locked down access to your network configuration and created a secure way to connect your staff and clients to the network resources they need.

For more information about upcoming State Bar CLEs, contact Meagan Caprara at **mcaprara@montanabar.org**. You can also find more info and register at **www.montanabar.org**. Just click in the Calendar on the upper left of the home page to find links to registration for CLE events.

Hot environmental law topics on tap for March 30 seminar

Learn the latest in natural resources law at the 2017 Environmental Law CLE , including Montana Supreme Court case law updates from Justice Laurie McKinnon and federal case law updates from UM Law Professor Michelle Bryan.

This CLE, presented by the Natural Resource, Energy, & Environmental Law Section, brings together attorneys from various backgrounds to discuss current and emerging issues in the practice of environmental law in Montana.

The seminar will be at the Radisson Colonial Hotel, Helena, Thursday, March 30. It is approved for 6.75 live Montana CLE credits (0.5 Ethics).

More Upcoming State Bar CLE Seminars

- **Friday, April 7, Missoula** — 2017 New Lawyers Section's Annual Toolkit CLE. University of Montana, Gallagher Business Building.
- **Wednesday, April 19, Missoula**: Indian Wills CLE
- **Friday, April 28, Bozeman**: Bench Bar CLE
- **Friday, May 5, Helena**: 2017 Disability Rights CLE
- **Friday, May 19, Helena**: 2017 Family Law Section CLE
- **Friday, Aug. 10-11, Helena**: Annual Bankruptcy CLE

Other notable CLE

The Ninth Annual Red Mass Ethics CLE for attorneys, paralegals and judges will be 1 p.m. Thursday, March 23, at Holy Spirit Church, 201 44th St. S., Great Falls. Cost is $30. Contact Karen Reiff, 761-3000 or Dale Schwanke, 452-2520, for further information.

Upcoming State Bar webinars

Domestic Violence Webinar Series Part 3: The Impact of Domestic Violence on Children. Wednesday, March 15, noon to 1 p.m. 1 Live CLE credit. Adverse Childhood Experiences (ACES) have been scientifically proven to affect lifelong mental and physical well-being. As a part of the Family Violence Intervention and Education Sessions ACES have provoked immediate and powerful responses in session participants.

Webinar: Health Care Reform 2017. Wednesday, March 22, noon to 1:30 p.m. 1 Live CLE credit. The Health Care Law Section welcomes Lesley Carol Reynolds and Tom Dowdell -- partners in Norton Rose Fulbright's Washington, D.C., office -- to discuss the most recent health care reform developments in Washington, D.C. We will also discuss CMS's site neutral payment policy, including Medicare outpatient prospective payment system payments in 2017 and 2018.

New Lawyers Section Presents:

ANNUAL TOOLKIT CLE

April 7, 2017

1:00pm to 5:00pm

4 CLE Credits, Including 1 Ethics Credit

Client Control and Difficult Situations • Cross Examination Tips • Pro Bono Opportunities • Benefits of ABA Participation • Internet Sleuthing Tips• Practicing Law in Indian Country • Courtroom Professionalism

Location: *University of Montana, Gallagher Business Building, Room L14*

Cost: *$35 NLS Members/$40 Nonmembers via State Bar Website*
$40 NLS Members/$45 Nonmembers at the Door
FREE Law Clerks and Students

Montana Justice Foundation
Issues Call for Grant Proposals

The Montana Justice Foundation (MJF) is pleased to announce that it is now accepting proposals for its 2017 Grants Program! The MJF works to achieve equal access to justice for all Montanans through effective funding and leadership. One way the MJF fulfills this mission is through its Grants Program. The MJF awards grants to non-profit organizations qualified to carry out the following charitable objectives of the MJF:

- Support and encourage the availability of legal services to vulnerable and underserved populations;
- Increase public understanding of the law and the legal system through education;
- Promote the effective administration of justice; &
- Raise public awareness of and access to alternative dispute resolution.

The MJF recently moved to an online grant application process. Organizations interested in applying for a grant may create an account and begin the application process by visiting our website or directly accessing the grant application at:

https://www.grantinterface.com/montanajustice/common/logon.aspx

The deadline for submission of grant proposals is Monday April 17, 2017.

For further information or answers to questions about the application process, please contact the MJF at (406) 523-3920, or visit us online at www.mtjustice.org.

Agent, from page 14

more or less like 30(b)(6) witnesses. Firsthand knowledge of the matter at issue, however, is insufficient in itself to render an employee a managing agent. There must be some degree of exercised judgment and discretion in corporate matters as well. In one federal case, for example, the plaintiff argued on appeal in a slip and fall case that the district court erred in excluding the deposition testimony of the employee primarily responsible for maintaining the defendant hotel's property.[43] Irrespective of the employee's knowledge of the matter at issue, the Ninth Circuit Court of Appeals held that the employee was not a managing agent because the employee did not contractually bind the principal or attend management conferences and there were multiple layers of administration above him.[44]

By way of summary, the more an intermediate to upper level employee looks, acts, and sounds like an officer, director, or corporate designee, the more likely he or she will qualify as a managing agent. An attorney's basic inquiry in this regard should be whether the employee acts on behalf of the organization in corporate matters and exercises judgment and discretion in doing so. If the answer is in the affirmative, the employee will likely be deemed to be a managing agent unless it can be shown that the individual's interests or loyalties diverge from the employer's. In such cases, fundamental fairness may prevent the organization from being bound by the admissions of the employee.

Mark Feddes is a litigation associate with Crowley Fleck PLLP in Bozeman and practices primarily in the areas of employment law and medical malpractice defense.

Endnotes

1 Mont. Unif. Dist. Ct. R. 5

2 M.R.Evid. 801, 802; Jim's Excavating Serv., Inc. v. HKM Assocs., 265 Mont. 494, 507, 878 P.2d 248, 255-56 (1994); Varela v. Exxon, U.S.A., Billings Refinery, 237 Mont. 300, 307-08, 773 P.2d 299, 303-04 (1989).

3 See M.R.Evid. 804.

4 Nationwide Life Ins. Co. v. Richards, 541 F.3d 903, 914–15 (9th Cir. 2008) (citing S. Indiana Broadcasting, Ltd. v. FCC, 935 F.2d 1340, 1341–42 (D.C.Cir.1991)).

5 M.R.Civ.P. 32(a)(3).

6 Hart-Albin Co. v. McLees Inc., 264 Mont. 1, 7–8, 870 P.2d 51, 54–55 (1994).

7 See 8A Wright & Miller, Federal Practice and Procedure, § 2103 (3d ed.) ("The meaning of the term 'officer' has caused no difficulty, but 'managing agent' has required definition.").

8 See id. See also Mont. Code Ann. § 35-2-114(10) (defining director); Mont. Code Ann. § 35-1-442 (describing duties of officers).

9 See Mont. Code Ann. §§ 35-2-114(10), 35-2-440, 35-1-442.

10 M.R.Civ.P. 30(b)(6).

11 Libbey Glass, Inc. v. Oneida, Ltd., 197 F.R.D. 342, 349 (N.D. Ohio 1999).

12 Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

13 In re Maynard, 2006 MT 162, ¶ 5, 332 Mont. 485, 139 P.3d 803 ("In interpreting a statute, we first look to the plain meaning of the words used.").

14 Agent, Black's Law Dictionary (10th ed. 2014).

15 See Eldredge v. Asarco Inc., 2011 MT 80, ¶ 51, 360 Mont. 112, 252 P.3d 182 ("The right to control constitutes the most crucial factor in distinguishing between employees and independent contractors").

16 Yates v. United States, 135 S. Ct. 1074, 1085, 191 L. Ed. 2d 64 (2015) ("we rely on the principle of noscitur a sociis—a word is known by the company it keeps—to 'avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.'").

17 United States v. Williams, 553 U.S. 285, 294 (2008).

18 State v. Hobbs, 974 So. 2d 1119, 1122 (Fla. Dist. Ct. App. 2008).

19 Noscitur a Sociis, Black's Law Dictionary (10th ed. 2014) ("Noscitur a sociis, a Latin phrase meaning 'it is known by its associates,' is a canon of textual construction holding that the meaning of an word or phrase, especially one in a list, should be determined by the words immediately surrounding it.").

20 See Krauss v. Erie R.R.Co., 16 F.R.D. 126, 127 (S.D.N.Y. 1954) ("A managing agent, as distinguished from one who is merely 'an employee' is a person invested by the corporation with general powers to exercise his judgment and discretion in dealing with corporate matters; he does not act 'in an inferior capacity' under close supervision or direction of 'superior authority . . . . the interests of the corporation so close to his heart that he could be depended upon to carry out his employer's direction to give testimony at the demand of a party engaged in litigation with the employer.").

21 Hart-Albin Co., 264 Mont. at 7-8, 870 P.2d at 55.

22 Clark Bros. Contractors v. State, 218 Mont. 490, 493, 710 P.2d 41, 43 (1985).

23 Id.

24 Id.

25 Hart-Albin, 264 Mont. at 8–9, 870 P.2d at 55.

26 See Ackerman v. Pierce Packing Co., 206 Mont. 508, 511, 672 P.2d 267, 269 (1983).

27 Id. ("We must liberally construe the Workers' Compensation Act (section 39–71–104, MCA), and there is probably no area more important to apply a liberal construction than on the question of whether sufficient notice was given of the accident. A liberal construction here leads us to conclude that the company nurse was in effect the managing agent insofar as receipt of notice of injuries is concerned.").

28 Id.

29 Napier v. Bossard, 102 F.2d 467, 469 (2d Cir.1939). See also McDowell v. Blankenship, 759 F.3d 847, 852, 89 Fed. R. Serv. 3d 375 (8th Cir. 2014) (stating that "live witness testimony is axiomatically preferred to depositions"); Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1118 (9th Cir. 2002) (observing the preference for live testimony embodied in Rule 32); Young & Associates Pub. Relations, L.L.C. v. Delta Air Lines, Inc., 216 F.R.D. 521, 522 (D. Utah 2003) ("The preference for live testimony at trial rather than deposition testimony as a substitute is uniformly stressed in case law.").

30 Reis v. Luckett, 2015 MT 337, ¶ 16, 381 Mont. 490, 362 P.3d 632 ("it is within the jury's province to weigh the evidence and determine the credibility of the witnesses.").

31 United States v. Yida, 498 F.3d 945, 950 (9th Cir. 2007).

32 See Libbey Glass, 197 F.R.D. at 350; Reed Paper Co. v. Proctor & Gamble Distrib. Co., 144 F.R.D. 2, 6 (D. Me. 1992).

33 See Petition of Manor Inv. Co., 43 F.R.D. 299, 300–01 (S.D.N.Y. 1967) (citing Krauss, 16 F.R.D. at 128).

34 Krauss, 16 F.R.D. at 127.

35 Id.; Young & Assocs., 216 F.R.D. at 523 ("Rule 32(a)(2) requires a determination of what the employee actually did, rather than what title or position she held.").

36 Reed Paper Co., 144 F.R.D. at 6.

37 Hart-Albin, 264 Mont. at 7-8, 870 P.2d at 55.

38 JSC Foreign Econ. Ass'n Technostroyexport v. Int'l Dev. & Trade Servs., Inc., 220 F.R.D. 235, 238 (S.D.N.Y. 2004).

39 Reed Paper Co., 144 F.R.D. at 5.

40 JSC Foreign Econ. Ass'n Technostroyexport, 220 F.R.D. at 238. ("Mr. Shine and Mr. Edwards do continue to have some attenuated connections with the entity defendants; however, they have refused to appear for noticed depositions and have made it clear that they will not appear in the future, even at the expense of sanctions for the entity defendants, so it cannot be said that their interests are identified with those of the entity defendants.").

41 See Cameo-Parkway Records, Inc. v. Premier Albums, Inc., 43 F.R.D. 400, 401 (S.D.N.Y. 1967); Newark Ins. Co. v. Sartain, 20 F.R.D. 583, 586 (N.D. Cal. 1957). A minority of courts have held that the unity of interest factor is of such importance that it should be the paramount consideration in the managing agent analysis. See, e.g., Newark Ins. Co., 20 F.R.D. at 586; In re Honda American Motor Co., Inc. Dealership Relations Litigation, 168 F.R.D. 535, 540 (D. Md. 1996).

42 Hart-Albin Co., 264 Mont. at 8, 870 P.2d at 55.

43 Spector v. El Ranco, Inc., 263 F.2d 143, 145 (9th Cir. 1959).

44 Id.

2017 Nomination Petition

State Bar Officer and Trustee Election

I, _____ , residing at _____ , am a candidate for the office of ( ) President-Elect; ( ) Secretary/Treasurer; ( ) Area E Trustee; ( ) Area F Trustee; ( ) Area H Trustee at the election to be held on June 2, 2017. I am a resident of Montana and an active member of the State Bar of Montana. I request my name be placed on the ballot. The term of office of the President-Elect is one year. The term of office of the Secretary/Treasurer and of the Trustee is two years.

Signature _____

The following are signatures of active members of the State Bar of Montana supporting my candidacy. Trustee candidates include the area of residence. No fewer than 10 signatures must be provided for a Trustee; and no fewer than 25 signatures for President-Elect or Secretary/Treasurer candidates.

NAME ADDRESS

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____
11. _____
12. _____
13. _____
14. _____
15. _____
16. _____
17. _____
18. _____
19. _____
20. _____
21. _____
22. _____
23. _____
24. _____
25. _____

Return this petition to State Bar of Montana, P.O. Box 577, Helena MT 59624, postmarked no later than April 3, 2017.

Ballots will be mailed to Bar members on May 1, 2017, and must be returned to the Bar by May 22, 2017.

***CLASSIFIEDS** | List an opening or see additional job listings at **jobs.montanabar.org**. Basic 30-day listing is $99 (includes Montana Lawyer classified ad for State Bar of Montana members). For ads for legal services, office space, mediation, or consultants and experts, email jmenden@montanabar.org or call 406-447-2200.*

ATTORNEYS

ASSOCIATE ATTORNEY: Join a smart, fast-paced, tech-savvy law firm in one of the coolest outdoors/western towns anywhere. We work hard, but like to have fun, too. And we hire people who feel the same way. We're looking for an excellent lawyer to be a new associate. Practice focus = litigation/business/mediation. Excellent pay package = salary/bonus/benefits. Check us out at www.bonnerlawfirmpc.com and www.yellowstonemediation.com. Then email a resume and cover letter to alex@yellowstonemediation.com

ASSOCIATE ATTORNEY: Hendrickson Law Firm, P.C. seeks one or two attorneys with excellent academic, writing, and personal skills to do transaction and litigation work, with the opportunity to be a major part of a small, well established, highly rated, general practice firm in Billings. Several members are at or nearing retirement and want to keep their good clients in capable hands. This is an opportunity for immediate client involvement, experienced mentoring, developing your own areas of practice, and financial success primarily based on productivity, while keeping a strong emphasis on professionalism. Some experience is preferred but quality new graduates will be considered. Please send letter of application, references, resume, transcript, and writing sample to katie@hendricksonlawmt.com.

ASSOCIATE ATTORNEY: Ebeltoft . Sickler . Lawyers, a growing and progressive regional law firm located in Dickinson, North Dakota, seeks to hire an associate lawyer. For more information, visit our website at www.ndlaw.com. Please submit your letter of application and resume to Ebeltoft . Sickler . Lawyers, Attn: Randall N. Sickler, 2272 8th Street West, Dickinson, ND 58601, or to rsickler@ndlaw.com.

ASSOCIATE ATTORNEY: Small well-established Missoula law firm seeks full-time associate attorney. Large general client base including workers' compensation, personal injury, probate, domestic relations, some criminal. Please send cover letter, resume, and writing sample to Hiring Partner, Skjelset & Geer, P.O. Box 4102, Missoula, MT 59806. All applications confidential.

ASSOCIATE ATTORNEY: Hall & Evans, LLC., a Denver-based law firm is seeking two Associate attorneys with varying levels of litigation experience to join their Billings office to service existing national clients in Montana. Qualified candidates must be licensed and in good standing with the State of Montana. Trial experience is preferred, but not required. If you are looking for an employer who appreciates dedicated employees with a strong desire for excellence, then don't miss this opportunity. Apply today at http://hallandevansllc.appone.com. Applicants need to complete an online employment application, and upload their cover letter, resume, and writing sample. Candidates will be required to provide a writing sample for review prior to an interview.

ASSOCIATE ATTORNEY: Do you like the idea of small town living with autonomy and the ability to build a quality law practice and make a decent living doing it? Rocky Mountain Law Partners, P.C. has an immediate opening for an Associate Attorney in its Glasgow, Montana office. Enjoy a congenial office environment in an area known for its great hunting and fishing and friendly small town atmosphere. Two to five years' experience a plus but not necessarily required. Montana law license required and a North Dakota license a plus. Check us out on the web at www.rockymountainlaw partners.com. Email cover letter, resume and writing sample to bruce@rmtlawp.com.

ATTORNEY: Luxan & Murfitt, PLLP, in Helena seeks attorney applicants to join our practice. We offer a collaborative, family-friendly environment in a pleasant work space. Come help serve long-standing clients while further developing your own practice. Three or more years' experience in private practice preferred. Compensation is candidate-specific. Send a résumé and cover letter to manager@luxanmurfitt.com. Inquiries will be kept confidential.

ATTORNEY: Collection Bureau Services, Inc. is a family owned and operated Montana company established in 1976. We pride our company in being honest and compliance driven. We are seeking an attorney for our Missoula office. You will negotiate with consumers and their counsel, process lawsuits, prepare briefs, conduct pre-trials and trials. Some infrequent in-state travel which may entail overnight stays or late returns to Missoula. Salary position. Knowledge of debt collection, corporate affairs, and personnel issues helpful.

EXPERIENCED ASSOCIATE ATTORNEY: Halverson, Mahlen & Wright, P.C., an established Billings, Montana civil defense firm, seeks an experienced associate attorney with 1-3 years of experience in a civil firm or similar setting. Current and former judicial law clerks with experience in administration of civil cases are also encouraged to apply. All applicants must be licensed to practice in Montana, and have strong research and writing skills. Competitive starting base salary, D.O.E., plus benefit/incentive package. Please send cover letter, writing sample, and resume to Hiring Partner, P.O. Box 80470, Billings, MT 59108-0470, or by email at tmahlen@hglaw.net. All applications confidential. Learn more at www.hglaw.net.

COMMERCIAL (WITH TAX) ATTORNEY: Morrison & Frampton, PLLP (Whitefish, Montana) is seeking a commercial attorney with knowledge and experience in tax-related matters, estate and succession planning, trust creation and administration, real estate transactions, and business entity formation and succession. Please apply online or submit resume to wanda@morrisonframpton.com.

LITIGATION ATTORNEY: Hammer, Quinn & Shaw PLLC seeks a litigation attorney to practice in its Kalispell offices. Successful applicant must be licensed in Montana, with exceptional research and writing capabilities, a strong work ethic and a desire to substantively participate in civil jury trials. Judicial law clerks are encouraged to apply. The firm offers a compensation package that rewards productivity and is not limited to a base salary. Please submit a cover letter, resume, law school transcript and writing sample to Tammy Wyatt-Shaw at twshaw@attorneysmontana.com. All applications will be held in confidence.

PARALEGALS/LEGAL ASSISTANTS

BOOKKEEPER/LEGAL ASSISTANT: Position opening for law office bookkeeper/legal assistant in well-established three-lawyer firm in Columbia Falls. Position open due to retirement in March of this year. Must be a self-starter as well as a team player. Working knowledge of

Microsoft Word, Excel, Quickbooks and Quicken a must. Prior or current law firm experience desired but will train the right person. Requires exceptional communication skills and word processing speed of 75 wpm. Successful applicant will work directly with attorneys and 2-4 administrative staff members. Must coordinate information exchange with government agencies and private accounting firm. Benefits include company-paid health insurance, 401(k) plan, paid vacation, bonus eligibility and competitive wages. Send resume with cover letter to: ks_thomas@hotmail.com.

LEGAL ASSISTANT/PARALEGAL: Legal Assistant/Paralegal wanted for a small Helena law firm. Must be extremely detail oriented and motivated with several years' legal assistant experience and/or certification. Will be responsible for proof-reading, legal filing, file organization, calendaring, and bookkeeping. Also will be trained in nonprofit association management. Salary is $30-35,000, DOE, plus dental and generous vacation time. Please contact (406) 449-7444 or thunderdomelaw2@gmail.com. See full listing at jobs.montanabar.org.

LEGAL SECRETARY: Hall & Evans, a leading regional law firm which focuses on tort and commercial litigation, is hiring for a new full-time Legal Secretary/Assistant at our expanding Billings office. This position also shares the responsibility for various other tasks and duties such as receptionist and general office services administrative support. Ideally, the successful candidate would have experience with a defense firm and exposure to transportation litigation. However, candidates with strong administrative secretarial experience and minimal law office exposure will be seriously considered if you are outgoing, energetic with excellent secretary, software and general office administration experience. This is a wonderful opportunity to join a great team of talented people with an awesome Firm!

LITIGATION PARALEGAL: Berg, Lilly & Tollefsen is hiring a full-time paralegal to provide litigation support to attorneys in our downtown Bozeman office. Work will entail research, drafting, document management and production, and witness preparation. Strong technical, organizational, and communication skills essential. Pay DOE; benefits include health insurance, disability insurance, and 401(k). Apply by sending cover letter and resume to info@berglawfirm.com.

ATTORNEY SUPPORT/RESEARCH/WRITING

MONTANA BANKRUPTCY REPORTER: A searchable database of Montana Bankruptcy cases from 2005 through the present. Email alerts as opinions are entered. Weekly legislative update throughout the Montana Legislative session. Subscriptions $200 per year. www.Montanabankrtupcyreporter.com; Box 1795; Great Falls, MT 59403.

DO YOU NEED HELP in your busy criminal defense or family law practice? Over 20 years experience in criminal and family law. LEGAL RESEARCH & WRITING: motions, pleadings, discovery, and appeals. moiramurphylaw@gmail.com or (406) 697-5419. Reasonable rates with flat fee.

ENHANCE YOUR PRACTICE with help from an AV-rated attorney with 33 years of broad-based experience. I can research, write and/or edit your trial or appellate briefs, analyze legal issues or otherwise assist with litigation. Please visit my website at www.denevilegal.com to learn more. mdenevi@bresnan.net, 406-210-1133..

BUSY PRACTICE? I can help. Former MSC law clerk and UM Law honors graduate available for all types of contract work, including legal/factual research, brief writing, court/depo appearances, pre/post trial jury investigations, and document review. For more information, visit www.meguirelaw.com; e-mail robin@meguirelaw.com; or call 406-442-8317.

ON DEMAND LITIGATION SUPPORT: When things get busy, increase your productivity without increasing overhead. Outsource legal research, writing, and other litigation tasks to David Sulzbacher, a Montana and North Dakota licensed attorney with clerkship, civil litigation, and criminal experience in Montana courts. $75/hr for speedy and high quality briefs, pleadings, memoranda, doc review, etc. Call 406-407-7079 or email david@thefreelanceassociate.com.

OFFICE SPACE/SHARE

BILLINGS: Looking for attorney(s) to share fully furnished office and legal assistant in Billings, Montana. Reasonable terms. For more information email: bruce@bharperlaw.com or call 406-255- 7474.

GREAT FALLS: Looking for attorney to share fully furnished office and legal assistant in Great Falls, MT. Reasonable terms. Great view. For more information e-mail: ageiger@strainbld.com; 406-727-4041.

CONSULTANTS & EXPERTS

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

COMPUTER FORENSICS, DATA RECOVERY, E-DISCOVERY: Retrieval and examination of computer and electronically stored evidence by an internationally recognized computer forensics practitioner. Certified by the International Association of Computer Investigative Specialists (IACIS) as a Certified Forensic Computer Examiner. More than 15 years of experience. Qualified as an expert in Montana and United States District Courts. Practice limited to civil and administrative matters. Preliminary review, general advice, and technical questions are complimentary. Jimmy Weg, CFCE, Weg Computer Forensics LLC, 512 S. Roberts, Helena MT 59601; 406-449-0565 (evenings); jimmyweg@yahoo.com; www.wegcomputerforensics.com.

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

EVICTIONS

EVICTIONS LAWYER: We do hundreds of evictions statewide. Send your landlord clients to us. We'll respect your "ownership" of their other business. Call for prices. Hess-Homeier Law Firm, 406-549-9611, ted@montanaevictions.com. See website at www.montanaevictions.com.

GIVEAWAY ITEM

Will give or donate: Montana Law Review volumes 1-54 complete; Public Land Law Review volumes 1-18 complete. Express interest at 406-449-4688.

MONTANA LAWYER
State Bar of Montana

State Bar of Montana
P.O. Box 577
Helena MT 59624