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MAY

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FEATURE ARTICLES



'OTHER DUTIES' OF LITIGATORS

Taxes, investments and Medicare aren't in most litigators' job description, but neglecting to consider them can sometimes come back to haunt you.



LAWYER WELL BEING

Well-Being in Law Week was May 3-7. Participating firms share some tips about things activities that were successful for them.

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STATE BAR ELECTIONS

State Bar elections open till May 24. Meet the candidates. **Page12**

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JEST IS FOR ALL BY ARNIE GLICK



"I have been accused of trespassing, but I can't help it -- I'm a free-range chicken."

Setting new precedents after these unprecedented times

"These are unprecedented times." I've read and heard that phrase countless times over the past 14 months. I reflected on this phrase at my daughter's soccer game this weekend, catching up with people I hadn't seen in at least a year. As we talked about vaccinations and summer travel plans, I thought, at what point does the unprecedented become precedent? And it goes without saying to this audience (but I'll say it anyway) that lawyers know precedent.

Precedent is defined generally as "an earlier event or action that is regarded as an example or guide to be considered in subsequent similar circumstances." Precedent is how lawyers use past decisions to evolve the law, ideally for the better. This skill can be applied equally to evolve our profession post-pandemic. Granted, there is much we'd like to forget — COVID-19 deaths in the United States are approaching 600,000 and a significant portion of the population still out of work, unable to pay rent or mortgage, and facing food insecurity, particularly minorities and children. However, there's also opportunity to learn from challenges of the pandemic that can be applied transitioning into the "new normal."

The ABA Coordinating Group on Practice Forward looked at this exact issue and conducted one of the largest surveys ever taken among ABA members. The survey results are published in Practicing Law in the Pandemic and Moving
Forward: Results and Best Practices from a
Nationwide Survey of the Legal Profession,
which covers the gamut of pandemic-related topics, from the effect of the pandemic
on women and minorities, to concerns
about the economics of a post-pandemic
law practice, to best practices for lawyers
and their employers moving forward. Not
surprisingly, the report concluded that the
pandemic has had a significant effect on
virtually all segments of the legal profession, regardless of age, gender, race/ethnicity, level of seniority, or practice setting.

Perhaps one of the most notable impacts is the effect of the pandemic on lawyers' work setting and schedules. The pandemic has taught us that the legal profession can survive and even thrive outside of the traditional work environment. A substantial number of members reported they preferred working remotely and having a flexible work schedule. In turn, the report identifies best practices for lawyers in these settings to set realistic expectations, negotiate boundaries between home and work, and maintain frequent contact with clients, partners, and other lawyers. The report also identifies best practices for lawyers' employers in communicating clearly about expectations.

The pandemic has also crystalized lawyers' desires for guidance about enhancing mental health and



KATE McGRATH ELLIS

well-being. A significant number of ABA members identified as "extremely important" the availability of comprehensive plans for sick and family leave. The percentage identifying these plans as "extremely important" was much higher among women. This is likely related to the report's finding that women were significantly more likely to have taken on more childcare responsibility during the pandemic. These are valuable lessons for work-personal life harmony that can form the building blocks of a post-pandemic workplace structure in the legal profession.

While the last year has been undoubtedly "unprecedented," the lessons learned in overcoming the challenges sets the precedent for positive changes moving forward.

We all know how to use precedent to evolve the law, now we can use that skill to evolve our profession.

Kate McGrath Ellis is an attorney with the Montana Auditor's Office in Helena

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State Bar of Montana's 2021 Annual Meeting

Met us Missoula

Holiday Inn Missoula Downtown Save the dates • September 9-11

It's been a long year for us all.

It may not be time to turn the page on COVID-19 yet, but we are ready to move forward with holding a safe, in-person Annual Meeting this fall.

Not ready for in-person gatherings?

If you don't yet feel comfortable with in-person meetings, we still have you covered. We will offer a live-streaming option for the CLE programming from this year's Annual Meeting.

UM Griz football game on Saturday

Griz fans will have another reason to make the trip. Montana is scheduled to host Western Illinois on the gridiron.

We are excited to see you again this fall in Missoula!

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CAREER MOVES

Berget joins Karell Dyre Haney in Billings as an associate attorney

Dylan J. Berget has joined the Billings law firm of Karell Dyre Haney PLLP as an associate attorney.

Berget received his B.A. degree cum laude in chemistry from the University of Great Falls in 2016, his M.B.A. from



Berget

the University of Montana in 2020, and his J.D. from the Alexander Blewett III School of Law at the University of Montana in 2020.

During law school, he interned with the Lincoln

County Attorney's Office and with the Honorable Benjamin P. Hursh in the U.S. Bankruptcy Court, District of Montana. Berget's primary areas of practice include estate planning, real estate, and commercial law. He can be reached at 406-294-8488.

Tuss joins Patten Peterman Bekkedahl & Green

Patten Peterman Bekkedahl & Green in Billings has announced that Morgan E. Tuss has joined the firm.

Tuss grew up in Billings and graduated from Billings Senior High School in



Tuss

2011. In 2017, she received her B.A. in Communications, and in 2018, she received her A.A. in Psychology, both from Montana State University Billings. In 2018, she enrolled in law school at the University of North

Dakota School of Law, serving as the Student Bar Association president her second year and as a student representative during her first and third years. She also participated on the school's trial team, on extracurricular mock trial, and on the Minnesota Innocence Project.

In December 2020, Tuss graduated a semester early, cum laude, and fourth in her class. She is newly admitted to Montana and will soon admit in other jurisdictions

Prior to joining the firm, Tuss interned at Moulton Bellingham in Billings for two summers. Her areas of practice are general business and estates. You can reach Morgan at 406.252.8500 or mtuss@ppbglaw.com.

The firm also offers legal services relating to: Commercial; Collections; Personal Injury; Property; Employment; Estate and Tax Planning; Probate and Trust Estates; Estate and Gift Taxation; Business Succession; Estate and Trust Litigation; Tax Disputes involving Income, Real Estate or Personal Property; Bankruptcy including Business/Personal and Restructures; Business Planning for Corporations, LLCs, and Partnerships; Oil & Gas and Adoptions issues.

Garlington law firm welcomes Venegas as associate attorney



Venegas

Raven D.
Venegas has
joined the law
firm Garlington,
Lohn & Robinson,
PLLP as an associate attorney. She
brings experience
gained from her
time as an intern
with the World

Justice Project and Marathon Petroleum Corporation.

Her practice areas include civil litigation, insurance defense, medical malpractice defense, and health care law.

Venegas was born and raised in Lima, Ohio. She graduated from Walsh University, where she received two Bachelor of Arts degrees in history and museum studies.

She went on to obtain both a Juris Doctor from Ohio Northern University Pettit College of Law and an LLM in Democratic Governance and Rule of Law.

Bridger Law welcomes Monica Payne to firm

Bridger Law is pleased to introduce its newest attorney, Monica Payne. Payne's practice includes family law,

criminal law, and civil litigation.



Payne

An Indiana native, Payne is a Purdue University graduate and earned her J.D. from Michigan State University College of Law in 2018. After law school, she clerked

at various law firms in the Denver metro area before relocating with her partner to Montana.

Payne became licensed to practice law in Montana in 2020. Prior to starting at Bridger Law, she was an associate at another local Bozeman law firm.

When not working, she enjoys hiking, skiing, and looks forward to

HAVE NEWS TO SHARE?

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

traveling again post-pandemic.

RETIREMENT

Boone Karlberg congratulates Dean Stensland on retirement

After 30 years practicing law with Boone Karlberg and volunteering



Stensland

his time in the Missoula community, Dean Stensland has set his sights on a well-deserved retirement. The firm has benefited from his outstanding leadership and commitment to excellence in all aspects of life.

While it's never easy to bid farewell, the firm knows Dean will not slow down or retire in the traditional sense but merely shift the focus of his considerable talents and boundless energy in pursuit of his other passions. Dean will be deeply missed, and Boone Karlberg wishes him all the best as he takes on new challenges and adventures with his amazing wife, Kim, who is herself retiring from an impressive career of serving the community in nursing. We are grateful for everything Dean has accomplished. His

work ethic and legacy will inspire us well into the future.

HONORS

Munson admitted to American Academy of Matrimonial Lawyers

Kasting, Kauffman & Mersen PC in Bozeman is pleased to announce that



Munson

Dennis Munson, a firm shareholder, has been admitted to the American Academy of Matrimonial Lawyers. The AAML is the preeminent organization for family law practitioners,

comprised of approximately 1650 family law practitioners ("fellows") who have substantial expertise in family law; have been reviewed and approved by other Fellows; and have successfully passed a comprehensive written AAML examination. The AAML was founded in 1962 to "provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law." Munson becomes only the third Montana lawyer admitted to the AAML, joining his former partner, Kent Kasting

(now "of Counsel" to the firm) as one of the three fellows in Montana.

Rogers has become a American College of Trial Lawyers fellow

Guy W. Rogers has become a fellow of the American College of Trial Lawyers, one of the premier legal associations in

North America.



Rogers

The special induction ceremony at which Rogers became a Fellow took place virtually during the recent Induction Ceremony at the 2020 Meeting of the College. Fellowship in the college is extended by invita-

tion only and only to those it finds meet the highest standards of ethical conduct, professionalism, civility and collegiality.

Lawyers must have a minimum of 15 years trial experience before they can be considered for Fellowship. Membership in the College cannot exceed 1% of the total lawyer population of any state or province. Rogers practices in the Billings office of the Brown Law Firm. He is a 1985 graduate of the University of Montana School of Law.



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Tribal Courts fill access to justice needs, offer practice opportunity for lawyers

Chief Judge Stacie FourStar (JF) of the Fort Peck Assiniboine and Sioux Tribal Court, and Montana Legal Services Association Staff Attorney, Kathryn Seaton (KS) recently had a wide-ranging discussion touching on the role of tribal courts, their importance in communities and what role Montana's attorneys might have in advancing racial justice in tribal courts.

KS: How would you describe what a tribal court is?

JF: Every tribal court in the country is different. Montana has seven different tribal court systems. The Fort Peck Tribal Court is a court of general jurisdiction that was established in 1965.

KS: It's interesting that you say a court of general jurisdiction, because there are many limits on who and what a tribal court has jurisdiction over. But, at the same time, a tribal court is like a state court in that it is dealing with the general legal problems of a community.

JF: It is very complicated. At Fort Peck we have implemented the Violence Against Women Act and Tribal Law and Order Act which means we are able to have expanded jurisdiction and sentencing. When we talk about general jurisdiction, it's traffic tickets to murder charges.

KS: In terms of handling all of those big and small legal matters for a community, what is your opinion on why tribal courts are important? Or, why can't a tribal member just go to the state district court in their county?

JF: From back in the day when I started as a prosecutor, I could see that the westernized system wasn't going to work for my community. We needed to implement restorative justice on a community level to address the historical and intergenerational trauma. We always want to consider, what can the tribal court offer that the state or federal court can't? Often, it's those alternatives to sentencing and restorative justice. In many cases, the tribal court can act more swiftly to keep



Fort Peck Assiniboine and Sioux Tribal Court Chief Judge Stacie FourStar is shown. (Photo provided)

peace and protect the community.

KS: I find that tribal courts can often respond much more quickly on the civil side as well. There is also the aspect that a tribal court system is reflective of the community's needs and values. For example, a parent might be granted less parenting time in state court because a home is viewed as "too crowded" due to multigenerational living. Whereas, the tribal court may view a multigenerational home as advantageous or at least consider cultural norms. Many times, there is a presumption that tribal courts are different from state courts and

therefore inferior, but not a consideration of ways in which tribal courts may be different and superior. What are your thoughts?

JF: Our tribal court is able to utilize specialty courts with a lot of freedom and leeway. We have an investment in the system because the offenders are members of our community. In Bozeman, you may never see an offender again, but in tribal courts, you know his mom, his grandma, and his kids go to school with your kids. We want to stop the cycles of violence and poverty because we have an investment in the community. We don't

just give you a piece of paper that says what to do. We are going to grab your hand, walk with you, and sit with you until you get it done. We are also much less restricted in changing our laws. If we want our laws to change, it's a relatively quick process. We have an opportunity to be very cutting edge, or we can choose to see what other jurisdictions are doing and go with the flow.

KS: Another advantage I see in my tribal court practice is a focus on giving litigants an opportunity to be heard, instead of a focus on procedures. There is much more emphasis placed on getting everyone to come to court and making sure they have an opportunity to say their piece. Litigants fundamentally don't care about if the exact procedures around an entry of judgment are followed, for example. They want to have the chance to go to court, say their piece, and feel they are able to talk and be listened to by the judge.

JF: I totally agree with that. There are times when a litigant just wants to vent. I will let them so long as they aren't swearing or being crazy. If you want to vent, I

can hear it. Then, the other side will get the same opportunity.

KS: Are there cases you see coming through your court that have a racial justice component that people might not think of?

JF: Housing is a major one. We had a bunch of evictions being filed by nontribal landlords during the height of the pandemic. It was very difficult because people weren't able to, for example, get a job, because the tribe was shut down. They couldn't even get a job application. We had people waiting in line in cars for hours to get food. It became a big access to justice issue. We had a hard time figuring out how to make decisions.

KS: What would you say to an attorney who is hesitant to practice in tribal court, or maybe thinks that because they aren't a member of that community, they don't have a role to be involved in the court system?

JF: I would tell an attorney, if you want to experience something outside of what you are used to, tribal court is the best place to do it. There is a lot of room for error. There's a lot of room to grow

INTERESTED IN TRIBAL **COURT PRACTICE?**

If you are interested in practicing in the Fort Peck Tribal Court, the next Bar Exam administration will be June 25, 2021, in Poplar. Interested applicants should contact the court at 406-768-2400 to sign up.

in tribal court, to learn the practice, and to learn the law. You would never go without work. There is always something going on. Even with the little jurisdiction that we have, we run through upwards of 5,000 criminal cases each year. That's just the criminal cases. It's completely busy all the time. I would encourage people to practice in tribal court and step out of that norm. If they are looking for a path to make change or to create a vision that they have, tribal court would be the place to do it.

KS: Thank you for your time, Judge FourStar!



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Steele running for State Bar President-Elect

David Steele's candidate statement

I am honored and humbled to be nominated to serve as President-Elect for the State Bar of Montana. I have served in various capacities in both my local bar and the State Bar over the last several years. I look forward to the opportunity to continue to serve

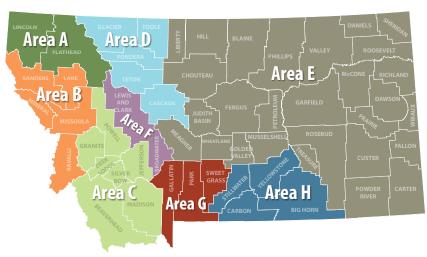


Montana's citizens, attorneys and courts as President-Elect of the State Bar of Montana.

I started my tenure as a State Bar Trustee for Area B. During those years, I became familiar with the inner work-

ings of the State Bar, and how the various Commissions, Committees and Sections interact with the Courts, the Bar and with each other. As my experience grew, I was asked to serve on various ad-hoc and permanent committees established to ensure the State Bar remains responsive to its mission and its members. Through this work I have had the good fortune to develop important relationships with a number of stakeholders, including Committee and Commission members and peripheral organizations involved with the Bar.

During the last two years, I have served as Secretary-Treasurer for the State Bar. As Treasurer, and among other duties, I served as chair of the Finance Committee. The Finance Committee is charged with establishing a proposed budget for the State Bar, and works with the Executive Committee and Executive Director to establish that



Bar elections running online through May 24

Online voting for the State Bar of Montana's 2021 elections is open from May 3 to 24.

Positions on this year's ballot are President-Elect, Secretary Treasurer, and Trustees from Areas E, F and H (see above).

Eligible votes are active attorneys, active military service attorneys and judicial members except Supreme Court justices are eligible to vote in the election.

budget. During these years, I have gained a detailed working knowledge of the state bar budget and how those numbers on a spread-sheet translate into real life. As a member of the Executive Committee, I have also become familiar with, and continue to be involved in a large variety of non-budgetary issues which affect the State Bar, its members and Montanans. And over these years, I have continued to develop and maintain those important relationships with the Courts, the Board of Trustees, the Executive Committee Members, and the Executive

Director and State Bar staff.

If I am fortunate enough to serve as President-Elect for the State Bar of Montana, I will work hard to continue the great work my predecessors have done. It is not lost upon me that I will stand on the shoulders of those who have helped make the Montana State Bar such an outstanding organization. I will continue those efforts by working with all of you to ensure the State Bar of Montana remains dedicated to its purpose and mission, responsive to its members and a model integrated bar organization for the country.

Griffith running for secretary/treasurer of state bar

I am seeking to serve as your Secretary/Treasurer. As your Secretary/Treasurer, I will do my best to ensure that a proper record is kept of our meetings, that we have a balanced budget that is used to serve the needs of the membership and that I complete all of the duties of the position. I would use my experience serving in such roles in the past, including serving as my college's President of Student Government Finances, overseeing a million dollar budget, serving on a number of Gallatin County nonprofits in the same or similar role and balancing my own law firm's budget for years.

About me personally: I am a general civil attorney

with Griffith & Cummings, PC. My practice focuses on the legal areas of contract law, particularly business, real estate, construction and community association law. I am actively involved in Montana's legal community. I am President of the Professionalism Committee as well as Chair of the Board. I volunteer for many local legal assistance programs and nonprofits. I enjoy constantly looking for my son's mask prior to school, socially distancing from the other baseball and soccer families, and hiking with no hiking buddies but my dogs. I continue to be profusely thankful my husband is an IT consultant-genius and am looking forward to normalcy soon.



Candidate statements from 2021 State Bar of Montana Board of Trustees candidates

AREA F

Aislinn Brown, Montana Department of Justice, Helena

I am a Helena resident, current trustee for Area F, and Assistant Attorney General for the Montana Department of Justice. As trustee, I have enjoyed serving the attorneys in Broadwater and Lewis and Clark counties for the past two years, and I hope to continue doing so.

This past year especially has been challenging, and the State Bar has acted quickly to meet the needs of Montana attorneys during the global pandemic. For example, we recommended to the Montana Supreme Court that they



allow temporary admission to the bar for eligible candidates who were unable to sit for the bar amid the pandemic and worked to make CLE courses available remotely. We also recommended

revisions to Montana's professional conduct rules and approved two new State Bar sections: Animal Law and Public Utilities Law. As your trustee, I look forward to continuing to ensure that Montana attorneys have the support and resources they need, so they in turn can assist Montanans with the many challenges they face.

When I am not interacting with the local legal community, you will most likely find me exploring the great outdoors with my husband, Roy; our hyperactive dog, Bowie; and the newest addition to our family, our son, Tucker.

Anna Kecskes, Uda Law Firm, Helena

I am currently running for the Area F Trustee position to the Montana State Bar.

By way of a bit of background, I am originally from Montana, and I completed both my undergraduate degree and my law degree at Gonzaga University, in Spokane, Washington. I moved back to Montana after graduation in 2015, took the bar exam that summer, and have been working in Helena since.

I am excited about the opportunity to serve in the Trustee position; as I now have a few years of experience un-



der my belt, I am less consumed in the day-to-day survival, and am increasingly interested in the bigger picture of the practice of law. I currently work at a small firm with a civil

practice, and I have come to realize that the legal world in Montana is a small but active one. The extremely complex nature of the law requires all lawyers to be able to navigate a complicated world, and to make the best of our connections to solve problems for clients, especially after all that the year 2020 brought us. In the position of a Trustee, I would hope to bring new ideas for hosting a community of attorneys in the State of Montana, across different practice areas, geographical locations within the state, and especially in this time of limited face-toface interaction.

Stuart Segrest, Montana Department of Justice, Helena

Since 2014, I have had the privilege of representing the attorneys in Lewis and Clark and Broadwater counties on the Board of Trustees. I look forward to working with new Trustee Anna Kecskes and continuing to work with Trustee Aislinn Brown. Please contact me with any questions or concerns.

AREA E

Joel Krautter, Netzer Law Office, Sidney

I would be honored to serve as a State Bar Trustee and represent the attorneys and local bar associations in Area E. Issues I would like to work on would be seeing more in-person



continuing legal education events being held in Area E, including an annual Bucking Horse Sale CLE in Miles City. I would also look for ways to increase education to the public about the State

Bar, support for the rule of law and the importance of preserving an independent judiciary.

I am an attorney with the Netzer Law Office, P.C., in Sidney and serve as the President of the Northeast Montana Bar Association. I have also enjoyed helping out with the Access to Justice Commission's Policy and Resources Subcommittee and the Montana Legal Services Association's Rural Incubator Project for Lawyers.

ONLINE VOTING RUNS THROUGH MAY 24

AREA H

Shane Coleman, Holland & Hart, Billings

For just over 20 years, I have prac-



ticed commercial and intellectual property litigation. I was previously elected to a partial term as a Trustee. This has been a time of many changes and challenges for the State Bar. I would like to continue work

on these matters. I hope to continue to be a good steward of the State Bar's budget, and will endeavor to help the State Bar bring the most value to its members.

Eli Patten, Crowley Fleck, Billings

I am a partner with the Crowley Fleck law firm in Billings and serve as the co-chair of the firm's Banking, Finance, Creditors' Rights and



Bankruptcy practice group. My practice primarily involves the areas of creditors' rights, including bankruptcy, collections, real and personal property foreclosures, bankruptcy litigation,

and commercial litigation. I have been selected as a Rising Star in the Mountain States Super Lawyer Magazine for 2013 - 2020 for the practice areas of creditor's rights/bankruptcy.

Since admission to the State Bar, I have served as the Chair of the State Bar Bankruptcy Section, serving as the secretary/treasurer and a member of the section counsel prior to my tenure as Chair. For the past 7 years, I have served as the co-chair of the Bankruptcy Section seminar planning committee. I also served for 4 years on the New Lawyers' Section board as a trustee.

Presently, I serve as one of the Area H Trustees on the State Bar Board of Trustees.

In addition to my involvement with State Bar, I served in numerous positions on the Yellowstone Area Bar Association board, including serving as the Yellowstone Area Bar Association President. Further, I have been active with the American Bar Association, serving as a District Representative to the Young Lawyer Division, and most recently as a Delegate to the ABA House of Delegates.

I believe my experience in various capacities with the local bar, State Bar and ABA make me a qualified candidate to continue my service to our profession. I would appreciate your support in my reelection bid.

Antoinette "Toni" Tease, Antoinette M. Tease PLLC, Billings

When I moved to Montana with my husband in 1995, I had the good fortune to join the Crowley law firm, where I was afforded the opportunity to work with some of the best lawyers in the state at a forward-thinking law firm. While at Crowley, I and a few of my colleagues started the intellectual property practice group, and in 2003, I left the firm



to act as General Counsel for a software development company with its headquarters in Billings.

Two years later, the call of private practice beckoned, and I decided to hang my shingle

as a solo attorney specializing in intellectual property and technology law. I worked from home for nine years while my sons were little and then got office space in downtown Billings on the same day that my eldest son got his driver's license.

I have clerked for a U.S. District Court Judge in Hawaii, and I have worked for law firms in Connecticut, New York, San Diego and Washington, D.C.—but what makes Montana unique among all of these experiences is its vastness of place and collegiality of the State Bar. Having served on the CLE Institute for a number of years, and as Chair of the State Bar Section of Intellectual Property Law, I know that one of the State Bar's greatest challenges is delivering quality education to its members. I also believe that networking is a particularly important function of the State Bar, given that over 40% of our members are solo practitioners. Members also cite pro bono activities and bench-bar relations as important roles of the State Bar.

My husband and I have lived in Billings for 26 years, and I value tremendously all of the contacts I have made with other lawyers throughout Montana—all of us striving to stay current on legal developments in our areas of practice so that we can deliver quality legal services to our clients—during that time. I have often sought advice from those older and wiser than I, and I believe that mentoring younger lawyers is an important service that the State Bar can provide.

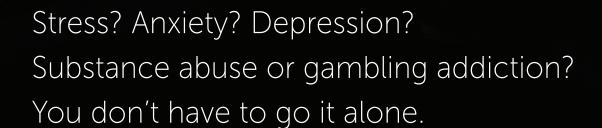
If I am afforded an opportunity to serve as your trustee, I will aim to further the goals identified by our members as critical Bar functions. I will also bring to bear a business-oriented mindset that stems from my three decades of helping inventors and entrepreneurs protect their ideas.

MORE ON ELECTIONS

Elections for State Bar of Montana Board of Trustees and bar officer positions will be conducted online through May 24. Check your email for voting instructions. See page 11 for a map of trustee areas. Visit https://www.montanabar.org/page/State_Bar_Elections for more information.



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Gov. accepting 8th Judicial District judge nominations

Gov. Greg Gianforte is now accepting applications from and nominations of lawyers for an open 8th Judicial District judge position.

Any lawyer in good standing who has the qualifications set forth by law for holding the position of district court judge may apply or be nominated. The application form is available electronically at nominatejudges. mt.gov. Applications must be submitted electronically as well as in hard copy by Tuesday, June 1.

Applications will be made available

to the public.

Members of the public will have the opportunity to provide letters of support or other comments regarding applicants during a comment period that will run from Tuesday, June 1, through Friday, June 30, at the nomination website. Applicants must receive at least three letters of support to be considered for appointment by the governor.

The governor's appointee, who will be named in July, will be required to run for election in the 2022 election.

Senate confirms Abbott, Ohman to state district court judge seats

The Montana Senate confirmed two of former Democratic Gov. Steve Bullock's judicial appointments before it adjourned in April.

The Honorable Chris Abbott of the First Judicial District was confirmed on the final day of the Legislature. The Senate had previously confirmed the Honorable Peter Ohman of the 18th Judicial District by a 50-0 vote.

The Senate declined to confirm District Judge Michelle Levine a former Democratic legislator, by a 28-22 vote.

Judge Abbott's confirmation came in dramatic fashion on the last day of the session. After the Senate Judiciary Committee voted 7-4



Abbott



Ohman

against the confirmation, the committee's report failed to pass on a tie vote in the full Senate.

After supporters brought Abbott's confirmation back before the full Senate, it passed by a 27-23 vote.

Applications being accepted for Water Court chief judge

The Montana Judicial Branch has begun accepting applications for the position of Water Court chief judge.

Applications will be accepted until June 4, after which members of the public will have an opportunity to comment on applicants. Montana Supreme Court Chief Justice Mike McGrath will appoint an applicant to a four-year term.

Current Chief Water Court Judge Russ McElyea's term expires July 31.

Applicants must submit a cover letter and a resume by 5 p.m. on June 4 to bmclaughlin@mt.gov. Applications must be submitted electronically. In order to be considered, an applicant must be a citizen of the United States who has resided in the state two years immediately before taking office and admitted to the practice of law in Montana for at least five years prior to the date of appointment.

Public comment will begin June 7, 2021. Applicants must receive a minimum of three support letters in order to be forwarded for consideration.

The Water Court was created by the 1979 Montana Legislature. It has exclusive jurisdiction over the adjudication of all water-rights claims in Montana. More than 200,000 water rights claims will eventually be adjudicated through the Water Court.

The person appointed to the position is subject to Senate confirmation in 2023.

Belke, Perry reappointed to Commission on Practice

Attorneys Brad Belke of Butte and Heather Perry of Stanford have been reappointed to four-year terms on the Montana Supreme Court's Commission on Practice.

Belke represents Area C, consisting of

the 2nd, 3rd and 5th Judicial Districts. He is a solo practitioner.

Perry represents Area E, consisting of the 7th, 10th, 12th, 14th, 15th, 16th and 17th Judicial Districts. She is the county attorney from Judith Basin County. The Supreme Court announced both appointments on April 13.

The two were appointed after elections were held in their respective areas. The top three vote-getters in each area were forwarded to the Supreme Court.

2021 Montana Legislature adjourns April 29

The 2021 Montana Legislative Session adjourned sine die on April 29.

Following is a list of bills introduced in the 2021 Montana Legislature that the State Bar of Montana has taken a position on, noting whether the Bar was in support or opposition, including in amended form. Status as of May 4, 2021.

House Bills

HB 102 (Rep Berglee): Revise concealed carry laws. Bar position: monitor re courthouse exemption. Status: Passed by Legislature with exemption.

HB 325 (Rep. Usher): Elect supreme court justices by districts. Bar position: Opposed. Status: Passed by Legislature.

HB 342 (Rep. Regier): Providing for partisan elections for supreme court justices and district court judges. Bar position: Opposed. Status: Not passed on second reading (44-56). Missed deadline for general bill transmittal.

HB 355 (Rep. Kerns): Providing for partisan elections for supreme court justices, district court judges and justices of the peace. Bar position: Opposed. Status: Not passed on second reading (44-56). Missed deadline for general bill transmittal.

HB 380 (Rep. Seekins-Crowe): Requiring senate confirmation for all members of judicial standards commission. Bar position: Opposed as amended concerning attorney and judicial members appointed by Supreme Court. Status: Passed by Legislature, transmitted to Governor.

HB 436 (Rep. Kerns): Prohibited local governments from regulating open carry of firearms. Bar position: Monitor to obtain the same exemptions in HB 102. Status: Tabled in committee.

HB 564 (Rep Noland) Eliminate lawyer exemption to escrow agent license. Bar position: monitor. Status: Tabled in committee.

HB 685 (Rep. Tschida): An act to submit a constitutional initiative to electors to alter composition and procedures of the Judicial Standards Commission. Bar position: Opposed. Status: Not passed on second reading

Bar lobbying refund request policy

Every two years, the State Bar of Montana engages in lobbying before the Montana Legislature on matters germane to the State Bar's purposes, including to "aid the courts in maintaining and improving the administration of justice," and "to insure that the responsibilities of the legal profession to the public are more effectively discharged." Article III, Constitution of the State Bar of Montana.

For example, the State Bar traditionally supports a governor's judicial system budget proposal (as it did this year with Gov. Gianforte's budget), requests for additional district court judicial positions and has supported presently seated judges for final Senate confirmation. The State Bar also opposes certain legislation, including when it believes proposed legislation would invade Article VII of the Montana Constitution and the authority of the judicial branch to regulate the courts and the legal profession, poses a threat to an independent and impartial judiciary, or otherwise adversely affects the profession. The Bar's Executive Committee monitors pending legislation and establishes the position of the Bar

on various matters pursuant to the Board's Policies.

The State Bar has established Policies for refunds to active members paying mandatory dues who object to a position that the State Bar has taken on a particular legislative matter (Board Policies 3-102 and 3-104) consistent with the Montana Supreme Court's 1983 decision in *Reynolds v. State Bar of Montana* which requires the State Bar to provide an aliquot refund to a member who objects.

If you have an objection to a particular position taken by the State Bar of Montana during the recent legislative session, you may request a pro rata refund. Total legislative expenses for this past legislative session are \$21,907.50, including payments to the State Bar's outside lobbyists, allocated salary/lobbying expense for the executive director, allocated office overhead, etc.

Based upon the current active membership of 3,977, the pro rata refund to active members is \$5.51.

To request a refund, send a written objection and request for a refund to the executive director of the State Bar of Montana, P.O. Box 577, Helena, MT 59624. Letters must be signed, and include the challenger's name, address, telephone number and Bar number.

(47-52). Missed deadline for referendum proposal transmittal.

HB 693 (Rep. Mercer): Implement provisions of HB2 (Budget) - Section D- Judiciary, Law Enforcement and Justice. Bar position: Support. Passed by Legislature, transmitted to Governor.

HJ 23 (Rep. Olsen): Requesting an interim study on enacting the uniform electronic legal materials act. Bar position: Support. Tabled in committee.

HJ 40 (Rep. Mercer): Requesting an interim study and audit of the Judicial Standards Commission. Bar position:

Support. Passed by Legislature.

HJ 43 (Rep. Mercer): Requesting an interim study of security in Montana's district courts. Bar position: Support. Passed House (58-40). Tabled in Senate committee.

Senate Bills

SB1 (Sen. Kary): Revise lobbying laws to update terminology and conform lobbying definition. Bar position: Support. Status: Passed by Legislature,

Bills, next page

67% pass Montana's February bar exam

The Montana Supreme Court's Board of Bar Examiners has announced that 67% of candidates for admission to the State Bar of Montana passed the February 2021 administration of the exam.

A total of 51 applicants took the February exam, with 34 achieving a passing score of 266 or better on the Uniform Bar Exam.

The following Montana applicants passed the February 2021 exam (asterisk indicates applicant still needed to acquire a qualifying MPRE score and/or attend the Montana Law Seminar for admission to the bar at the time the):

- William Shawver Adams*
- Sarah Grace Baehr
- K.C. James Barrett*
- Daniel Mastin Brister
- Shane Marcus Cashin

- Karra Melissa Comstock
- Elspeth Cooper
- Steven Earl Goodson
- Matthew Clark Hall*
- Abby Elizabeth Hogan
- Alexandra Justine House
- Meghan Renee Holtz
- Layne Raymond Johnson
- Dillon Kato
- Alicia Marie Kelly
- Laura Stevens Kokotailo
- Stephen Alfredo Latuso*
- Lindsay Donahue Love
- Michael Garrett Malone
- Braden Shayne Murphy
- Anders Kingsland Newsbury*
- Matthew Thomas Paoli-Asaro
- Shkeqim Pilinci
- Dillon Alexander Post
- Mark Bucknew Pullin*
- Seth Hanson Rogers*

- Layne Luther Ryerson
- Nina Nicole Sperling
- Morgan Elizabeth Tuss
- Martha Yvonne VanSickle
- Ravden Venegas
- Tyler Allen Waite
- Jarrett Brant Wheeler
- Geoffrey Eugene Wiggs

As of April 28, the National Conference of Bar Examiners had posted the pass rates for 25 other jurisdictions. Of those, only New Mexico, Oklahoma and Wyoming had higher passing rates than Montana. Of the other reporting jurisdictions with the same 266 passing score as Montana — Connecticut, Illinois, Iowa, Kentucky and New York — the pass rates ranged from 42% to 60%.

Bills, from previous page

signed by Governor, chapter number assigned.

SB 140 (Sen. Regier): Generally revising laws related to certain judicial appointments and providing direct appointment process for the governor to appoint district court judges and supreme court justices to fill judicial vacancies. Bar position: Opposed. Status: Passed by Legislature, signed by Governor, chapter number assigned.

SB 168 (Sen. Fitzpatrick Generally revise attorney lien laws. Bar position: Monitor. Status: Passed by Legislature signed by Governor, chapter number assigned.

SB252 (Sen. Howard): Revise laws related to judicial impeachment. Bar position: Opposed. Status: Second reading indefinitely postponed (29-21). Missed deadline for general bill transmittal.

SB271 (Sen. Glimm): Allow judicial candidates to announce campaign endorsements. Bar position: Opposed. Status: Tabled in House committee.

SB 278 (Sen. Hertz): Generally revise civil liability law. Bar position: Opposed amendment placed on bill concerning nonprofit corporations due to concern over potential impact on civil legal aid

organizations which assist with governmental benefits claims. Status: Passed by Legislature.

SB 318 (Sen. Manzella): Revise laws relating to the judiciary. Bar position: Opposed as amended in House providing new definition of "malfeasance" for judicial impeachment, using the same language in SB 252. Status: Passed by Senate, not passed by House as amended (46-53).

SB 319 (Sen. Hertz): Generally revising campaign finance laws. Bar position: Opposed as amended creating Section 22 of bill requiring judicial officers recuse themselves in certain instances where an attorney or party has made campaign donations in past six years. Status: Passed by the Legislature.

SB 366 (Sen. Glimm): Revise Judicial Standards Commission complaint process. Bar position: Opposed. Status: Tabled in Senate committee. Missed deadline for general bill transmittal.

SB 402 (Sen. Smith): In the event Senate Bill 140 found unconstitutional, adding eight lay members to the Judicial Nominating Commission. Bar position: Did not oppose original bill as introduced adding additional lay members to Commission, opposed various proposed amendments in House and conference committee and final bill as amended that require recusal in a case involving a constitutional question if the judge or a committee or group the judge served on contacted a legislator or another government entity in support or opposition to a bill involving the same legislation. Status: Passed the Legislature.

SR 46 (Sen. Regier): Confirm appointment of the Honorable Chris Abbott as 1st Judicial District judge. Bar position: Proponent. Status: Confirmed.

SR 47 (Sen. Regier): Confirm appointment of the Honorable Peter Ohman as 18th Judicial District judge. Bar position: Proponent. Status: Confirmed.

SR 50 (Sen. Sands): Confirm appointment of the Honorable Michelle Reinhart Levine as 8th Judicial District judge. Bar position: Proponent. Status: Senate adopted adverse report from Senate Judiciary Committee, 28-22. Not confirmed.

LC 0553 (Sen. Ellsworth): An act revising court administration to improve efficiency and effectiveness of court operations and creating civil justice improvements grants program. Bar position: Support. Status: not introduced.



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Don't forget about Fastcase's weekly Thursday webinars. Whether you're a new or experienced user, product experts will teach you all the ins and outs of Fastcase. The Thursday webinars are approved for CLE credit in Montana. Register and download handouts at www.fastcase.com/webinars/

Introduction to Legal Research on Fastcase

Date: Thursday, May 6 **Time**: 11 a.m. Mountain

The Docket Sheet: A Docket Research Primer for the Modern Attorney Featuring Docket Alarm

Date: Thursday, May 13, 2021 **Time**: 11 a.m. Mountain

Introduction to Legal Research on Fastcase

Date: Thursday, May 20 **Time**: 11 a.m. Mountain

Introduction to Boolean on Fastcase

Date: Thursday, May 27, 2021 **Time**: 11 a.m. Mountain

Introduction to Legal Research on Fastcase

Date: Thursday, June 4 **Time**: 11 a.m. Mountain

The Docket Sheet: A Docket Research Primer for the Modern Attorney Featuring Docket Alarm

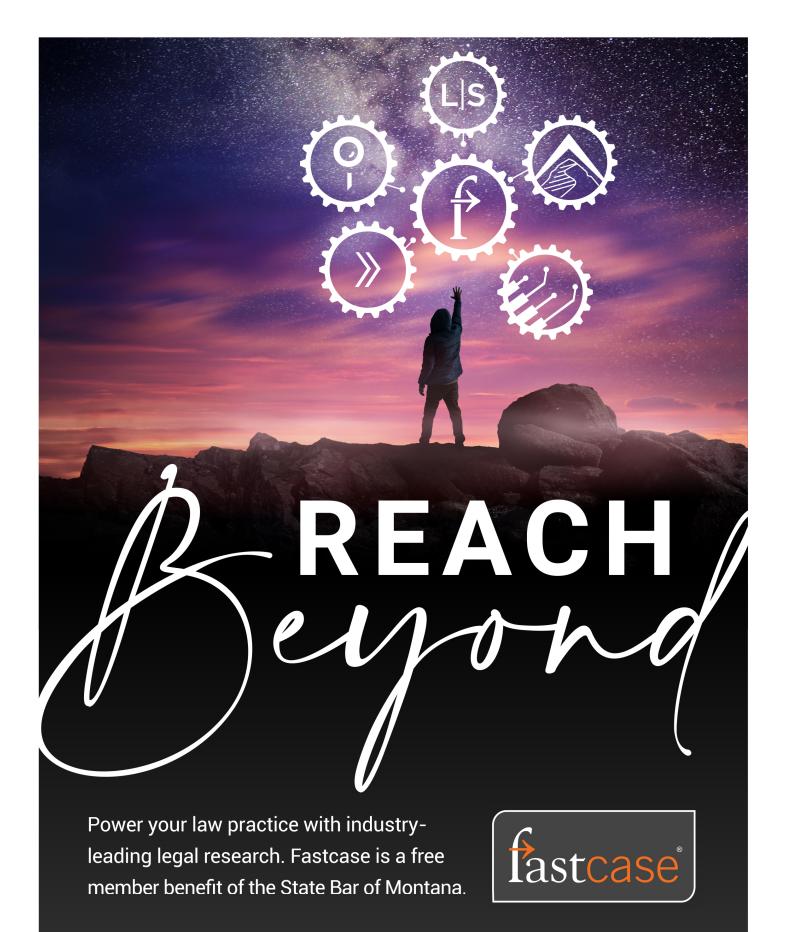
Date: Thursday, June 11 **Time**: 11 a.m. Mountain

Introduction to Legal Research on Fastcase

Date: Thursday, June 18 **Time**: 11 a.m. Mountain

Introduction to Boolean on Fastcase

Date: Thursday, June 25 **Time**: 11 a.m. Mountain



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Firms find success with week devoted to lawyer well-being

The Well Being in Law Institute's Well Being Week in Law this year was May 3-7, with law firms and organizations all over particiapating in activities to encourage lawyer well-being.

The institute asked firms that participated in Well Being Week 2020 to share activities they implemented for the week, and they determined that there were several factors that contributed to a program's success. These included:

- Top leader involvement—as presenters or as cheerleaders encouraging participation.
- Leaders and colleagues acknowledging their own challenges and well-being strategies.
- Incentives such as raffles and prizes.
- Ongoing activities for which participants collect points to earn prizes.
- Fostering friendly competition and gamification of activities.
- Bite-sized ways to participate that felt manageable.
- Use calendar invites for important events rather than just email announcements.
 - Build buzz in advance.
- Daily emails with simple ways to participate.
- For Q & A in open forums, allow option to submit questions anonymously.
- Firm member-generated content (e.g., videos/photos sharing their own well-being strategies, review daily recommended readings and develop well-being tips that are circulated).

If you missed this year's Well-Being Week in Law it's never too early to think about participating in next year's event — and there's no reason you can't designate a Well Being Week of your own anytime.

With that in mind, following are ideas from firms that participated in Well-Being Week 2020 that you could use or tailor to fit your organization.

LAP CLE programs: Several firms



Have you or your firm had success with well-being activities? We'd like to hear about it: editor@montanabar.org

worked with the Lawyer Assistance Programs in their area

Associate-Created Well-Being Tips:

One firm had an associate select a tip corresponding to the day's theme, writing their own message to complete the tip and sent it out to the entire firm. Firm members received great information, and it helped associates take the lead.

Exercise: Organized activities such as virtual 5K runs.

Social Connection Challenge:

International firm Crowell and Moring issued colleagues a challenge: to connect in person or by video to someone they hadn't talked to since remote work began and to write a thank-you to a colleague.

Daily Articles/Videos: Several firms circulated daily articles or videos on topics such as Stress Management, Leadership, and Mental Health, with some adding an inspiring quote.

Colleague-Created Videos: One firm asked a different attorney to create a twoto three-minute video for each day of Well-Being Week, focusing on each daily theme.

Book Club: Chicago's Seyfarth Shaw has a Book Club in which firm members read and discuss well-being-related books. They've also done Watch Clubs where a team picks a TV show.

Meditation: Many firms offered guided meditation opportunities, with one offering a panel of firm members who practice mediation discussing its benefits.

Wellness Holiday: Washington, D.C., firm Hausfeld gave everyone at the firm a "Wellness Holiday" on the Friday of Well-Being Week.

WELL-BEING RESOURCES

Following is a selection of articles and videos have tips for finding phsyical, spiritual, career, social and emotional well-being.

PHYSICAL WELL-BEING

Dr. Wendy Suzuki discusses how exercise changed her life and the interconnection of physical activity and peak brain function. Watch at: http://bit.ly/3nHSwSE-Exercise

Don't Underestimate the Power of a Walk, Deborah Grayson Riegel writes in Harvard Business Review: http://bit.ly/3ulxEDm-Walk

The way you breathe may be making you anxious. Try the stress-calming 4-7-8 Breathing Exercise Activity Guide: https://bit.ly/2RpY08s-Breathe

SPIRITUAL WELL-BEING

Fellow professionals in law share how they integrate their personal spirituality into their work lives. Watch at: http://bit.ly/3gZkZC8-spiritual

CAREER WELL-BEING

Leo Babauta offers Nine Steps to Achieving Flow in Your Work in University of California Berkeley's Greater Good http://bit.ly/3gV5k73-Flow SOCIAL WELL-BEING

Learn how deep and meaningful friendships can help you thrive and reach your goals on The Model Health Show with Dhru Purohit https://themodelhealthshow. com/dhru-purohit/

EMOTIONAL WELL-BEING

Guy Winch's TEDx talk tells us why we all need to practice emotional first aid http://bit. ly/3vAoPG3-Emotional

Find more resources from the Institute for Well-Being in Law: https://lawyerwellbeing.net/

"People who learn to control inner experience will be able to determine the quality of their lives, which is as close as any of us can come to being happy."

Mihaly Csikszentmihaly

Photo by Alex Gurung on Unsplash

STATE BAR OF MONTANA

ANNUAL AWARDS CALL FOR NOMINATIONS

Nominations Due Friday, June 18



WILLIAM J. JAMESON AWARD

to a lawyer who exemplifies the essence of professionalism while exhibiting devotion to the public good





KARLA M. GRAY EQUAL JUSTICE AWARD

to a judge who has demonstrated dedication to improving access to the Montana justice system





PRO BONO AWARD

to a lawyer, other individual or organization which has provided pro bono services to Montanans in need.





GEORGE BOUSLIMAN PROFESSIONALISM AWARD

to a lawyer or firm that has established a reputation for and a tradition of professionalism



Nomination Forms & More Information Available at MONTANABAR.ORG/PAGE/AWARD_NOMINATIONS



'Other duties' of litigators

Hidden issues with taxes, asset protection, and Medicare can easily come back to haunt an unsuspecting trial lawyer

By Jeremy Babener and Jack Meligan

sk most anyone what a personal injury lawyer does – they won't think of taxes, investments, or Medicare. And yet, that won't stop the aberrant client when IRS, Medicare, and financial

problems come knocking. Thanks to an ever-increasing standard of care in trial work, some personal injury firms have paid a steep price without ever claiming to advise on these non-litigation issues.

Says Arden Olson, Former Member of the ABA's Committee on Ethics & Professional Responsibility, and current Director of the Association of Professional Responsibility Lawyers:

Too often, personal injury lawyers don't tell clients everything needed to make good decisions on specialty subjects like tax, finance, and government benefits. But ethical rules require that lawyers do so, or that they obtain their clients' informed consent not to do so.

Here, we discuss the trial lawyers' rising standard of care and what to do about it. In short, inform your clients, recommend involving specialists, and exclude the issues from the scope of your representation. Here's a good start...

- Taxes Notify your client that she may owe tax on part of her personal physical injury award, save taxes on her emotional distress settlement, and get taxed on the amount she pays you in legal fees.
- Financial Protection Notify your client that settlement presents her with a one-time option, but not the obligation, to make use of certain financial strategies, including a specialneeds trust or a structured settlement annuity. They also need to be notified of the risks neither of these are right for everyone. In fact, the last two decades many plaintiffs and attorneys have been irresponsibly recommended to these strategies.
- Medicare Notify your client that her recovery may prompt Medicare to withhold future coverage or to take part of her settlement proceeds as reimbursement for past covered medicals.

To shortcut the process, you can use disclosure forms intended to limit the scope of your representation, inform clients, and remind them that you're focused on the most important job – fighting for the big recovery.

Client liability becomes firm liability

When it comes to legal malpractice, personal injury lawyers are the most common defendants among all legal

specialties, including divorce lawyers.¹ This is probably unsurprising since their clients have sued or considered suing before. Making things more difficult, trial lawyers are expected to advise on an expanding range of specialized issues.²

American Bar Association materials advise that "competent representation" of plaintiffs requires "considering the tax implications of the settlement." And, that a trial lawyer must "ensure his client is informed about the options of structured settlements, trusts and the effect of the judgment or settlement on the client's public benefits eligibility." State Bar Associations have come to similar conclusions. Attorneys must take care to avoid inserting their bias for or against these options, especially structured settlements.

Though lawyers can limit their scope of representation, doing so requires "informed consent" and limitations that are "reasonable under the circumstances" – an evolving concept. The D.C. Bar Association writes, "Because the tasks excluded from a limited services agreement will typically fall to the client to perform or not get done at all, it is essential that clients clearly understand the division of responsibilities under a limited representation agreement."

As a result, trial lawyers are particularly vulnerable to malpractice claims for simply failing to inform clients about specialized subjects that could drastically impact the rest of their clients' lives. Here, we discuss three of the most impactful: Taxes, Financial Protection, and Medicare.

<u>Taxes</u>. Personal injury plaintiffs often believe the IRS cannot tax their recovery, in large part due to mistaken and outdated information published online. Others believe the IRS taxes all recoveries, only to find out later how much they could have saved with small, simple changes to their settlement agreement.

Tax advisors specializing in litigation advise plaintiffs and their lawyers how to reduce taxes resulting from settlement – often by "allocating" more to tax-free damages – and by enabling plaintiffs to deduct more of their legal fees and medical expenses. But many tax-saving

Though lawyers can limit their scope of representation, doing so requires "informed consent" and limitations that are "reasonable under the circumstances" – an evolving concept. The D.C. Bar Association writes, "Because the tasks excluded from a limited services agreement will typically fall to the client to perform or not get done at all, it is essential that clients clearly understand the division of responsibilities under a limited representation agreement."

strategies are lost forever once a settlement is signed, and sometimes, once a complaint is filed or a demand letter is sent. For example, by not acting on tax strategies before settlement, a plaintiff can entirely lose their opportunity to shift the "burden of proof" to the IRS in any tax challenge.⁸

Legal malpractice literature recounts many examples of plaintiffs suing their lawyers after settlement regarding tax matters.9 Plaintiffs have brought actions after learning that their lawyers' assumption of a complete or partial tax-free recovery were wrong. 10 Similarly, they have pursued claims for failure to "allocate" within the settlement agreement,11 which can dramatically increase settlement taxation. In sending a malpractice matter to trial, one court wrote, "Had the settlement agreement apportioned the monies ... the compensatory portion ... arguably would have been nontaxable."12

Financial Protection. An award or settlement is the largest influx of money many plaintiffs will ever see – and it is critical to preserve for their financial future. Unfortunately, a lack of financial experience leads many to dissipate the money within several years. Preserving funds requires proper planning, and often, ensuring continued eligibility for government benefits (e.g., Medicaid).

Structured settlements, settlementpreservation trusts, and special-needs trusts have proven invaluable to some plaintiffs. In fact, a few plaintiffs not at least offered those opportunities later sued counsel based on their lost protection and never realized gains.

For example, in 2001 two Texas plaintiff firms paid \$1.6 million to settle malpractice claims brought by their former client. In 1990, the firms had settled the client's medical malpractice suit for \$2.5 million in direct cash rather than exploring a structured settlement

or establishing a special-needs trust – failing to account for the client's \$20 million of future medicals.¹³

In another case, a gunshot victim sued her lawyers for incorrectly advising that she could preserve her Medicaid eligibility by establishing a specialneeds trust after settlement, rather than beforehand.¹⁴

In 2019, California firm Lieff
Cabraser successfully defended against
a \$25 million legal malpractice suit – the
former client brought her action after
the firm settled a wrongful death claim
for \$24 million in cash, and allegedly
not exploring a structured settlement
to minimize taxes. 15 Fortunately for the
lawyers, they could provide evidence
that the defendant's insurer would not
have agreed to a structured settlement.

Medicare. Medicare has a new mentality when it comes to personal injury plaintiffs – do not cover medicals when a defendant or insurer should.





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And, take portions of plaintiff recoveries as a refund for Medicare's past payment of medicals. This presents a huge risk to your plaintiffs and their lawyers. In fact, some plaintiff firms have faced "double damages" for not directing settlement proceeds to Medicare or Medicare Advantage companies¹⁶ – liability not covered by their malpractice insurance.

There have been many suits against plaintiff firms for not reimbursing Medicare at settlement. Perhaps best known is the 2016 lawsuit for \$20 million against five plaintiff firms in Texas by Humana, UnitedHealthcare, and Aetna insurance companies, all of which offer Medicare Advantage plans. The three had paid \$20 million in medical expenses for the firms 300 asbestoslitigation clients – Humana also pursued the firms for double damages.

Also of concern, the U.S. Department of Justice has increased its enforcement and rhetoric. For example, the Department recently issued press releases announcing settlements with two firms that failed to direct settlement proceeds to Medicare as reimbursement for past coverage of their clients' medicals. The language used by the DOJ attorneys in these cases is quite telling:

- "We intend to hold attorneys accountable for failing to make good on their obligations to repay Medicare for its conditional payments, regardless of whether they were the ones primarily handling the litigation for the plaintiff." 18
- "When an attorney fails to reimburse Medicare, the United States can recover from the attorney even if the attorney already transmitted the proceeds to the client." 19

From the U.S. Department of Justice, Medicare, and private companies entitled to recoup previously covered medicals, plaintiffs and their lawyers face increasing exposure post-settlement.

Now What?

The risk from ignoring these specialized issues is daunting, but lawyers can avoid it by limiting the scope of engagement. To do so, it's necessary to disclose material risks in order to obtain clients' informed consent. For lawyers who want expert support we recommend consulting with advisers from the Society of

Settlement Planners, the Academy of Special Needs Planners, and the National Association of Medicare Set-Aside Professionals.

When referring plaintiffs to advisers we recommend the same groups. Lawyers should make referrals "based on assessment of the quality of the third party's services and fairness of the price,"²⁰ and provide enough information for the client to make an informed decision.²¹

Jeremy Babener is a tax lawyer specializing in settlement issues. He is Chair of the Society of Settlement Planner's Legal Committee and a former Tax Policy Fellow at the U.S. Treasury. Jack Meligan is a settlement planner, financial advisor, and government benefits specialist. He has advised plaintiffs and their attorneys for over 30 years. Together, they co-authored a set of engagement documents for trial lawyers to address each of these issues, available at TrialLawyerProtection.com."

Endnotes

- 1 ABA, Profile of Legal Malpractice Claims 2016-2019 (2020).
- 2 Relevant here are ABA Model Rules 1.1, 1.3, 1.4, 1.7, 1.9, and 2.1, which have been directly or in some version by most states. To focus on practical applications, we instead discuss conclusions made by the ABA and State Bar Associations.
- 3 ABA, Ethical Guidelines for Settlement Negotiations, August, 2002. See generally Smith v. St. Paul Fire & Marine Ins. Co., 366 F. Supp. 1283, 1290 (D.C. La. 1973) (lawyer required to inform client of potential negative consequences), affd, 500 F.2d 1131 (5th Cir. 1974).
- 4 ALI-ABA, Krooks, Bernard, Special Needs Trusts: The Basics, The Benefits, and The Burdens (2009).
- See generally Bd. of Comms. on Grievances and Discipline of the Supr. Ct. of Ohio, Op. 2019-10 (Oct. 4, 2019) ("If, during the legal representation, a lawyer ascertains that a client needs financial services, the lawyer has a fiduciary duty to counsel the client accordingly, and may refer the client to appropriate resources."); Utah State Bar Ethics Advisory Op. Comm., Op. 193 (Sept. 23, 1993) ("In this case, as in others, the attorney should assist the client in becoming fully informed of the economic benefits and risks of the client's actions."); Conn. Informal Ethics Op. 89-10 (1989) ("Some degree of investment advice may be necessary to the adequate representation of the client in many situations."); Ala. Ethics Op. 2015-01 (2015) (holding that negotiations to reduce third party liens are generally "incidental to normal representation"

- in a personal injury settlement); Doucette v. Kwiat 392 Mass. 915 (1984) (noting that a personal injury attorney's services normally includes the discharging of unchallenged liens and similar claims).
- 6 E.g., ABA Model Rule 1.2(c); CRPC 1.2(b). NYRPC 1.2(c). Obtaining "informed consent" for limiting scope requires the same disclosure protocols as obtaining a conflict waiver. ABA Model Rule 1.2, Commentary Note 8. See Indianapolis Podiatry, P.C. v. Efroymson, 720 N.E.2d 376, 381 (Ind. Ct. App. 1999). Click here for the ABA's catalogue of the states' scope-limitation rules.
- 7 D.C. Ethics Op. 330 (2005).
- 8 See 26 U.S.C. Section 7491(a)(1). To shift the burden of proof, a plaintiff must introduce "credible evidence" on the factual issue. Typically, a plaintiff's best opportunity to establish that evidence is in the complaint or settlement agreement.
- 9 E.g., 4 Legal Malpractice § 33:105 (2019 ed.).
- 10 E.g., Cire v. Cummings, 134 S.W.3d 835 (Tex. 2004); Jalali v. Root, 109 Cal. App. 4th 1768 (2003) (lawyer assumed that plaintiff would not be taxed on portion paid to attorney).
- 11 Naqvi v. Rossiello, 321 III. App. 3d 143 (2001); see generally Ortiz v. Allyn, Hausner & Montanile, LLP, 852 N.Y.S.2d 555 (App. Term 2007).
- 12 Naqvi, 321 III. App. at 150.
- 13 Grillo v. Pettiete, 96-45090-92, 96th District Court, Tarrant County, Texas; Gullen, Christopher, What Attorneys Need to Learn from Grillo v. Pettiete, 82 Mich. B. J. 27 (2003).
- 14 French v. Glorioso, 94 S.W.3d 739 (Tex. App. 2002).
- 15 A.M. v. Lieff Cabraser Heimann & Bernstein, LLP, No. B269624, 2019 WL 2433188 (Cal. Ct. App. June 11, 2019).
- 16 E.g., Humana Ins. Co. v. Paris Blank LLP, 187 F.Supp.3d 676, 680 (E.D. Va. 2016); In re Avandia Mktg., Sales Practices & Prod. Liab. Litig., 685 F.3d 353 (3rd Cir. 2012); but see Aetna Life Ins. Co. v. Guerrera, 300 F. Supp. 3d 367, 378 (D. Conn. 2018) (concluding that a company are not entitled to double damages).
- 17 Humana, Inc. v. Brent W. Coon, 2016 WL 4702759 (S.D. Tex.).
- 18 U.S. Dep't of Justice, Baltimore Plaintiffs' Law Firm Saiontz & Kirk, P.S., Pays the United States Over \$90,000 to Settle Allegations that it Failed to Reimburse Medicare for Payments Made on Behalf of Firm Clients (Nov. 4, 2019).
- 19 U.S. Dep't of Justice, Philadelphia Personal Injury Law Firm Agrees to Start Compliance Program and Reimburse the United States for Clients' Medicare Debts (June 18, 2018).
- 20 *E.g.* D.C. Bar Ethics Opinion 245 (Nov. 1993).
- See ABA Model Rule 1.4, Comment 5.



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10 ways to make your conversations with your clients more constructive

In a conversation between an attorney and a client, effective communication occurs when both the attorney and the client feel they have been heard. For example, at the outset of representation, a client is often looking for confirmation that their lawyer understands the problem and desired outcome. Similarly, a lawyer often seeks confirmation that the client has a clear understanding of what the lawyer can realistically do for the client given the circumstances at hand. The challenge here is that an effective communication can only occur by way of a constructive conversation, which requires both participants to enter a mutual conversation. There must be a balance between talking and listening.

This balance can be harder than it might seem. Suffice it to say, that while I can be a good listener at times, having a constructive conversation every time I open my mouth remains a challenge, and it's all about my inability to find that proper balance between talking and listening. In fact, in my personal life I have been told more than a few times by my lovely wife that if I would just listen, it would become apparent that she isn't looking to have me solve her problem. Sometimes she just wants to be heard, to get it out, so to speak. Unfortunately, the lawyer problem solver in me just can't shut up. I suspect I'm not the only lawyer who suffers from this conversational shortcoming. I don't know about you, but law school taught me how to problem solve. I never had any law professor pontificate on the virtues of being an effective listener. Quite the opposite in fact, I was taught how to debate and how to put forth a compelling argument.

If any of this is striking a chord with you, following through with even one or two of the following tips will enable you to have a more constructive conversation with your clients. All ten tips come from a TED Talk by noted author, journalist, and speaker Celeste Headlee. The following are a summary of her points coupled with my trying to put an attorney-client conversation spin on them. If you care to view the entire TED talk, and I encourage you to do so, you will find it at https://www.ted.com/talks/celeste_headlee_10_ways_to_have_a_better_conversation#t-653478. In sum:

- 1. Don't Multi-task Simply be present and pay attention. No texting, no thinking about other matters, no working through your email. You are in your client's employ and this is his or her time.
- 2. Don't Pontificate Enter every conversation with an assumption that YOU have something to learn. Remember, the matter being discussed is the client's matter. The more you learn, the better your advice will be.
- 3. Use open ended questions
 Questions like "Will you tell me
 more about that?" invite your client
 to think and provide a more informative response. You don't want to
 make it easy for a client to sit back
 and just confirm what you think you
 know or want to hear.
- 4. Go with the flow Don't get stuck on what you want to say next. To do so requires that you miss half

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Mark Bassingthwaighte



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

Maristuen, bar president in 2004-05, dies at age 68

Keith A. Maristuen, 68, died peacefully Sunday, April 18, with his children by his side.

He served as 2004-2005 State Bar of Montana president. He served on the bar's Ethics Committee, Past Presidents Committee, and Resolutions Committee. He was recognized for coordinating pro bono services in the Havre area and taking on a large number of



Maristuen

pro bono cases himself, and in 2013 he received the State Bar of Montana's George L. Bousliman Professionalism Award.

Keith was born Feb. 6, 1953, in Malta, MT, to Kermit and Agnes

(Haugland) Maristuen. He and his two sisters, Cheryl and Monica, were raised and educated in Malta. Keith graduated from Malta High School in 1971. Growing up, he was very involved in many activities including wrestling, football, Key Club, student government, Boy's State, National Honor Society, FFA, Canadian Exchange Student, and M club. He was class president and valedictorian.

Keith attended the University of Montana, earning a BA with high honors in 1975 and graduating from the University of Montana Law School with high honors in 1978. Most importantly while attending the U of M, he met the love of his life, Christine "Chrissy" Barrow. They were married in Chinook Sept. 14, 1974.

Keith was active in the State Bar throughout his career, and he was a member of the 12th Judicial District, 17th Judicial District, U.S. Tax Court, and U.S. Court of Appeals, Ninth Circuit. He was a cherished member of the Bosch, Kuhr, Dugdale, Martin and Kaze in Havre throughout his career, continuing to serve of counsel in his retirement.

Keith was an active leader in the First Lutheran Church community, serving as church president along with service to the Stewardship committee, Call committees, and lay pastor duties.

Keith was also extremely active in the Kiwanis organization, serving as president of the Havre Club and District of Kiwanis of Montana governor along with assisting with the Havre High School Key Club, Special Olympics, many hours at the fair booth, and countless other valuable projects for the community.

Keith volunteered in many additional organizations throughout the years including Sons of Norway, Elks, Hill County Council on Aging, and helping his friends in Lions and Rotary.

Keith enjoyed hunting, fishing, golfing, bowling, spending time at the cabin at Fresno, and cheering for the Mustangs, Blue Ponies, Packers, and Griz! He was an extremely proud member of the North End Zone Cheering section at Washington Grizzly Stadium.

Memorials may be sent to Special Olympics Montana, Flathead Lutheran Bible Camp, and First Lutheran Church.

Messages of condolence for his family can be left at his online memorial page at www.hollandbonine.com.

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of what your client has just told you because it's quite difficult to concentrate on an important point you want to make and also listen at the same time.

- 5. If you don't know something say so Honesty instills trust. Faking it fosters doubt. It's as simple as that.
- 6. Don't equate the other person's experience with yours For example, as a client shares his or her story during intake, don't try and relate by telling your story. Worse yet, don't respond by talking about how many times you've heard this story before. Again, you are in someone else's employ. These conversations are not to be about you.
- 7. Try not to repeat yourself If you feel you haven't been heard or understood, ask your client to make sure. Continuing to repeat yourself risks your coming across as condescending.
- 8. Stay out of the weeds Most people really are not that interested in the minutiae or the nitty-gritty details. Clients just want to know they're in good hands.
- 9. Listen, truly listen This does take a lot of effort and energy. According to Steven Covey, most of us don't listen with the intent to understand. Most of us listen with the intent to reply. The only way to maximize the relevancy of any reply is to first listen well.
- 10. Be Brief Share your thoughts and advice in a succinct manner. Demonstrate that the client matters to you as a person by confirming that he or she understands what has been discussed. Invite questions.

Memorial submissions

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

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

JOBS & CLASSIFIEDS

CLASSIFIEDS Contact | To post a job on our online Career Center, visit **jobs.montanabar.org** (Montana Lawyer classified included in price). For all other classified inquiries, email editor@montanabar.org or call 406-447-2200.

ATTORNEY POSITIONS

LITIGATION ATTORNEY: Crowley Fleck PLLP seeks a Lateral Attorney to join our Tort Litigation and/or Commercial Litigation Practice Group in our Helena, MT office. Successful applicants must have a minimum of 2 years of Litigation experience, with 3-5 years preferred. Immigration Law experience preferred, but not required. Applicants must have a good standing reputation in the legal community and be licensed or willing to be licensed in Montana is required. Competitive salary and benefits for region. All applications will be held in confidence. Please submit your cover letter, resume, writing sample and law school transcript to: Recruiting Coordinator, Tiffani Swenson, tswenson@crowleyfleck.com **ASSOCIATE ATTORNEY:** Harshbarger Law seeks qualified and experienced candidates for a full-time associate position. This position will expose the candidate to most areas of law (exempting criminal, immigration and bankruptcy practice areas). The associate will be joining the team under a senior, supervising attorney who is looking forward to a positive collaboration with the right person. This is your opportunity to experience both breadth and depth in the practice of law from an experienced, well-regarded team. The ideal candidate will be excited about sharing his/her considerable talents with our passionate and committed firm. We strive for excellence in our client care and technical work and are looking for a candidate who is similarly aligned. Apply by email at office@ harshbargerlawfirm.com

ATTORNEY: Silverman Law Office is changing the way law is practiced, and we're looking for the right attorney to join us. As our Bozeman office continues to grow, we're seeking an associate with at least Two years of experience in estate planning, business, contracts, and real estate matters. You will get the opportunity to work with an effective team and connect with clients in a meaningful way — all while living under the beautiful Big Sky. We're looking for applicants who are humble, hungry and smart. That means they're willing to learn and grow, strive to do their best and work well with clients and colleagues. Our extraordinary team — from secretaries to paralegals to fellow attorneys provides support and a positive atmosphere. Our compensation and benefits are at the top of the industry in Montana, and we provide bonuses based upon individual and team performance. Applicants must be admitted to practice in Montana or in the process of obtaining admission to practice here. Send cover letter, resume, references, and writing sample to Julie@mttaxlaw.com.

DEPUTY COUNTY ATTORNEY: Under the general direction of the County Attorney, this position prosecutes criminal and civil offenses, represents county government in legal proceedings, and advises county officials on civil matters.

DEPUTY COUNTY ATTORNEY: This position primarily prosecutes criminal matters in Justice Court, District Court and Youth Court, and represents the Department of Public Health and Human Services in abuse and neglect cases; performs all duties of the County Attorney in the County Attorney's absence, or at the direction of the County Attorney including but not limited to representing the county or state in civil matters in various courts of law and advising county officials and the public on legal matters of concern to the county or the various county departments. Apply by email at alleyk@hillcounty.us

DEPUTY COUNTY ATTORNEY: Re-advertised, with increase in salary range. Full-time Deputy County Attorney position with the Beaverhead County Attorney's Office, Dillon, Montana. Majority of work will be criminal prosecution related, in Justice and District Court. Requires a Juris Doctor Degree from accredited law school, and a license to practice in Montana. Salary range of \$68,000 -\$86,000 per year, depending upon experience and qualifications. Excellent benefits available. Experience preferred. This is a two attorney office, handling a medium sized county's robust caseload. Position is open, start date negotiable. To apply, please submit a resume and cover letter to: Beaverhead County Attorney's Office, 2 S. Pacific Street, Suite #2, Dillon, Montana 59725, or send via email to mmantei@beaverheadcounty. org. Applications will be accepted until position filled. Direct questions or request accommodation from Beaverhead County Attorney's Office, above email or by phone to (406) 683-3730.

DIRECTOR OF ADVOCACY: Northwest justice Project, in Seattle, seeks candidates for a leadership opportunity as the Director of Advocacy. This role is a member of the NJP's executive management team and is responsible for leading, inspiring, and promoting excellence in pursuit of NJP's mission to combat injustice, strengthen communities and protect human dignity through legal representation and advocacy on behalf of client communities statewide. Submit a letter of interest, current resume and writing sample to Human Resources at attorneyresume@nwjustice.org. Cover letter and email subject line should clearly reference "Director of Advocacy". Cover

letter should directly address reason for interest in the position and outline experience mentoring others. See full listing at https:// nwjustice.org/employment-opportunities. **MANAGING ATTORNEY**: The Northwest Justice Project (NJP) is seeking a Managing Attorney to help launch and oversee a new Statewide Eviction Defense Unit to protect the rights of low-income tenants across Washington State. This position may be located in any of NJP's 20 offices in the state. Submit a letter of interest, current resume and writing sample to Human Resources at attorneyresume@nwjustice.org. Cover letter and email subject line should clearly reference "Managing Attorney – Evictions Unit". Cover letter should directly address reason for interest in the position and outline experience mentoring others. See full listing at https:// nwjustice.org/employment-opportunities. ATTORNEY: Workers' compensation and personal injury litigation law firm is seeking an attorney to join our practice. We have an excellent reputation and are looking for a candidate who is willing to join our team and work hard to achieve outstanding results for our clients. We want someone who is highly motivated, driven to succeed and willing to take initiative in their work. Successful litigation attorneys are excellent communicators with strong interpersonal skills and strong analytical abilities. They are dedicated, honest and possess the highest integrity. They are capable of working independently as well as cooperatively in a team. Apply by email: tturner@fairclaimlaw. com

ATTORNEY: Our criminal defense and personal injury firm is ready to add another Attorney to our roster to manage an increasing caseload. We operate a busy and highly successful practice that practices throughout Wyoming. We employ an advanced certified paralegal, a legal assistant as well as two investigators. You will join us in advocating for our clients and upholding our clients' rights and providing them with the best possible defense against the crimes with which they've been charged. We work primarily with plaintiffs' personal injury and defending every type of criminal charge. We have no issue with allowing new attorneys to expand their practices as they see fit. We operate a highly collaborative and technologically advanced office in which each professional helps each other to ensure all of our clients receive the best possible service. Apply by email at sjt@steventituslaw.com

PROJECT DEVELOPMENT & FINANCE

ASSOCIATE: Holland & Hart's Project Development & Finance Group is seeking an associate to join its team. This position can be based in any of our office locations. The team represents developers, borrowers, and utilities in connection with complex development and commercial contracts, project finance transactions, and the purchase and sale of projects. Clients of the team span the energy sector and include independent power producers, electric cooperatives, corporate buyers, and oil and gas producers and midstream companies. Holland & Hart's Project Development & Finance Group is recognized by US News and Best Lawyers, Best Law Firms (Energy Law) as a leading practice group nationwide in the energy sector. Apply at www.hollandhart.com/ laterals-current-openings

PARALEGALS

LEGAL ASSISTANT/PARALEGAL: Bozeman law firm seeks a Legal Assistant/Paralegal. Duties include document preparation, file management, communication with clients and other parties, scheduling, records review/organization, and general legal paralegal duties. This position requires strong organizational, multi-tasking and people skills. Attention to detail and the ability to work as part of a team are a must. Salary approximately \$18-25 per hour depending upon experience and background. Firm offers benefits, including health insurance, retirement and paid time off. Please email cover letter, resume, and references to marty@westernjusticelaw.com.

PARALEGAL/LEGAL ASSISTANT: Wall, McLean & Gallagher, PLLC, a Montana law firm with offices in Helena and Anaconda is seeking a full time paralegal/ legal assistant for our Helena office. Previous litigation and/ or legal office experience preferred, but will train the right candidate. Competency in word processing including Word and WordPerfect, and Excel along with the ability to work in a collaborative, family friendly, fast paced environment a must. Wide range of legal practice areas creates opportunity for continuing education and self-directed work. Competitive salary and benefits. Nice place to come to work each day.

PARALEGAL/LEGAL ASSISTANT: Berg, Lilly is hiring a full-time Legal Assistant or Paralegal to provide litigation support to attorneys in our busy downtown Bozeman office. Work will entail research, drafting, document management and production, scheduling of deadlines and Court filings. Strong technical, organizational, detail orientation and communication skills essential. Minimum of 1 year working experience as Legal Assistant

or Paralegal required; degree or equivalent certification will be considered.

PARALEGAL/LEGAL ASSISTANT:

Christensen & Prezeau, PLLP, in Helena is seeking to hire a paralegal to assist with legal document production, litigation support, case preparation, scheduling, file management, and general administrative support. The individual must be proactive, able to multitask, and comfortable working as part of a team. Christensen & Prezeau offers a highly competitive salary with a signing bonus and an excellent benefits package, including health insurance. Position may be full-time or part-time. Please provide cover letter, resume, and references by email to amy@cplawmt.com.

PARALEGAL: Goodrich & Reely, PLLC seeks an experienced paralegal to join our Missoula, Montana office. We are a small firm serving a sophisticated client base with varied needs including estate planning, business transactions, complex real estate matters, and liquor and gaming licensing and compliance. The ideal candidate will have at least 5 years' experience as a transactional paralegal, but we will consider relevant experience in lieu of a law firm background. Attention to detail, strong client communication skills, and ability to work efficiently are crucial. Compensation is highly competitive and dependent on experience. Please send your cover letter, resume, and references, to jess@ goodrichreely.com.

LITIGATION PARALEGAL: Established AVrated Missoula law firm is seeking a full-time litigation paralegal to join our litigation team. Must be able to work in a fast paced, deadline driven environment with attention to detail and the ability to multi-task. Must also possess strong interpersonal, administrative and organizational skills and be able to work independently, as well as part of a team. Candidate should have excellent written and verbal communication skills and be proficient with Microsoft including Office Suite and law firm timekeeping software (firm uses Orion). Prior experience is preferred, end a resume together with a cover letter, and references, to ammurray@boonekarlberg.com.

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

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SCUBA BUDDY NEEDED: I am looking for a SCUBA buddy to dive a few Montana lakes this summer. I'm retired so I can probably fit into your schedule. If you have a favorite dive site, I would like to see it. Perhaps, we can start a "Lawyers Who SCUBA" section. My email is BruceLoble@yahoo.com



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

