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SEPTEMBER/OCTOBER

2019

VOL. 44 ISS. 10

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ON THE COVER



Just as fall in Montana brings new colors for the aspen and larch, fall brings change to State Bar leadership every year. Page 14

FEATURE ARTICLES



ANNUAL MEETING HIGHLIGHTS

The State Bar of Montana welcomed national thought leaders and state practice experts,



SAY GOODBYE TO WINDOWS 7

Microsoft ends support for the operating system Jan. 13, so using it will put you and your clients at risk.

MACINTYRE HONORED FOR SERVICE ON MJF BOARD

Supreme Court issues order of recognition honoring Helena lawyer Don MacIntyre for his two decades of service on the Montana Justice Foundation board.



Autumn brings leadership change to State Bar board

Fall at the State Bar of Montana means the passing of the baton between attorneys who volunteer to serve in elected leadership of the organization.

At this year's annual meeting in Billings, Juli Pierce of Billings took the handoff from her fellow Yellowstone area colleague Eric Nord, who ably served as president of the State Bar for the past year. Likewise, Jason Holden of Great Falls stepped aside after many years of indispensable service as the organization's Secretary/Treasurer and will be replaced by David Steele of Missoula. Brian Smith of Missoula has moved into the Chair of the Board role as Kate McGrath Ellis of Helena assumes the responsibilities of president-elect. We also welcomed two new trustees from Helena, Aislinn Brown and Danna Jackson. Erica Grinde of Missoula was selected to fill the vacancy left when David Steele assumed his new duties.

When you see these volunteer leaders, please thank each of them for all of their uncompensated service, a remarkable sacrifice for these busy attorneys.

And speaking of the 2019 Annual Meeting, in this month's issue we recap the record-setting meeting in Billings, highlighted by a visit from Chief Judge Sidney R. Thomas of the United States

Court of Appeals for the Ninth Circuit, ABA past presidents Hilarie Bass and Montana's Bob Carlson, as well as Cliff Edwards, who presently serves as the president of the International Academy of Trial Lawyers. Along with our award honorees, fifty-year pin recipients and hundreds lawyers, paralegals and guests from around the state and nation, the Northern Hotel in Billings was a hub of activity.

Make sure to mark your calendars, because we are coming to Missoula next Sept. 9-12!

This month's issue features several important technology-related articles. Sam Alpert, the bar's director of information technology and digital strategy, has an important message for Windows 7 users: You need to move to a new operating system, and soon (page 18). Recent ABA opinions on disasters and data breaches hold great significance for lawyers — but few people seem to know about them (page 20). If you've thought about moving to a virtual practice, Brooke Moore has tips for a successful shift (page 23).

Meanwhile, legal writing columnist Abbie Cziok has advice on an importantbut often overlooked aspect of writing — typography.



JOHN MUDD

When you see these volunteer leaders, please thank each of them for all of their uncompensated service, a remarkable sacrifice for these busy attorneys.

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Reflecting on your good work can help get you through challenges

As attorneys, we know that people normally only seek our help during the most difficult times in their lives. Whether our client is a child, adult, group, or company, or whether the matter is civil or criminal, the nature of our work does not always lend itself to uplifting, cheerful encounters or outcomes.

I spend at least half of my time each week working with abused and neglected children as a guardian ad litem in dependent neglect matters. These kids, through no fault of their own, have experienced some form of abuse or neglect. Most of the children I work with are in foster care because of neglect related to their parents' methamphetamine addictions. Sometimes due to the volume in Yellowstone County, I feel like I am spinning my wheels and not making much of a difference as an attorney. However, sometimes I have days like a recent Tuesday, when everyone came together to help Michael (name changed to protect confidentiality of the child). Michael has been in foster care for four years. He has been in and out of family placements, group homes, and foster homes. As a teenager, he struggles with mental health problems. Due to administrative red tape, he was removed from his forever home (a home where he hopes to live permanently and possibly be adopted). These forever homes are rare for a child of Michael's age who struggles with his mental health. Last week, the attorneys for the parents, Michael's attorney, the attorney for the Department of Child and Family Services, Michael's therapists, and I all came together and recommended to the judge that Michael be placed back with his forever family. All the parties believed this was in his best interests. Michael appeared at the hearing by telephone. At the end of the hearing,

the judge agreed with the parties and ordered Michael to be placed back with his forever family. When Michael heard that he was going back with his foster mom and dad, he was overjoyed. Though he did not have to say a word, Michael thanked everyone involved and expressed his appreciation for all of us in the room. The excitement and gratitude in his voice brought tears to my eyes.

Although there are many difficult days in my job as a guardian *ad litem*, outcomes like this one with Michael make it all worthwhile. When I have one of those difficult days in the future, I will take time to reflect on this day to reassure myself that sometimes I do make a difference, along with the help of many others who have children's best interests in mind as well.

Sometimes in our busy lives we tend to forget that the legal field is first and foremost a helping profession. I suspect there are many different reasons that all of you became attorneys, but in the end, all of us probably wanted to help others and make a difference in someone's life. Despite the challenges you may encounter with different clients, and even though you may often experience days when you feel like you are spinning your wheels, please do not forget to find your "Tuesday with Michael" and focus on the good work you do as an attorney to help others.

I look forward to traveling across the state in the upcoming year as State Bar President. I hope to meet as many of you as possible, but in the meantime if you have questions, concerns, or comments, please email me at juli@julipierce.com.

Juli Pierce is a sole practitioner in Billings focusing on criminal law and representation of abused and neglected children.



JULI PIERCE

Sometimes in our busy lives we forget that the legal field is first and foremost a helping profession. Please do not forget to find your 'Tuesday with Michael' and focus on the good work you do as an attorney to help others.

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CAREER MOVES

Rhoades founds intellectual property firm in Missoula

Sarah J. Rhoades is proud to announce the formation of Rhoades Intellectual Property Law, PLLC dba Rhoades IP.

Now entering her 17th year of IP practice as a registered patent attorney in Montana, Rhoades assists clients in acquiring and enforcing their intel-



Rhoades

lectual property rights in the U.S. and international jurisdictions. She counsels clients on developing strategies for protecting their IP assets. She then represents them in patent, copyright, trademark, trade dress,

trade secret, and related business matters. She also provides IP-related contract preparation and licensing services.

Rhoades frequently consults and works with other attorneys when they are handling litigation or transactional matters with IP issues. She is admitted to practice in the state courts of Montana, the federal courts for the District of Montana, United States Tax Court, and the United States Patent and Trademark Office. She has served as counsel in trials and hearings in State and Federal Courts around Montana and has also served as co-counsel on many jury trials.

Rhoades is the co-organizer of the free, annual IP Day in Montana at the Blewett School of Law at the University of Montana. Rhoades is a founding member and Inaugural Chair of the Intellectual Property Law Section of the State Bar of Montana. As part of her ongoing efforts and initiatives as Past-Chair, she began the Explorations Series featuring free educational and professional development opportunities on various intellectual property topics. Rhoades has presented several Community Copyright Registration

Workshops in Missoula, a free presentation to help authors and artists secure their legal rights; the next presentation is scheduled for Nov. 12. She is an instructor in the Rocky Mountain School of Photography - Professional Intensive program. She has presented a number of continuing legal education seminars, serving as a panelist and presenter for the Inland Empire Intellectual Property Institute, at Gonzaga Law School, and for the State Bar of Montana's Annual Meeting.

Rhoades is a member of the American Intellectual Property
Law Association, the International
Trademark Association, the American
Bar Association, the ABA Intellectual
Property Law Section, and the Western
Montana Bar Association. She is
vice-chair of the Intellectual Property
Committee for the Solo, Small and
General Practice Section of the ABA.

Rhoades can be reached at RHOADES IP, P.O. Box 1119, Missoula, MT 59806; sarah@ipmontana.com; 406-218-7475; www.ipmontana.com.



Sullivan



Hollar

Great Falls firm adds Sullivan as partner, Hollar as attorney

Longtime Great Falls attorney

Joseph M. Sullivan has been added as a
partner to the law firm of Davis, Hatley,
Haffeman & Tighe, P.C.. Sullivan has
practiced in the area of civil litigation,
both at the trial and appellate levels,
for over 30 years. Sullivan's focus has
primarily been in the areas of insurance
defense and insurance law, and more recently, as a mediator. In joining DHHT
he has brought his trial and appellate experience to assist the firm in its defense
of insureds and insurers as well as the

HAVE NEWS TO SHARE?

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firm's work in business litigation, transactional work, and probate practice.

Also, DHHT is pleased to announce the addition of **Stephanie A. Hollar**, an experienced litigation attorney. Hollar has practiced in the area of civil litigation for twenty-five years. The majority of this time has been in private practice with a focus on insurance defense and insurance law. Hollar was in private practice in Great Falls for 20 years before going to work for the Montana State Fund as an in-house claims attorney where she represented the insurer in workers' compensation matters, including litigated matters before the Workers' Compensation Court and at the appellate level. Hollar was at the State Fund for three and a half years before returning to private practice in 2018. She joined DHHT in March 2019.

DHHT is a business and litigation law firm which has been in continuous existence since 1912. Originally the firm focused on insurance defense work. While the defense of insureds and insurers remains a primary component of DHHT's practice, the firm's work has expanded over the years to include business litigation, representation of national and multi-national corporations in class actions, products liability, employment, environmental, toxic tort and commercial litigation, and the defense of public entities, including the State of Montana and numerous cities

and counties, as well as a wide range of transactional work, running the gamut of business formations, farm and ranch sales, commercial leasing, oil and gas, and business consulting. There is also an active estate planning and probate practice.





DeMarois

Munro

DeMarois, Munro join Goodrich & Reely's Missoula office

Goodrich & Reely PLLC has welcomed two new attorneys to the firm's Missoula office.

Jessica M. DeMarois, JD, LLM, has joined Goodrich & Reely as an associate attorney. A Missoula native, DeMarois was a Sentinel High School valedictorian and graduate with high honors of the University of Montana Davidson Honors College. DeMarois received her juris doctorate from the University of Montana School of Law and a master's degree in tax law from the University of Washington. Prior to returning to Missoula, DeMarois practiced in Seattle and Helena. Practice areas include tax, estate planning, business transactions and liquor licensing. She can be reached at 406-541-9700 or jess@goodrichreely.

Mark Munro has joined the firm as an attorney in the firm's Missoula office. Munro grew up in Missoula

and has 22 years of experience as a tax and business lawyer. Prior to joining Goodrich & Reely he was a partner with Garlington, Lohn & Robinson, PLLP in Missoula. He previously worked for large law firms in Seattle and New York and taught tax law at the University of Washington School of Law. He received his ID and an LLM in tax law from the New York University School of Law. He can be reached at 406-541-9700 or mark@goodrichreely.com.

Clark, Conley, Jennings promoted at Missoula **County Attorney's Office**

Missoula County Attorney Kirsten Pabst recently announced three new appointments to Missoula County Chief Deputy Attorneys.

Jennifer Clark has been appointed operations chief. Clark has been a prosecutor at the Missoula County Attorney's Office since 2000, serving as lead counsel on complex and high-profile cases such as Markus Kaarma, Tiffany Pierce and Augustus Standingrock. Prior to 2000, she worked in private practice and as a public defender in Cascade County. As Ops Chief, she will directly supervise several employees, serve as training coordinator, technical adviser, human resources liaison, and carry a partial case load.

Anna Conley has been appointed to serve as Civil Division chief. Conley has practiced law for 17 years. She has a Juris Doctor from the George Washington Law School, and an LL.M. and Doctor of Civil Laws from McGill University's Law School. Conley has worked in private practice and as a staff attorney for the American Civil Liberties Union of Montana and successfully litigated many large-scale complex cases, including class actions. She is an

adjunct professor at the University of Montana, has participated in rule of law initiatives abroad, and has published extensively in international, comparative and constitutional law. In her role as chief civil deputy, she will oversee the Civil Litigation Division, the Dependent Neglect Unit, the Involuntary Commitment Unit and serve as the point of contact for all Missoula County departments, including the Board of County Commissioners, while maintaining an active caseload.

Matt Jennings has been appointed to serve as Criminal Division chief. Before attending law school, Jennings worked in Washington, D.C. as a legislative assistant in the U.S. Senate specializing in energy and natural resource policy. During law school, he and his partner won the Regional Trial Team Competition. Jennings has been recognized by the American College of Trial Lawyers for Excellence in Advocacy. After law school, he clerked for the Honorable Karen Townsend before joining the Missoula County Attorney's Office in 2014. As chief criminal deputy, he will supervise all prosecutors in the General Crimes Unit, Special Victims Unit, Drug Unit and Juvenile Court. He will also serve as the law enforcement point of contact and provide regular legal updates with law enforcement, while maintaining an active criminal caseload.

HONORS

10 from Boone Karlberg selected for latest Best Lawyers in America list

Boone Karlberg P.C., in Missoula, is proud to announce that 10 of its attorneys have been selected for inclusion in

MORE NEWS, PAGE 9



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¹MRPC 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment 5 of Rule 1.3 states: To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

NEWS

FROM PAGE 7

the 26th edition of The Best Lawyers in America.

They are Thomas H. Boone, Jaymie A. Bowditch, Randy J. Cox, William L. Crowley, Matthew B. Hayhurst, Natasha P. Jones, Scott M. Stearns, Dean A. Stensland, Robert J. Sullivan, and Cindy K. Thiel.

Three of these attorneys received 2020 Lawyer of the Year awards: Hayhurst for his work in Product Liability Litigation – Defendants; Stensland, for his work in Litigation - Real Estate; and Sullivan, for his work in Litigation - Banking and Finance.

6 from Holland & Hart selected for latest Best Lawyers in America list

Holland & Hart is pleased to announce that six Billingsbased Holland & Hart attorneys have been included in the 2020 edition of The Best Lawyers in America, which recognized 170 attorneys across the firm.

They are Shane P. Coleman, Kyle Gray, Charles W. Hingle, William Mercer, W. Scott Mitchell, and Elizabeth A. Nedrow.

Two of these attorneys received 2020 Lawyer of the Year awards: Kyle Gray for her work in Appellate Practice; and Scott Mitchell for his work in Litigation – Insurance.

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Pierce begins term as State Bar president

By Montana Lawyer Staff

Juli Pierce began her term as the 2019-2020 State Bar of Montana president in September, announcing that she intends to meet as many of her fellow attorneys around the state as she can during her term.

Pierce, who operates Juli Pierce Law in Billings, was elected president-elect in the 2018 State Bar of Montana elections. She previously served as Chair of the Board of Trustees. She joined the board in 2013.

She took the gavel from 2018-2019 President Eric Nord on Sept. 13 in Billings during the Business Meeting at the bar's Annual Meeting.

Pierce said sheespecially hopes to talk in the eastern part of the state where there is great need for more attorneys. She also hopes to build on the work of her predecessors, particularly in the areas of access to justice, attorney wellness, and making the bar more relevant, both to members of the bar and the public. She is also excited that the inaugural Montana High School Mock Trial competition will happen while she is president.

Other officers who began terms during the Annual Meeting were:

- President-Elect: Kate Ellis, attorney at Chrstensen Prezeau in Helena. Ellis was chair of the Board of Trustees in 2018-2019.
- Secretary-Treasurer: David Steele, a partner at Geiszler Steele in Missoula. Steele, who joined the board of in 2016, takes over for Jason Holden. Holden was termed out after two twoyear terms.
- Chair of the Board: Brian Smith, a solo practitioner from Missoula. Smith has been a member of the board since 2016.

Three new trustees join board

Two new trustees from Area F (Lewis and Clark County and Jefferson County) began two-year terms on the bar's Board of Trustees at the September meeting in Billings.

Danna Jackson has been chief legal



Juli Pierce speaks after taking the gavel as State Bar of Montana president on Sept. 13 during the 2019 Annual Meeting in Billings.

counsel for the Department of Natural Resources and Conservation since 2016. She previously worked as in the U.S. Attorney's Office in Montana as a tribal liaison and in the Indian Crimes Unit, and as counsel for Akin Gump in Washington, D.C.

Aislinn Brown is an assistant attorney general in the Montana Department of Justice's Agency Legal Services Bureau. She is a graduate of Georgetown University Law Center.

The board selected Erica Grinde of Missoula for an open Area B trustee position.

Grinde was one of three people who applied for the two-year term, which became open with Steele's election as Secretary-Treasurer. She is currently Missoula County's director of risk management and benefits.

Grinde said she has put a priority on bar service, both on the state and national levels, in her 11 years as a lawyer. She volunteered in the State Bar's New Lawyers Section for years, serving as president in 2012-2013. She was appointed in 2009 to a two-year term as the the American Bar Association Young Lawyers Division's district representative for Idaho and Montana. She has since held various leadership roles in the YLD, and chosen by the YLD as a Member-at-Large in the ABA's Board of Governors.

Area B encompasses Lake, Missoula, Mineral, Ravalli, and Sanders Counties.

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SAVE THE DATE!

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MARCH 7-8, 2020 | HELENA

ATTORNEY COACHES NEEDED!

STATE COMPETITION

The State Bar of Montana is pleased to announce it will join the ranks of bar organizations around the country that help coordinate state competitions to qualify for the National High School Mock Trial competition. Planning is underway for the first-ever statewide competition in Helena to select a team to participate in the national competition next spring.



Any Montana high school, public or private, will be allowed to create up to three teams consisting of six to nine students. Each school must have at least one faculty coach and one attorney coach.

GET INVOLVED

This is an excellent opportunity for high school students from across the state and for volunteer lawyers interested in passing on their knowledge of trial work. If you are interested in becoming involved or helping support this effort financially please email mocktrial@montanabar.org







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2019

ANNUAL MEETING

If you missed the 2019 Annual Meeting in Billings, you missed a lot. Here are a few of the highlights.

THIS PAGE, CLOCKWISE FROM TOP:
Montana Supreme Court Justice Laurie
McKinnon (left) is presented the Karla M.
Gray Equal Justice Award by Justice Beth
Baker; Montana Legal Services Award
Executive Director Alison Paul introduces the winner of the 2019 William J.
Jameson Award; Dean Paul Kirgis of UM's
Alexander Blewett III School of Law provides an update on the law school; Anna
Conley of the Missoula County Attorney's
Office introduces Eli Parker, winner of
the George L. Bousliman Professionalism
Award; Patten speaks after receiving the
Bousliman Award.

Facing page: Dan McLean of Helena accepts the 2019 William J. Jameson Award, the highest honor bestowed to an attorney by the State Bar of Montana; Abbie Cziok of Helena receives Frank I. Haswell Award for outstanding contribution to the Montana Lawyer; attendees admire the items in the Art for Justice benefit auction, which raised over \$3,000 for the Montana Justice Foundation; Kate Ellis of Helena, the bar's new President-Elect, stands with Brian Smith, the new Chair of the Board of Trustees; Kyle Gray of Billings accepts the 2019 Pro Bono Award.

See the following pages for more moments from the Annual Meeting.







NATIONAL THOUGHT LEADERS
AND PRACTICE AREA EXPERTS
FROM MONTANA were among the speakers at Annual Meeting CLE presentations. At right, Hillarie Bass, president of the Bass Institute for Diversity & Inclusion and past ABA president, gives an illuminating talk on implicit bias in the workplace. Below, Bass joined Montana's Bob Carlson and Cliff Edwards for a talk on "The Lawyer's Role in Defending and Advancing the Rule of Law."

FACING PAGE, clockwise from top: The Montana Supreme Court heard oral argument in Nunez v. Watchtower, a case that could test Montana's law limiting punitive damage awards, with UM law professor Cynthia Ford providing an introduction. Meeting attendees received free chair massages from massage therapists as a wellness initiative, courtesy of the Lawyer Assistance Program. Ninth Circuit Chief Judge Sidney Thomas gave the keynote address to open the Annual Meeting.













WE HOPE TO SEE

YOU NEXT YEAR

SEPTEMBER 9-12
IN MISSOULA!

SERVICE TO THE BAR



THE STATE BAR OF MONTANA MEMBERS recognized attorneys for 50 years of service to the legal profession

in Montana at the Annual Meeting in Billings. Receiving their awards from current president Juli





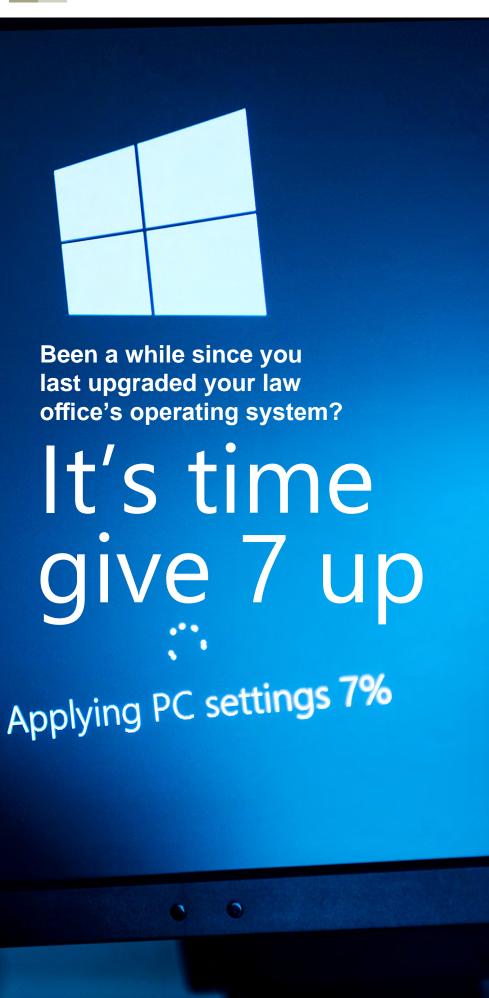


Pierce and Immediate Past President Eric Nord are (above, from left) Clarence Belue, William Krutzfeld, and

William Spoja; and (below, from left) Charles Petaja, Ron Waterman, Jerry Cook and John Ross.







f your law office is still using
Microsoft Windows 7 on its computers (or operating a server running
the Windows Server 2008 operating
system), you should circle January
13, 2020, on your calendar. That is when
Microsoft is ending support for the
operating system — and it's when you
should finally let it go. Offices still using
Windows 7 after that date are putting
their equipment and their data at risk.

For the past four years, Microsoft has been trying to pry Windows 7 away from users. When enticements like free upgrades to Windows 10 didn't work, they resorted to threats: Get off or you're on your own. That means no more security updates and fixes, technical support, or software updates. It is, as they term it, END OF SUPPORT.

While it may not be the end of the world, it is the end of Windows 7's nearly 10-year run as a supported operating system, and the safety and security of your data and any machine running Windows 7 that is connected to the internet or connected to internet-facing devices on your network will be at increased risk.

Leaving Windows 7 is not technically hard or expensive, depending on how you choose to do it. You should take a close look at the programs you currently use and determine whether they will be compatible with whatever operating system you choose to migrate to. Some of these programs may work in compatibility mode, but it will always pay to do your research (or pay someone else to do your research) before making any moves.

Options for migration

As far as your options, you really have two: upgrade your current system or buy a new computer. For some, upgrading may not be an option, as the newer operating system may not be compatible with your current computer and you will need to buy a new one. Think of it as an opportunity – an opportunity that has been forced upon you. It doesn't matter whether you go to Macintosh, Windows 8, or Windows 10, as long as you have moved before Jan. 14, 2020.

Pro tip: If you choose to stick with Windows, go with Windows 10. Windows 10 is functionally closer to Windows 7 than Windows 8. So, if you like Windows 7, you probably won't hate Windows 10. In fact, as I have slowly transitioned staff here at the State Bar of Montana to Windows 10, I have received very few complaints or questions relating to the new setup.

But it doesn't matter what I think — it's a brave new world full of choices! Just don't make the choice that puts your business and clients at risk.

Feel free to reach out to me if you would like to talk further on this issue.

Sam Alpert is the State Bar of Montana's Director of Information Technology and Digital Strategy. You can reach him at salpert@montanabar. org or 406-447-2213.

It doesn't matter whether you move to Windows 8, Windows 10, or Macintosh — as long as you stop using *Windows 7* before **Jan. 14, 2020**.



NOT SURE WHAT YOU'RE RUNNING?

Want to find out whether your computers are running the Windows 7 operating system? A short video posted on the home page at www.montanabar.org will show you how to find out.



WWW.MONTANABAR,ORG SEPTEMBER/OCTOBER2019 19

Disasters and data breaches: The ABA has spoken — but was anyone listening?

By Sharon D. Nelson, Esq. and John W. Simek

In 2018, the ABA released two very significant ethical opinions. One was Formal Opinion 483: Lawyers' Obligations After an Electronic Data Breach or Cyberattack (October 17, 2018). The other was Formal Opinion 482: Ethical Obligations Related to Disasters (September 19, 2018).

To our surprise, we rarely find CLE attendees who are aware of these opinions. Even those who are aware of them do not seem to know their details or understand their implications. Hence the inspiration for this article. Both opinions should be carefully read by lawyers seeking to understand their ethical duties in the event of a disaster (natural or man-made) or a data breach (which is of course a very specific form of a disaster)!

Headless chicken mode

In our line of work, we see a lot of law firms that have been breached. "Headless Chicken Mode" is our name for the reaction of those who have not prepared for a breach – they have no incident response plan. They run in circles, hysterical, with no idea what to do. Sadly, there are a lot of law firms without an incident response plan – a 2018 study by IBM Resilient and the Ponemon Institute revealed that half of all organizations described their incident response plans as informal, ad hoc, or completely nonexistent.

Not having a formal incident response plan is inexcusable for law firms today – and unethical under these new opinions. With respect to cyberattacks, our own experience has shown:

- The faster you catch a cyberattack, the less it will cost you and the faster you can recover.
- You are no stronger than your weakest link (usually your employees).
- With a good incident response plan, preparation is two-thirds of the effort, and the remaining one-third is solving the problems when an attack occurs.

The cloud is your friend

Whether you have a data breach or another form of disaster, the cloud is your friend. Opinion 482 talks about the duty of communication required by Rule 1.4, which requires lawyers to communicate regularly with clients and keep their clients reasonably apprised about their cases. Following a disaster, a lawyer must evaluate available methods to maintain communication with clients. The opinion instructs that lawyers should keep electronic lists of current clients in a manner that is "easily accessible."

The opinion also references Rule 1.1, which requires lawyers to consider the benefits and risks of relevant technology. It also notes that lawyers "must evaluate in advance storing files electronically" such they can access them after a disaster.

If your office is flooded (and maybe your home where you leave your backups), the best way to access client contact information is via the cloud. More and more, ABA opinions are not so gently pushing law firms toward the cloud. We agree completely that essential law firm data should, at the very least, be backed up in the cloud. Keep your data on premises if you like

with an on-premises backup, but make sure there is a copy in the cloud. Today, that is just a commonsense precaution and almost universally accepted by legal technologists.

Yes, you need a reputable cloud provider, and you need to read the terms of service and ask questions regarding the security of client data, but there are many acceptable and respected cloud providers available to lawyers today – the fear of the cloud has faded. In fact, law firms tend to fear *not* being in the cloud.

Safeguarding client property

There was a time not so long ago whe lawyers obeyed Rule 1.15 (safeguarding client property) by locking up paper files. It is a whole new world today. If client data is destroyed, the opinion says lawyers can attempt to reconstruct files by obtaining documents from other sources. If they cannot, they must notify the clients of the loss of the files. To prevent such losses, "lawyers should maintain an electronic copy of important documents in an off-site location that is updated regularly." Yup, we're back to the cloud again.

In many law firms, cloud backups are updated as frequently as every 15 minutes. While that frequency of backups may not be ethically required, most firms at least perform daily cloud backups.

Money, lawyer withdrawal & greed

As we saw with Katrina in particular, disasters can impact financial institutions and, therefore, client funds. Thus, the opinion says that lawyers "must take reasonable steps in the event of a disaster to ensure access for funds the

A 2018 STUDY BY IBM RESILIENT AND THE PONEMON INSTITUTE REVEALED THAT HALF OF ALL ORGANIZATIONS DESCRIBED THEIR INCIDENT RESPONSE PLANS AS INFORMAL, AD HOC, OR COMPLETELY NONEXISTENT.

lawyer is holding in trust." This largely presupposes that you are doing electronic banking, which most firms are, and can therefore access client funds once you have an internet connection (which means you need a redundant internet connection). You may also need to have another trusted signatory or, if the worst happens, have a successor lawyer to wind up your practice. Gloomy thoughts, but it's like having a will – simply a necessity of life and your profession.

In a true disaster, you may not be able to perform legal services and may have to withdraw. Under Rule 1.16, "In determining whether withdrawal is required, lawyers must assess whether the client needs immediate legal services that the lawyer will be unable to timely provide." Again, we harken back to Katrina, where many lawyers were forced by circumstances to withdraw from representation. Needless to say, you must seek the court's permission to withdraw as required by law and court rules. A good practice tip is to address in your engagement letter how to contact you in the event of a disaster.

When the U.S. Virgin Islands firm Bolt Nagi lost its St. Thomas office during Irma and Maria, our friend and colleague Tom Bolt had the law firm website temporarily altered to display his cell phone number. Tom, the firm's managing partner, certainly went the extra mile to make sure firm clients could contact him.

Many people seek to gain from disaster victims. The opinion warns lawyers that they should not take advantage of disaster victims for personal gain. "Of particular concern is the possibility of improper solicitation in the wake of a disaster." While the warning is well taken, the authors note anecdotally that they were never prouder of the legal profession than after Katrina, when so many lawyers and legal professionals reached out to help lawyers (and their clients) impacted by the flood waters of Katrina.

Practicing in other states

On this issue, you should read the opinion itself carefully. If you are displaced from your jurisdiction and seek to practice elsewhere temporarily, in accordance with Rule 5.5(c), you must obtain approval from the new jurisdiction.

The opinion cites a key provision of the ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster. That rule provides in part that a lawyer displaced by a disaster "may provide legal services in this jurisdiction on a temporary basis if permitted by order of the highest court of the other jurisdiction."

Many lawyers simply want to volunteer to help disaster victims. The opinion states that, "Out-of-state lawyers may provide representation to disaster victims in the affected jurisdiction only when permitted by that jurisdiction's laws or rules, or by order of the jurisdiction's highest court."

The ABA Model Court Rule on Provision of Legal Services Following Determination of Major Disaster requires that "the supreme court of the affected jurisdiction must declare a major disaster and issue an order that allows lawyers in good standing from another jurisdiction to temporarily provide pro bono legal services in the affected jurisdiction through a nonprofit bar association, pro bono program, legal services program or other organization designated by the courts."

Just make sure you follow the rules. It is also helpful to volunteer your time through the ABA or other pro bono services providers. A good many of our ABA colleagues went down to New Orleans to help lawyers re-establish their practices. Even from Virginia, we took five Tulane Law School students under our wings and purchased/configured new laptops for them, which they took to Georgetown, which generously allowed them to continue their legal education there.

There is always a way to help without getting yourself in ethical trouble!

Most likely disaster: Data breach

The Cyber Readiness Report 2019, commissioned by global insurer Hiscox, found that 61% of global firms have been breached in the past year. While not specific to law firms, that is a dramatic increase – and law firms are by no

means immune. In fact, we are a targetrich environment because we hold the data of so many clients. And, to be frank, law firm security remains weak, especially in solo, small, and midsized firms.

Data breaches are silent and deadly – not at all like the disasters recounted above. If you want to feel your blood pressure rise, Google "FireEye Live Cyber Threat Map" and watch the attacks in real time. In the last several years, we have witnessed cyberattacks routinely conducted by bots and seen attacks powered by artificial intelligence.

The ABA speaks twice in two years

The ABA's Formal Opinion 483, "Lawyers' Obligations After an Electronic Data Breach or Cyberattack" builds on the Standing Committee on Ethics and Professional Responsibility's Formal Opinion 477R released in May 2017, which set forth a lawyer's ethical obligation to secure protected client information when communicating digitally.

The new opinion states: "When a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach."

The opinion discusses Model Rule 1.1 (competence), Model Rule 1.4 (communications), Model Rule 1.6 (confidentiality of information), Model Rule 1.15 (safekeeping property), Model Rule 5.1 (responsibilities of a partner or supervisory lawyer) and Model Rule 5.3 (responsibilities regarding nonlawyer assistance). Where we have gone through these rules with respect to Opinion 482, we will not repeat ourselves here unless there are additional aspects to cover.

There is a "rule of reason" overtone to the opinion, which states, "As a matter of preparation and best practices, however, lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach. ... The decision whether to adopt a plan, the content of any plan and actions taken to

MORE DISASTER, PAGE 29



Abbie Nordhagen Cziok

Most readers are looking for reasons to stop paying close attention. It is essential to remove all roadblocks that make reading your document difficult.

Ignoring typography can lead to losing your readers' attention

Writing this column comes with its highs and lows. High: a new book comes in the mail. Low: my husband's disappointed, confused look when he sees the new book's title is "Typography for Lawyers." The next, and best high: a whole section is devoted to the number of spaces that ought to come after a period: one (cue the intra-law firm battles).

The book is "Typography for Lawyers: Essential Tools for Polished and Persuasive Documents," by Matthew Butterick, and in it, Butterick explains the importance of the visual aspect of all type-written material. Matthew Butterick, Typography for Lawyers: Essential Tools for Polished and Persuasive Documents 20 (2d Ed. 2015). The visual aspect of written work may seem trivial when you've spent hours researching cases and composing an argument, but Butterick reminds us that when the reader is looking at our document for the first time, the typography choice can either support our argument or detract from it. Foundationally, typography is for readers, not writers, and well-used typography conserves your reader's attention. Id. at 21. And your reader, when compared to you, has a lower attention span and interest in the topic, is persuadable by other opinions, and does not care about making your client happy. *Id.* at 22. Butterick even goes so far to say that most readers are looking for reasons to stop paying close attention, not because they are malicious or aloof, but because they are so busy. It is essential to remove all roadblocks that make reading your document difficult, like eyestrain and confusion.

Typographical choices revolve around a single principle: Good typography reinforces the goals of the text. Such reinforcement happens at all levels of the text. Butterick suggests focusing on three levels: type composition, text formatting, and page layout.

Type composition is made of all the non-alphabetic characters on the keyboard. *Id.* at 37. He provides rules or suggestions for of all of them. For example: Use curly, not straight quotation marks; use hyphens for multi-part words and en dashes for range values; and become familiar with nonbreaking spaces. The purpose of following such rules is so that the most basic aspects of our documents do not hinder readability. We don't want anyone getting tripped up on something as mundane as a quotation mark.

Second, he discusses text formatting. Throughout much of this section, he talks about different conventions and how they affect readability. He strongly recommends that "all caps" never be used except for on one- to three-word headings. Cognitive research has shown that the variable heights of lower-case letters helps our brain recognize words. *Id.* at 82. It is unhelpful to have our readers' brains working overtime just to read a point heading. There are other options to set apart text that don't involve the caps lock key.

Which brings me to the page layout, the last level of document typography. Butterick emphasizes how underrated white space can be to emphasize headings and provide cognitive clarity. See id. at 133. More text overwhelms a reader, so white space has a calming effect. This applies to letter spacing, font size, and line spacing. See id. at 136–37, 141. Becoming familiar with these options can help make a great document one that is readable.

This book was a valuable read. The tips can immediately be put into use, and Butterick's dry wit will keep you smiling.

Abbie Nordhagen Cziok is an associate with Browning, Kaleczyc, Berry & Hoven in the Helena office. She likes rock climbing, skiing, and one space after a period.

Maximizing success in your virtual practice

By Brooke Moore

Taking the leap and deciding to take your legal practice online can create flexibility and endless possibilities. The ability to create an alternative law firm model is both exciting and terrifying. Hare a couple tips to help you maximize success in your virtual practice.

Choosing and using technology

Choosing the best technology for your practice is imperative for a virtual law firm. At the top of that list is of course creating a functional, userfriendly website. Then you will need to find a law practice management system that provides all of the functionality that your law firm needs. Review your needs and make a list of all of the important components that are required to run your practice and run it efficiently. A secure, user-friendly client portal should be the first priority on your list when comparing law practice management offerings. You will want to review the software services that you currently use to determine if any of those services will integrate with your law practice management software. It will save you a significant amount of time and improve efficiency if the technologies that you use communicate with one another. Other software options that you may want to consider for your virtual law firm are an online calendaring or scheduling provider, electronic merchant services provider to accept payments online, an online accounting system, electronic signature service, document automation software, electronic intake software, video conferencing, and internal team collaboration software.

Outsourcing

When considering outsourcing you should first identify your needs and the scope of the work that will be outsourced. In order to make that determination you should consider three factors. What is important to your clients and what do your clients need? Exactly what legal work or administrative tasks do you need to outsource? What are the



Listen to Brooke Moore on the Digital Edge podcast discussing benefits of moving to a virtual law office: bit.ly/31ZbwAE

costs associated with the roles you want to outsource? Once you have answered these questions you can focus on finding the right organizations and individuals to meet your outsourcing needs. When you are reaching out to potential outsourcing providers you will also want to ask them questions. You will need to ask how they secure data, how they handle sensitive information, how many law firm clients they have, and any other questions that will make you more comfortable in using their services. Some services that you may want to consider outsourcing include receptionist tasks, paralegal or assistant services, service agents, notaries, and legal drafting or other attorney services.

Running a virtual law firm is similar in many ways to running a traditional law firm. Start by considering these key factors and be sure that you create systems and processes to promote efficiency and consistency in your virtual practice.

Brooke Moore is a part of the ABA TECHSHOW 2020 Planning Board.

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Mark Bassingthwaighte

If you ever find yourself irritated at being interrupted by clients, I encourage you to consider whether the problem might be you.



ALPS Risk Manager Mark Bassingthwaighte, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the U.S., and written extensively on risk management and technology.

Don't minimize managing your side of the attorney-client relationship

Over the years, manny articles have been written on how to successfully manage attorney-client relationships. Typically, these articles emphasize effective and thorough communication skills, maintaining a professional presentation at all times and in all work spaces, learning all you can about your clients in order to anticipate additional legal needs they might have, taking the time to say thank-you and the list goes on. Worthwhile info but it's time for something different.

I have been thinking of late about how hard all the above might be if a lawyer actually didn't really like many of his clients. What if he or she just found them irritating? Look, I love being a dad, but I can assure you that when our kids were still at home there were more than a few times over the years when I was seriously irritated with one or more of them. My point is this: Such feelings are normal in relationships of all types, so irritation is likely to be part of the picture in some attorney-client relationships. That is when I realized this topic is worth addressing, because we can all do something about it if we're aware of the issue and choose to do so.

It would be easy to now pontificate on client selection. All I will say about that here is this. Choose wisely and make sure they can pay.

No, what I really want to discuss is what you can do to minimize the time you spend being irritated with clients, because when you're irritated with any or all of them, the relationships involved can become stressed and your work product can suffer.

The obvious initial question I asked myself was, why might a lawyer become irritated a client? The immediate answer that came to mind was because she wasn't properly managing her side of the relationship. Again, when I was

irritated with my kids, it was often because they were bothering me when I didn't want to be bothered. I respectfully suggest that clients can get under your skin just as easily if you allow it. The good news is that you have a great deal of control over this.

Let's start by considering your overall workload. If you allow your workload to get out of hand, you are responsible for giving clients a reason to bother you. Depending upon the frequency of the interruptions, relationships can start to become strained. Almost by definition, effectively managing attorney-client relationships demands that you manage your side of the relationship. You must help them help you do what they have hired you to do.

So what can you do? For starters learn to say no. No to additional work that's out of your comfort zone or that you truly don't have time to take on. Think about it: You are most likely to procrastinate when you take work you really should be saying no to, and that invites relationship problems. When you fail to say no, you are the one creating the problem, not your clients. Learn to say no. It can be as easy as simply saying "While I sincerely appreciate your continued loyalty, I can serve you best by helping you find an attorney with the level of experience this particular matter calls for."

In a similar vein, if your workload is at a level where any interruption is truly burdensome or your work is beginning to seriously impede your ability to have a life outside of the office, perhaps the time has come to hire additional staff. Think about it this way: For the legal practitioner, relief isn't spelled r-o-l-a-i-d-s, it's spelled d-e-l-e-g-a-t-e!

More importantly, educate your

MORE RISK, PAGE 27

Supreme Court honors MacIntyre for 2 decades of service to MJF

The Montana Supreme Court honored Don MacIntyre with an Order of Recognition on his retirement from the Montana Justice Foundation Board of Directors after 21 years of service.

Justice Beth Baker, an ex-officio member of the MJF board, presented MacIntyre with the order at the MJF board's annual meeting in Billings in September.

MacIntyre, who was State Bar of Montana president in 1996-1997, joined the MJF board the following year, which was the year after the foundation assumed its current name and independent organizational structure. He served in many leadership roles for the foundation, including as its president and chair of several committees.

"Don was instrumental in leading the Foundation through a challenging period, when IOLTA revenues fell so dramatically that all grant funding temporarily ceased, to its recognized role today as a key partner in the State's efforts to achieve equal access to justice for all Montanans," the Order of Recognition reads. "He has been an integral part of stewarding the more than \$7 million in grants the Foundation has distributed to Montana's legal aid community and for loan repayment assistance to law school graduates dedicated to helping low-income Montanans with their legal needs. Don's devotion to the mission of justice for all has proved invaluable to the courts, to the legal profession, and to the people of Montana."

MJF Executive Director Niki Zupanic said MacIntyre served as



Don MacIntyre

chair of both the foundation's Grants Committee and Audit Committee, for which he was integral to ensuring the organization's long-term stability, growth and stewardship of resources. In particular, she noted his efforts in creating a new grant program focused on community redevelopment legal assistance, which resulted from a large award as part of a national mortgage-related settlement. He led the creation of guidelines and processes for the program, emphasizing creative projects that will have a far-ranging and lasting impact on communities.

"Don has been such an amazing member of our board and an important part of our success over the years -- in addition to being just one of the best people I know," Zupanic said.

Don's devotion to the mission of justice for all has proved invaluable to the courts, to the legal profession, and to the people of Montana.

Upcoming Montana Supreme Court oral arguments

The Montana Supreme Court has scheduled the following oral arguments for October and November. All arguments will be held at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena.

October

Wednesday, Oct. 30: BNSF v. Asbestos Court, OP 19-0085 – BNSF Railway petitions for a writ of supervisory control, appealing the Asbestos Claims Court's summary judgment against several of BNSF's defenses against its liability for plaintiffs' asbestos-related damages.

November

Wednesday, Nov. 6:
Murray v. BEJ Minerals, OP
19-0304 – The argument
arises from a certified question from the U.S. Court of
Appeals for the Ninth Circuit
about whether dinosaur
fossils are "minerals" for the
purpose of a mineral reservation in a Montana deed
between private parties.

The Honorable Olivia Rieger, 7th Judicial District, will participate in place of Justice Jim Rice, who has recused himself.

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RISK

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clients. Literally help them help you. Set aside specific blocks of time to respond to email, take and return calls, be available for walk-ins, or to just focus on client matters without interruption. If you fail to establish, and then protect your productive time, who will? If it helps you to follow through, block out these times in your calendar and give your staff the authority to help enforce these boundaries.

Next, let every new client know what your communication policy is, and educate your current client base as to any changes. You might place a short paragraph in your engagement letter or new client information sheet. Let them know when you will be available to take and return calls and explain what an emergency is so everyone is on the same page. Staff can take messages and offer what assistance they can when you are not available.

Establish a policy on responding to email. As a risk guy, I strongly suggest you allow yourself time to carefully consider your response to any substantive inquiry. Shooting out an immediate response to every email that comes in is a bad idea. How about text messages? I find them to be quite an annoyance. As with email, establish a policy and let everyone know what it is. If you don't want clients texting you, you will need to tell them and also explain why. For starters, I immediately think about

preservation, miscommunication, and acknowledgment problems. I don't know about you; but I sure as heck am not going to have my cell by my side every minute of every working day so I can check every text I receive as they come in. In fact, my phone is off more than it's on when I'm on the road.

If you ever find yourself irritated at being interrupted by some of your clients, I encourage you to consider whether the problem might be you. If it is, that's good news because you can definitely do something about it. You just need to decide to do so. How do you think my kids and I all made it through their teen years? I took my own advice and considered what my role in any relationship problem might be. All I can say is it made a world of difference.

COURT

FROM PAGE 25

APPOINTMENTS

The Montana Supreme Court has made the following appointments court commissions:

Access to Justice Commission: Five members were reappointed to new three-year terms: Georgette Boggio, Billings, representative of Native American communities; Katy Lovell, Helena, Montana Department of Public Health and Human Services; Dan McLean, Helena, State Bar of Montana representative; Kyle Nelson, Bozeman, Montana Justice Foundation representative; and Alison Paul, Helena, Montana Legal Services Association representative. There are 18 members of the court-appointed advisory

commission chaired by Justice Beth Baker.

Commission on Character and

Fitness Rex Renk of Helena was appointed on Sept. 24 to an indefinite term as a lay member of the commission. Renk replaces Margie Thompson of Butte, who resigned her position. Renk is the former longtime

her position. Renk is the former longtime deputy clerk of the Montana Supreme Court. The commission consists of six licensed Montana attorneys and three lay members.

Commission on Practice: Patricia DeVries, Polson, and Lois Menzies, Helena, were reappointed to new three-year terms as non-attorney members of the commission. Richard Ochsner, Missoula, was appointed to replace Gene Huntington, Helena, as a non-attorney member.

Uniform District Court Rules

Commission: James P. Molloy of Gallik, Bremer & Molloy in Bozeman was reappointed to a four-year term on the commission ending Sept. 30, 2023. The commission consists of two district court6 judges; four civil trial attorneys, two representing plaintiffs and two representing defendants; and one professor of the University of Montana's Blewett School of Law.

Commission of Continuing Legal Education: Lisa Mecklenberg Jackson and Cynthia Thiel, both of Missoula, were reappointed to terms on the commission, and Michele Peterson-Cook of Helena was appointed to replace Courtney Cosgrove, who stepped down at the end of her last term on the commission. Their terms will expire in September 2022.

Correction: Parenting plan article omitted name of co-author

The article titled "Program helps parents take responsibility for plan" in the April 2019 issue of the Montana Lawyer omitted the name of one of its authors. The article was co-written by Jolene Wilson-Glah, a retired lawyer based in Texas, and Butte lawyer Cathy Tutty.

To request a correction to an article in the Montana Lawyer, please email to MontanaLawyer@montanabar.org with "Correction" in the subject line. Please include the title of the article, the issue in which it ran, and a description of the correction that must be made.

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Shelton C. Williams

Shelton Cross Williams (Mike) was born at St. Patrick Hospital in Missoula, Montana on November 21, 1940, to Shelton R. and Madge (Cross) Williams. At the time of Mike's birth, his father was attending law school at the University of Montana.



William

The oldest of three boys, Mike was an Eagle Scout, and graduated from Libby High School in 1959. He played football for the Loggers. He received a scholarship to attend Dartmouth College,

graduating in 1963.

He then followed in his father's steps and attended UM School of Law. He graduated first in his class, was selected editor of the Law Review, and received his I.D. in 1966. Mike clerked for Chief Judge Walter Pope of the Ninth Circuit Court of Appeals in San Francisco upon graduation, then was hired by the law firm Worden Thane, which became Worden, Thane, Haines and Williams. In 1973, Mike started his own firm, originally with Alex George and Jim Benn, and later with Richard Ranney and then his son Mark. Today it continues on as Williams Law Firm PC, with nine attorneys and offices in Missoula and Bozeman.

In Mike's earlier years, he served as an officer of the Kiwanis Club, the Missoula Symphony Association Board, the State Bar Association, and the Montana Defense Trial Lawyers. He taught Insurance Law and Remedies as an adjunct professor at the UM School of Law. He tried nearly 100 civil jury trials and was selected to the American Board of Trial Advocates.

Mike married Donna Lea Finstad of Helena in 1963. Together they had six children. In 1984, he married Lois Pilote and added her two daughters to the collection.

Mike worked very hard but also played just as hard. He taught his children the importance of excelling in school and of recreation and exercise. He enjoyed skiing (especially Snowbowl), backpacking, lake kayaking, rafting, scuba diving, and traveling the world. We expect that he is still searching for that hidden untracked powder.

After retiring, Mike and Lois moved to Flathead Lake, with winter sojourns to Maui. Mike loved spending time with his children and grandchildren, and particularly enjoyed attending his grandchildren's numerous sporting events. An avid Grizzly football fan, he rarely missed a home football or basketball game.

Kathleen Carrick

Kathleen "Kathy" Carrick, 64, of Livingston, Montana, passed away Aug. 21, at her home in Livingston.

Kathy graduated from Charles M. Russell High School in Great Falls in 1973. She graduated from Pacific Lutheran University in Tacoma, Wash., with a B.S. in nursing. She continued

Damon Lynn Gannett

Damon Lynn Gannett, 72, a past State Bar of Montana president and 2016 winner of the bar's William J. Jameson Award, died on Oct. 2, 2019, after a herculean three-anda-half-year battle with pancreatic cancer.



Gannett

Damon was surrounded by his wife of over 50 years, all living children and his sister when he calmly and graciously drew his last breath, leaving a

void that will not soon be filled.

In lieu of flowers, please direct any financial contributions to CASA of Yellowstone County, the Family Tree Center, or any charity that might aid the Grizzlies in beating the Bobcats this November, because we all know he'll be watching.

A tribute to Damon will be included in the next issue of the Montana Lawyer.

nursing while putting herself through law school in California.

She held law licenses and practiced in California, New York and Montana. She was the Chief Deputy County Attorney for Park County at the time of her death.

Memorials are preferred to Stafford Animal Shelter or the nonprofit of your choice.

Memorial submissions

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

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

DISASTER

FROM PAGE 21

train and prepare for implementation of the plan should be made before a lawyer is swept up in an actual breach."

Wait – didn't we say that earlier in the article? In fairness, this is what all cybersecurity experts have said for a very long time – and, in our experience, all large firms tend to have an incident response plan. The smaller firms? Not so much. No one is saying that a law firm need to be invincible because that is not possible. As the opinion states, "the potential for an ethical violation occurs when a lawyer does not undertake reasonable efforts to avoid data loss or to detect cyber-intrusion, and that lack of reasonable effort is the cause of the breach." There you have it in a nutshell.

Zombie data

Is there anything not somehow affiliated with zombies these days? For those of you not familiar with the term, zombie data is also known as "dark data," – data you don't know you have until after you have a data breach. The opinion takes a "throw out the trash approach" and recommends, in a footnote, that firms should have data retention policies that limit their possession of personally identifiable information. What you don't have can't hurt you.

Telling clients

Since data breaches cannot entirely be avoided, the opinion says, "When

a lawyer knows or reasonably should know a data breach has occurred, the lawyer must evaluate notice obligations. Model Rule 1.4. Rule 1.4(a)(3) provides that a lawyer must "keep the client reasonably informed about the status of the matter." Rule 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

First, law firms must halt the attack, mitigate the damage and then make reasonable efforts to assess the data that may have been exposed. Not so easy. You can contract ransomware that exfiltrates your data before encrypting your files (therefore a data breach) or ransomware that only encrypts your files and then asks a ransom for the decryption key (therefore not a data breach). The opinion notes that your efforts in determining what happened and fixing it may be through qualified experts.

If you need to report an incident to a government agency, you are still bound by Rule 1.6. We sense there may be some tension over trying to report and trying to maintain client confidential data. How do you know if the disclosure is "impliedly authorized?" Read the opinion fully to understand all the nuances of this dilemma.

Under Rule 1.4, the opinion says bluntly that you must inform a current client of a data breach that impacts their material confidential information. Forgive us for how we say this, but this duty is often honored "in the breach." Typically, law firms say they have no evidence that the confidential information was accessed or used. It's often a rusty nail, but that's where they frequently hang their hat.

What exactly are you supposed to tell clients in your disclosure? The opinion only says that "the disclosure must be sufficient to provide enough information for the client to make an informed decision as to what to do next, if anything."

The opinion dodges a bit when it comes to former clients, finding no duty to notify former clients unless there is something mandating notification.

FINAL WORDS

These are good opinions, worthy of a careful read. As is now customary with all opinions dealing with technology, modification of these opinions may need to be made over time. The two opinions are good roadmaps – and we hope many law firms who are woefully unprepared for disasters, including data breaches, use them as intended to prepare for the worst before it happens.

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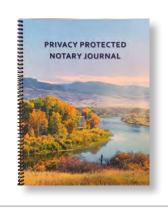
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