

MONTANA LAWYER

State Bar
— of —
Montana

September 2017 | Vol. 43, No. 10



CONSUMMATE PROFESSIONALS

Pair of longtime prominent Helena attorneys,
public servants share 2017 Bousliman Award

Also in this issue

Butte attorney Robert Carlson becomes ABA president-elect

Commission seeks applicants for Supreme Court justice seat

Rieger appointed 7th Judicial District Court judge

Proposed resolution opposes split of 9th Circuit Court of Appeals



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State Bar of Montana
President Bruce Spencer
is a solo practitioner
based in Helena. His
practice areas empha-
size, governmental rela-
tions, creditors' rights,
commercial law, auto-
motive law,
insurance law, and
health care law.

Term as bar president has been busy and eventful

My year as president of the State Bar of Montana has passed, and it's been an honor. My agenda was to add value to your membership, and I hope we have done that. I say "we" because nothing gets done without the fantastic work and support of the State Bar staff. Besides our families they may be the only people who care about the well being of lawyers. Treat State Bar staff well, they deserve it.

I believe we have added value.

We established a working group to examine how the State Bar can be more relevant to lawyers in the public sector and implement those ideas. We have new affinity agreements with MyCase, Clio, Hotel Engine, Chase, R Post, ABA Retirement Funds, for your benefit. Through the efforts of Bob Carlson you have the opportunity to join or renew with the ABA at substantially reduced rates. (You took advantage of this, right?)

We are working hard and continuing excellent relationships with the Montana Supreme Court and its commissions and offices. We continue our strong support for access to justice.

It's been a busy and eventful year. The Bar moved offices and again the staff performed above and beyond. Chris Manos is retiring after 16 years of wonderful service, and we are in the process of finding a new executive director. Your officers and trustees have worked without rancor during what could have been a stressful time. Chris Manos deserves credit as well as our wonderful staff for a smooth process. Due to the increasing costs of meeting our mandated responsibilities we have had to petition for a dues increase after nine years.

I have had some disappointments too.

I was unable to get a set of forms approved for use across our state. I don't feel I was able to gain the perspective I had hoped to on the many access to justice programs in our state. I suggest that one entity aggressively aggregate and supply lawyers and the public information on these efforts.

I am confident our Bar is in good hands. The incoming bar president, Judge Leslie Halligan, and the new executive director will lead us well.

My best wishes to you all, it has been a pleasure to serve you.

“My agenda was to add value to your membership, and I hope we have done that.”

Helvie joins Kasting, Kauffman & Mersen

Jordan P. Helvie has joined Kasting, Kauffman & Mersen in Bozeman as an associate attorney.



Helvie

Helvie was raised in Boise, Idaho. He received his bachelor's degree from Willamette University and his law degree from the University of Denver Sturm College of Law. He joins the firm with experience in representing businesses and individuals in civil litigation and contract advising matters. He will be assisting the firm in all aspects of its general practice of law.

You can reach him at 406-586-4383.

Kasting, Kauffman & Mersen is located at 716 S. 20th Ave., Suite 101, Bozeman, MT 59718.

Sparks, Scoones join Lund Law in Bozeman

Lund Law PLLC of Bozeman has announced that attorneys Katherine Sparks and Christopher Scoones have joined owner Hertha Lund.

Sparks grew up on her family's ranch in southeastern Montana, near Plevna. She attended Montana State University, graduating with a degree in ag business, and then went to Texas Tech University in Lubbock, Texas, for law school and a master's degree in applied and agricultural economics. In law school, Sparks served on an administrative law journal, was very active in negotiation and mock trial competitions, and earned her license to mediate. After law school, she worked for LexisNexis, instructing law students on legal research tactics in Colorado and Wyoming. Since returning to Montana, she has worked as a deputy county attorney and for the MSU Alumni Foundation. She is a member of the Colorado and Montana bars and her practice focuses on agricultural issues, estate planning, litigation and mediation.



Sparks



Scoones

Scoones holds a major in economics and a minor in French studies from the University of Florida. He graduated from Vermont Law School with a J.D. and Master of Environmental Law and Policy. In law school, he was a member of the Vermont Law Review. His article analyzing water rights and Fifth Amendment taking claims was published in the Seattle Journal of Environmental Law. After law school, he clerked for the Honorable Daniel A. Boucher of Montana's 12th Judicial District Court in Havre. He then served as a water master with the Montana Water Court before joining Lund Law. His practice emphasizes water and property rights. He is admitted to the state bars of Montana and Vermont.

Sparks and Scoones can be reached at Lund Law at

406-586-6254 or at their respective emails: sparks@lund-law.com and scoones@lund-law.com.

Lund Law is a well-established firm in Bozeman which focuses on property rights, eminent domain, easements, water rights (including due diligence for water rights in real estate transactions), wind and solar leases, environmental law, issues involving the Forest Service or Bureau of Land Management, business transactions, litigation, entity formation, and estate planning. For more information, please visit Lund Law's website at www.lund-law.com.

Pierce, Overstreet-Adkins join as associates at Moulton Bellingham

Moulton Bellingham PC is pleased to announce that Juli M. Pierce and Ariel Overstreet-Adkins have joined the firm as associate attorneys.

Pierce is an experienced litigator. She has tried numerous jury and bench trials. She served as the Chief Deputy County Attorney under Yellowstone County Attorney Scott Twito from January 2015 until she left the office in June 2017. She spent 13 years as a criminal prosecutor. She practices primarily in the areas of family law and civil litigation.



Pierce



Overstreet-Adkins

Pierce graduated from Skyview High School in 1995 and graduated with honors from Gonzaga University with a BA in Criminal Justice and Sociology. After college, she worked as a social worker with Child and Family Services in Billings. She has a law degree from the University of Washington School of Law. She served as the President of the Yellowstone Area Bar Association and now serves as the Board Chair for the State Bar of Montana Board of Trustees.

Overstreet-Adkins focuses her practice primarily on civil litigation, agricultural law, water law, natural resource law, land use law, property law, real estate law, and estate planning. Ariel clerked for the Honorable Brian Morris, United States District Court for the District of Montana in Great Falls from August 2016 to July 2017. She clerked for Chief Water Judge Russ McElyea at the Montana Water Court in Bozeman during the summer of 2015.

Overstreet-Adkins graduated from Reed Point High School in 2002 and graduated from Princeton University with a BA in anthropology with honors in 2006. After college, She worked for the Montana Stockgrowers Association as communications director and lobbyist. She earned her law degree, with honors, from the University of Montana School of Law in 2016. She serves as vice president of the Montana Cowboy Hall of Fame & Western Heritage Center. She is a 2013 graduate of Leadership Montana.

Clark Fork Law Offices opens in Missoula, welcomes two new associates

Christopher D. Helmer, formerly of Ogg & Helmer Law Offices, is pleased to announce as of Jan. 1, 2016, he has transitioned the firm to Clark Fork Law Offices, PC, in Missoula. The firm's practice emphasizes personal injury, workers' compensation, and Social Security disability.

The firm has also announced that Cassie M. Meyer and Kristine L. Foot have joined as associate attorneys.

Helmer is a Montana native, and a graduate of the University of Montana three times over. He received his Bachelor of Arts in organizational communication in 1999, his Master of Public Administration in 2002, and his J.D. in 2002.

Helmer worked for Liberty Insurance Co. before joining Ogg Law Offices, which eventually became Ogg and Helmer Law Offices. Following the retirement of his partner in 2015, Helmer created Clark Fork Law Offices, PC. Helmer focuses on workers' compensation and personal injury.

Meyer joined the firm in September, 2016. Her practice emphasizes personal injury and Social Security disability.

Meyer is a 2016 graduate of the University of Montana School of Law. While in law school she studied abroad in Santiago, Chile, and was an active participant in numerous extracurricular activities. She was secretary of the Veterans Law Group, Military Legal Society, and the Criminal Law Student



Helmer



Meyer



Foot

Group. She was also an active member of OUTLaws, the Women's Law Caucus, and the Montana Innocence Project.

Meyer is admitted to practice in all Montana state courts and the U.S. District Court for the District of Montana.

Foot joined as an associate attorney in April, 2017.

Foot graduated with honors from the University of Montana School of Law in 1985. After graduation, she served as a law clerk to the Hon. Timothy Reardon, Montana Workers' Compensation Court. For the next many years, Foot practiced at Milodragovich, Dale and Dye, where she became that firm's first female shareholder. In 1994, She started her own firm, where she practiced until early this year, when she joined Clark Fork Law Offices, P.C.

Member News, next page

Mark your calendars!

The Alexander Blewett School of Law at the University of Montana invites you to participate in:

On-Campus Interviews Fall 2017

Interview 2L, 3L, and recent graduates for intern, law clerk, and associate positions during our semi-annual on-campus interview program.

To advertise a position and set up an interview schedule on our new career services management program, Networkx, please visit:

<https://law-umt.12twenty.com/hire>

If you prefer to have us manage your job posting, please complete the OCI posting form found here and return it to our office:

www.umt.edu/law/careerservices/employers/

Or contact Lori Freeman at

LawCareerServices@mso.umt.edu | 406.243.2698

October 5 - 6 & October 12 - 13

Alexander Blewett III
SCHOOL OF LAW
UNIVERSITY OF MONTANA

Member News, from previous page

Foot's practice is limited to representing disabled individuals in Social Security disability and supplemental security income cases. She is a longtime member of the National Organization of Claimants' Representatives and is the only attorney practicing in Montana who is board certified in Social Security disability advocacy.

Clark Fork Law Offices, PC, is located at 202 W. Spruce St., Missoula, MT 59802. You may email Helmer at chris@clarkforklaw.com; Meyer at cassie@clarkforklaw.com; and Foot at kristine@clarkforklaw.com. All can be reached by phone at 406-728-0168. For more information, please visit www.clarkforklaw.com

Braun appointed general counsel at State Fund

Kevin Braun has been appointed as vice president, general counsel for Montana State Fund. In this role he will oversee Montana State Fund's legal department, including the special investigation unit and insurance compliance functions. In addition, Braun will provide advice and counsel to MSF's executive team, departments and the board of directors. He will also lead MSF's legislative duties and ensure compliance with the legal requirements applicable to MSF.



Braun

Braun is a graduate of Montana State University with a BA in political science and received his J.D. from the University of Montana School of Law. He served as a law clerk for the Workers' Compensation Court from 1992 to 1993, was a staff attorney with the Montana Department of Labor and Industry from 1993 to 1995 and served as chief legal counsel for the Department of Labor and Industry from 1995 to 2005. He

joined the State Fund in 2005 as a claims attorney providing legal advice and training to staff in addition to representing the State Fund before the Workers' Compensation Court and Montana Supreme Court. In 2006, Braun was promoted to assistant general counsel.

APPOINTMENTS

Gov. Steve Bullock has recently appointed the following Montana attorneys to state boards and committees:

Montana Achieving a Better Life Experience (ABLE) program oversight committee

Chief Deputy Attorney General Jon Bennion, Clancy, appointed for his experience working on behalf of disabled individuals.

Statewide Public Safety Communications System Advisory Council

Attorney General Tim Fox, Helena

Criminal Justice Oversight Council

Majel Russell, Billings. Qualification: member of a

state-recognized or federally recognized Indian tribe located within the boundaries of the state of Montana who has expertise in criminal justice. Russell is an enrolled member of the Crow Tribe and an attorney at Elk River Law Offices.

Robin Turner, Helena. Qualification: representative of Crime Victims. Turner is the Public Policy and Legal Director for the Montana Coalition Against Domestic and Sexual Violence.

Board of Environmental Review

John DeArment, Missoula. Qualification: experience or background in hydrology. DeArment is the CEO of Garlington, Lohn & Robinson.

Chris Tweeten, Missoula. Qualification: attorney. Tweeten operates a law practice in Missoula representing state and local governments.

Board of Pardons and Parole

Kristina Lucero, Missoula. Lucero is an assistant public defender, and a former tribal prosecutor for the Confederated Salish and Kootenai Tribes.

The following are among Attorney General Tim Fox's appointees to the child Abuse and Neglect Commission:

The Honorable Katherine "Kitty" Curtis, retired state district court judge, Flathead County.

Scott Pederson, , contract deputy county attorney for Carbon County and guardian ad litem, 13th Judicial District.

HONORS



Gray



Mitchell



Bender

3 from Holland & Hart in Billings named 2018 Lawyer of the Year

Holland & Hart has announced that Best Lawyers has named three partners in its Billings office as a 2018 Lawyer of the Year, and a total of eight attorneys from the Billings office are included in the 2018 edition of Best Lawyers.

Earning Lawyer of the Year recognition were Jeanne Matthews Bender, labor law – management; Kyle Gray, appellate practice; and W. Scott Mitchell, litigation – environmental.

Also included in 2018 Best Lawyers were Shane P. Coleman, Charles W. Hingle, Michael Monson, Elizabeth A. Nedrow, and Laurence W. Peterson.

Butte's Carlson installed as ABA president-elect

Newly installed American Bar Association President-Elect Robert M. Carlson pledged in an address to the ABA House of Delegates that he will fight to protect the American justice system and the principle of equal justice for all.



Carlson

Carlson, a partner at Corette Black Carlson & Mickelson law firm in Butte and a past president of the State Bar of Montana, was installed as president-elect Aug. 15 at the ABA's Annual Meeting in New York.

"We stand for justice for all," Carlson said. "We are the defenders of the constitution and the protectors of the American judicial system. ... The work of the ABA is now more important than ever before."

Carlson said the ABA must work to regain the public's trust in the judicial system and to make sure that our courts are open, accessible and fair to all. These, he said, shouldn't be partisan issues.

"These are rule of law and access to justice issues that should resonate with every lawyer in America," he said. "It benefits all lawyers and all judges, and most importantly, the

public we serve."

Carlson will become president of the 400,000-member organization in August 2018. His civil trial and mediation practice primarily involves insurance defense, products liability and insurance coverage.

Also at the Annual Meeting, Hilarie Bass became ABA president for 2017-2018. Carlson noted that while he is a partner in a six-attorney firm, Bass is co-president of Miami's Greenberg Traurig law firm, one of the largest firms in the U.S. He said that fact serves as a reminder that the ABA is a place for every lawyer to belong.

Only one Montanan in history has served as ABA President, William J. Jameson from 1953-1954. Jameson later became chief judge of the U.S. District Court for the District of Montana.

Carlson will be an honored guest and give a plenary CLE presentation at the State Bar of Montana's Annual Meeting Sept. 20-22 at Fairmont Hot Springs in Anaconda.

Carlson's speech to the House of Delegates is posted in the State Bar News section at www.montanabar.org, and at <https://goo.gl/9Mkd9h>.

Alexander Blewett III

SCHOOL OF LAW
UNIVERSITY OF MONTANA

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Missoula, MT

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| • Charles Redd | • Jeremy Miller |
| • James Walker | • Pippa Browde |
| • Nancy Rousch | • Martin Burke |
| • Jonathan Byington | • Elaine Gagliardi |
| • Ron Aucutt | • Jonathan Blattmachr |



Applicants sought for seat opening on Montana Supreme Court

The Judicial Nomination Commission on Aug. 28 opened the application process for the Supreme Court justice position that will become vacant in January.

Justice Mike Wheat announced in July that he will be retiring effective Dec. 31.

The commission is now accepting applications from any lawyer in good standing who has the qualifications set forth by law for holding the position of associate justice. The application form is available electronically at the commission's web page.

Applications must be submitted electronically as well as in hard copy. The deadline for submitting applications is **5 p.m., Friday, Sept. 29**. The commission will announce the names of the applicants thereafter.

The public is encouraged to contact commission members

regarding the applicants during the public comment period, which will begin Monday, Oct. 2, and close Wednesday, Nov. 1.

After reviewing the applications, receiving public comment, and interviewing the applicants if necessary, the commission will forward the names of three to five nominees to Gov. Steve Bullock for appointment. The position is subject to election in 2018. The successful candidate will serve the remainder of Justice Wheat's term, which expires in January 2023. The annual salary for the position is \$144,066.

Judicial Nomination Commission members are District Judge John C. Brown of Bozeman; Janice Bishop of Missoula; Karl Englund of Missoula; Elizabeth Halverson of Billings; Hal Harper of Helena; Lane Larson of Billings; and Nancy Zadick of Great Falls.

Rieger appointed 7th Judicial District judge

Gov. Steve Bullock in August appointed former Dawson County Attorney Olivia Cherlynn Rieger as 7th Judicial District judge.

Rieger was sworn in to office in mid-August. She replaced the Honorable Richard Simonton of Glendive, who retired effective July 14.



Rieger

Rieger was elected Dawson County Attorney in 2010. She previously served as Regional Deputy Public Defender for the Office of the State Public Defender in Glendive where she was named Public Defender of the Year in 2009.

She is a graduate of Belle Fourche High School in Belle Fourche, South Dakota, received her B.S. from Black Hills State University in Spearfish, South Dakota, and her Juris Doctorate from the University of South Dakota Law School.

The 7th Judicial District covers Dawson, Wibaux and Prairie counties.

The Judicial Nomination Commission in July nominated Rieger, along with Cynthia Thornton of the Office of the Public Defender in Glendive and Matthew Robertson of the Cascade County Attorney's Office.

Comment sought on Yellowstone County District judge applicants

The Judicial Nomination Commission has received applications from seven attorneys to fill a 13th Judicial District

(Yellowstone County) judge seat.

The seven are vying to replace the Honorable Russell C. Fagg, who is retiring effective Oct. 13. The applicants are:

- Charles Brentley Brooks, Billings city attorney
- Jessica Teresa Fehr, Moulton Bellingham, Billings
- Donald L. Harris, Harris, Gannett & Varela, Billings
- Jacquelyn Marjorie Hughes, Hughes Law, Billings
- Yvette Karen Lafrentz, standing master, 13th Judicial District, Billings

- Joseph Mathieu Raffiani, Raffiani Law Firm, Billings
- William John Speare, Speare Law Firm, Billings

The commission is now soliciting public comment on the applicants. Comments will be accepted until 5 p.m. on Sunday, Sept. 10. The public can view the applications at the commission's web page.

The commission accepts comment in writing (email or paper) or via telephone. The comments, which become part of an applicant's file, will be posted on the commission's web page and forwarded to Gov. Steve Bullock. Public comment may be submitted to:

Judicial Nomination Commission, c/o Lois Menzies, Office of Court Administrator, P.O. Box 203005, Helena, MT 59620-3005; mtsupremecourt@mt.gov; or 406-841-2950.

The commission will forward the names of three to five nominees to the governor for appointment after reviewing the applications, receiving public comment, and interviewing the applicants if necessary. The position is subject to election in 2018. The successful candidate will serve a six-year term.



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FEATURED TRIAL PRESENTERS

Presiding Judge

Hon. Dana L. Christensen *United States District Court for the District of Montana*

Plaintiff Team

Alexander (Zander) Blewett, III *Hoyt & Blewett, PLLC*

Michael D. Cok *Cok Kinzler, PLLP*

Donald L. Harris *Harris, Gannett & Varela, PLLC*

Sydney E. McKenna *McKenna & Starin, PLLC*

Peter W. Riley *Schwebel, Goetz & Sieben, P.A.*

Renée E. Rothauge *Markowitz Herbold, PC*

Defense Team

Kathleen L. DeSoto *Garlington Lohn & Robinson, PLLP*

Wilma J. Gray *McNamara, Ney, Beatty, Slattery, Borges & Ambacher, LLP*

Mikel L. Moore *Moore Cockrell Goicoechea & Johnson, P.C.*

Randall G. Nelson *Nelson & Dahle, P.C.*

Dominique A. Pollara *Pollara Law Group*

Linda Star *Lewis Brisbois Bisgaard & Smith, LLP*

The Foundation of the American Board of Trial Advocates has requested approval from the Montana Commission on Continuing Legal Education.

Visit ABOTAMastersinTrial.org to register!
Discounted rates are available to groups of 3 or more.

Enhanced Modest Means program poised to help fill in justice gaps

By Katie McFeeters
Justice for Montanans AmeriCorps

If you asked me a year ago from today if I would have any interest in affordable legal services, I would probably tell you I honestly do not know anything about the topic. However, as my AmeriCorps service with the State Bar of Montana's Modest Means Program has concluded, I can now say it is a topic that fascinates me and something I would consider pursuing in the future.

For the past year, I have been the Justice for Montanans AmeriCorps member serving with both the State Bar of Montana and Montana AAA Legal Services. I split my time between these two organizations in an effort to serve low- to moderate-income Montanans so they can advocate for their legal rights and increase access to justice. The bar's Modest Means program has been influential in my discovery of interest in affordable legal services.

Modest Means is a program with great potential to serve a population of Montanans left behind by traditional legal services because they have too much income to qualify for free legal aid, but also cannot afford a full-cost attorney. That is where Modest Means fills the justice gap: if an individual doesn't qualify for Montana Legal Services Association help but is under 200 percent of the federal poverty level, there is a conflict of interest for that client, or MLSA is unable to assist them, these clients are referred to me at the State Bar. I match them up with participating attorneys in our program who are willing to take reduced-fee cases.

Practice areas the program covers include divorce, custody/visitation issues, simple wills, adoptions/guardianships, immigration, powers of attorney, name changes, consumer, landlord/tenant issues, and bankruptcy. We assist clients all over



Katie McFeeters, left, recently completed a term as a Justice for Montana AmeriCorps member, serving with the State Bar of Montana and Montana AAA Legal Services. McFeeters dedicated much of her term to working with Equal Justice Coordinator Ann Goldes Sheahan, right, on enhancing the bar's Modest Means program.

the state to the best of our abilities thanks to the wonderful attorneys who make the program possible. In my AmeriCorps term alone, we have referred over 250 clients to our participating attorneys.

Although we are proud of the approximately 20 percent increase in referrals from 2015-2016 term to the 2016-2017, we want this program to continue to improve and flourish each year. That is why my term was dedicated to enhancing the program. My supervisor, the bar's Equal Justice Coordinator Ann Goldes-Sheahan, and I initiated an expansive outreach campaign for a much needed update of our attorney list. In addition, we developed a policies and procedures manual, created a follow-up system to be instituted next term, and are completing the process of updating our forms and documents for the program.

Want to help?

If you are interested in being a part of the State Bar of Montana's Modest Means program, send an email to ModestMeans@montanabar.org. You can find more information about the program on page 21.

It has been a worthwhile experience serving with the Modest Means program. I look forward to passing on the program to our next Justice for Montanans AmeriCorps member who will focus on expanding the program in terms of practice areas and recruitment of attorneys. I, on the other hand, will be headed back to my hometown of Philadelphia to pursue a career in legal services and hope to attend law school in the near future. I want to continue bridging the justice gap in Philadelphia and hope to do so through affordable legal services.

Proposed resolution calls for State Bar to oppose efforts to split 9th Circuit Court of Appeals

A resolution to oppose the passage of any bill in the Congress of the United States restructuring the United States Court of Appeals for the Ninth Circuit has been proposed for the State Bar of Montana's 2017 Annual Meeting.

The resolution is one of three that have been proposed for a vote of members at the Annual Meeting.

The 9th Circuit is the largest of the federal appeals court circuits, encompassing nine Western states, including Montana, as well as Guam and the Northern Mariana Islands.

Many congressional Republicans have long favored splitting the Ninth Circuit, arguing that it is oversized and overburdened, and criticizing its perceived liberal tendencies.

Sen. Jeff Flake, R-Ariz., has spearheaded the latest effort, holding a series of public hearings on the topic in August.

Ninth Circuit Chief Judge Sidney Thomas has said he opposes splitting up the Ninth Circuit because, in part, it would cause an increase in taxpayer costs because the courts would need more courthouses, law libraries and staff.

He also cites technological advancements the Ninth Circuit has made, creating an effective system for triaging filings for

any legal defects and has decreased the time it takes to process cases, saying a split would have negative impacts on Montana.

The American Bar Association's House of Delegates passed a similar resolution opposing a split of the Ninth Circuit.

Two other resolutions have been proposed for members to vote on at the State Bar of Montana's 2017 Annual Meeting at Fairmont Hot Springs. They are:

- A resolution calling for the funding of the Montana Legal Services Association; and

- A resolution thanking the members of the Silver Bow County Bar Association for its generous contributions of time and talent to the 43rd Annual Meeting.

The bar's Past Presidents Committee must approve the proposed resolutions before they can go before the members for a vote. Resolutions that the committee approves will be voted on at the Awards Luncheon/Business Meeting at the Annual Meeting.

The proposed resolutions are posted on the State Bar's website, www.montanabar.org.

Texas gives OK for hurricane assistance from out-of-state lawyers

The Supreme Court of Texas has entered an order to allow any attorney not licensed to practice in Texas, but licensed and in good standing in any other jurisdiction of the United States, to provide legal assistance to individuals and entities affected by Hurricane Harvey.

This should help in the effort to recruit volunteer attorneys to address the need for legal services by the mounting number of flood victims. Lawyers may volunteer through programs

supported by the State Bar of Texas and the Houston Bar Association.

The Louisiana State Bar Association is currently monitoring the need for any mobilization of volunteers in that state and encourages Louisiana attorneys to support efforts in Texas. For a summary of information on national mobilization of legal relief efforts, visit the ABA Hurricane Harvey Relief resource page at americanbar.org.



'ART FOR JUSTICE'

Once again this year, there will be an Art for Justice silent auction at the State Bar's Annual Meeting, being held Sept. 20-22 at Fairmont Hot Springs in Anaconda. One of the pieces that will be auctioned is Matt Thiel's painting "Moon over Jumbo" (8 x 18 oil on panel), shown at left.

A full list of auction items will be included in the Annual Meeting brochure.

STATE BAR OF MONTANA
2017 Annual Meeting
September 20-22



FAIRMONT HOT SPRINGS

REGISTRATION INFORMATION

To register online

Register at www.montanabar.org. You'll need to log in to your State Bar account. Call 406-442-7660 if you have problems.

To register by mail

Registration must be postmarked or by September 15. If you use this form to register, include payment.

Refund/Substitution policy

Refunds are 75% if cancellation is 7 days or more before the seminar. Refunds are 50% if cancellation is less than 7 days. No refunds for cancellations on or after the date of the seminar. Cancellations or substitutions may be made by calling 406-447-2206.

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Firm/Business Name: _____

Address: _____

Phone: _____ **Email:** _____

Guest's Name: _____

Bar License Number: _____ (for CLE reporting)

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Helena, MT 59624
Questions? Please call or email
mcaprara@montanabar.org
406-447-2206

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Admitted after 2014, Gov't employees, nonmembers	\$400
Paralegal Section members	\$275
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\$ _____

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Alan Joscelyn, who recently retired after over 40 years as a lawyer, is a winner of the 2017 George L. Bousliman Professionalism Award.

STARTING A NEW CHAPTER

Joscelyn says Bousliman Award recognition is a nice way to close the book on career

By Joe Menden

Alan Joscelyn thought he had closed the book on his 40-plus-year career in law when he stepped down earlier this year after a term as Attorney General Tim Fox's chief deputy.

So it came as quite a surprise to find out several months later that he would be a 2017 recipient of the State Bar of Montana's George L. Bousliman Award.

"I'm very appreciative," Joscelyn, who has since started a new chapter on his life as a legal fiction writer, said of the Bousliman Award recognition. "It means a lot. It's a very nice way to wrap up a career in what I always thought was a rough and tumble business."

Fox, Joscelyn's longtime friend and former partner at the Helena firm Gough, Shanahan, Johnson and Waterman, nominated him for the Bousliman.

Fox said he first met Joscelyn when he began working for the Montana Board of Oil and Gas Conservation in 1990, and he was immediately impressed by his professionalism, negotiation skills and knowledge of the law.

"Years ago, I came to the realization that Alan is not an attorney because he seeks fame or fortune," Fox wrote in his nomination letter. "No, Alan is an attorney because he loves the law, he loves solving problems, and he loves seeing how good laws, administered by good and competent people, can make our community, state and nation a better place for all, particularly for the disenfranchised, the disabled, and the disadvantaged."

Fox is far from alone in his appreciation for Joscelyn. His nomination received an outpouring of support from a long list of Joscelyn's former colleagues at both the Department of Justice and Gough, Shanahan and others from around the state, many of whom called him their mentor.

Joscelyn, page 22



Courtesy of the Bozeman Daily Chronicle/ Adrian Sanchez-Gonzalez

Jonathan Motl, former Montana political practices commissioner, stands in front of the Capitol in a 2015 file photo.

CIVILITY UNDER FIRE

Motl honored for his professionalism in carrying out duties as Montana commissioner of political practices

By Joe Menden

When Jonathan Motl took over as head of the Montana Commission of Political Practices in 2013, he knew he was taking on a big challenge. The commission was faced with a huge backlog of cases to deal with – some of which were in danger of expiring due to statutes of limitation.

Motl wasn't prepared, though, for the notoriety he would face in the position – or the vitriol aimed directly at him.

Motl is being honored with the State Bar of Montana's 2017 George L. Bousliman Professionalism Award for

the way he conducted himself while carrying out that job. He will receive the award during the Awards Banquet Thursday, Sept. 21, at the bar's Annual Meeting at Fairmont Hot Springs.

Motl, who said he was surprised and honored to be receiving the award, said he thinks the large caseload he inherited at the commission was a big part of the reason he became a lightning rod for criticism. Every case involved a decision, he said, and each decision was an opportunity for criticism in the press from someone unhappy with it.

"I think the one thing I was able to do over four years is I remained civil," he said. "I think that's the way most lawyers prefer it to be handled."

Helena attorney Mark Mackin nominated Motl for the Bousliman Award, with Amy Hall, Mike Lamb and Tom Towe writing letters in support.

In his nomination letter, Mackin said Motl put

Motl, page 22

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10:30 - 11:30 am	Medical Damages (Part I)
11:30 am - 1:15 pm	MDTL Annual Membership Meeting Luncheon & Election of Board Members <i>Lunch on your own if not attending</i>
1:15-2:15 pm	Medical Damages (Part 2)
2:30 - 4:30 pm	Self-Care and Resilience for the Professional
4:30 pm	Reception: Hosted by the Alexander Blewett III School of Law, University of Montana



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Little-known VA benefit can make a big difference for some aging vets

Here's a riddle: When is a government benefit that pays for caregivers, assisted living and a nursing home not a benefit? When hardly any people know they're entitled to it.

– Susan Seliger¹

By Larissa Anderson, Natalie Black, Hannah Gilbert & Molly McCarty

I. INTRODUCTION

Veterans are afforded health care through the U.S. Department of Veterans Affairs (VA) as a benefit arising from their service to the nation.² The need for elderly assistance increases each day, but aging veterans do not receive free long-term-care services and support through the VA.³ So, like many non-veteran Americans, veterans are left to turn to private financial resources to cover long-term-care costs.

Fortunately, a need-based and tax-exempt VA benefit is available to help defray the high costs of long-term care for elderly wartime veterans and surviving spouses. Aid and Attendance (A&A) is a special monthly pension awarded to veterans entitled

Editor's Note:

Students in Professor Hillary Wandler's four-day veterans law course at the University of Montana's Blewett School of Law produced articles on various aspects of veterans law as a course project. This is the second of several of these articles to be published in the Montana Lawyer.

to the VA pension who need the regular aid and attendance of another person.⁴ The VA pension benefit is available to low-income veterans who have served during a wartime period.⁵ These eligibility requirements will be described in more detail in this article.

In 2006, the VA recognized A&A was underutilized and issued a news release to increase awareness.⁶ However, A&A is still not part of the general knowledge of the available VA benefits.⁷

The additional monthly A&A benefit payment can lessen the financial burden experienced by aging veterans and their spouses and children. Many elder law attorneys and financial planners

are unaware of this benefit, but knowledge of A&A would make a difference for a client who is an eligible veteran.⁸

This article discusses the relevance of A&A to Montana Veterans, offers an overview of the eligibility requirements for the A&A pension, and provides a practical guide to assisting a Montana veteran in making a successful claim for A&A. Potential changes to the VA pension eligibility rules and its effect on A&A will also be covered.

II. DISCUSSION

A. Why the Aid & Attendance benefit matters for Montana's veteran population

For Montana's veterans, A&A is an especially relevant benefit. Wartime veterans age 65 or older may qualify for A&A.⁹ Veterans who are totally or permanently disabled or who live in a nursing home and receive skilled nursing care can also qualify.¹⁰

Montana ranks in the top three states for veterans per capita,¹¹ and nearly half of the state's 99,000 veterans are 65 or older.¹² Within the next 10 years, more than 19,000 more veterans in Montana will turn 65.¹³

Although a comprehensive evaluation of the elder Montana veteran population is not available, related statistics provide some context about this subset population. Just over 53 percent of Montana veterans served during World War II, the Korean War, or the Vietnam War.¹⁴ The VA reports that 21,326 Montana veterans received disability compensation in 2015 and 1,402 received a VA pension.¹⁵

This data suggests that Montana's veteran population is older, served during wartime, and could need long-term care at greater rates than the general state population. The characteristics of elder Montana veterans link directly to the eligibility requirements for A&A, as will be detailed in the following section.

The numbers of Montana veterans eligible for and those currently receiving A&A is unavailable. However, with 1,402 Montana veterans receiving a VA pension, it is likely many of these veterans would also qualify for A&A. In addition, 8.8 percent of Montana veterans lived at or below the poverty line in 2015.¹⁶ These numbers indicate that many Montana veterans could be eligible for the need-based A&A when long-term care becomes necessary.

The costs of long-term-care services in the United States regularly exceed an individual's retirement savings.¹⁷ Long-term-care services include those that occur in the home, at a nursing home, or at a community service organization.¹⁸ On average, an individual's long-term care will cost \$138,000.¹⁹ In consideration of these high costs and the unique characteristics of Montana's veteran population, Montana attorneys should have a basic understanding of the eligibility requirements for A&A and the procedure to pursue these benefits.

B. Aid & Attendance: A special monthly pension

A&A is one of the VA's special monthly pensions, which may be awarded to a veteran, or surviving spouse of a veteran, in addition to the basic pension that a veteran may receive based on need.²⁰ This additional pension allows veterans who require regular aid from another person with daily personal needs and medication dosing to receive supplemental monthly monetary

benefits.²¹ For a quick answer on whether your client may qualify for A&A, see VeteranAid.org, a nonprofit organization that seeks to increase awareness of A&A.²²

To qualify for A&A, an individual must first qualify for the basic pension, and must be in a position where they require the assistance of "another person to perform the personal functions required in everyday living."²³ This can be established by:

- Showing the claimant to be blind or nearly blind;
- Proving that the veteran is a patient in a nursing home due to mental or physical incapacity; or
- Showing that the claimant is unable to care for himself or herself without regular need of aid and attendance (this does not require a constant need, just a regular need).²⁴

In addition to the increased pension, veterans granted A&A are also entitled to cost-free medications. The VA will furnish drugs and medicines to A&A pensioners, whether ordered by a VA physician or a non-VA physician.²⁵

Perhaps the biggest hurdle to obtaining A&A is ensuring that a veteran is entitled to the basic VA pension, because of the amount of procedural paperwork required to apply for pension benefits. Veterans need advocates to guide them through this burdensome process.

C. Basic VA Pension Requirements

Entitlement to the VA basic pension is a prohibitive threshold to receiving A&A. This section will delve further into the eligibility criteria for pension, particularly the financial need requirement, as it is the more difficult requirement to meet. Basic pension is available to a veteran who:

- Was discharged from service under other than dishonorable conditions;
- Served 90 days or more of active service, with at least one day during a period of war;
- Has a net worth below the limitations;
- Has countable income below the maximum annual pension rate (MAPR); and
- Is at least 65 years of age OR produces evidence of a permanent and total non-service-connected disability.²⁶

The VA currently recognizes the following wartime periods to determine eligibility for pension benefits:

- Mexican Border Period (May 9, 1916 – April 5, 1917);
- World War I (April 6, 1917 – November 11, 1918);
- World War II (December 7, 1941 – December 31, 1946);
- Korean conflict (June 27, 1950 – January 31, 1955);
- Vietnam era (February 28, 1961 – May 7, 1975 for veterans who served in the Republic of Vietnam during that period; otherwise August 5, 1964 – May 7, 1975); and
- Gulf War (August 2, 1990 – through a future date to be set by law or Presidential Proclamation).²⁷

Many veterans will satisfy the service requirements but the financial need requirements may be an obstacle to some. Fortunately, there are available exclusions, noted below, that may help a veteran with a better economic situation qualify for pension benefits. There are two financial requirements to pension benefits: the net worth test and the income test.

1. Net Worth Test

There is currently no bright-line test for determining a

claimant's eligibility based on net worth. "If a claimant's assets are sufficiently large [enough] that the claimant could live off these assets for a reasonable period of time," the VA is instructed to deny the claimant for excessive net worth.²⁸ Generally, an estate over \$80,000 will be scrutinized by the VA to determine if the claimant's net worth is too excessive to qualify.²⁹ The VA will look at the claimant's life expectancy, countable income, number of dependents, potential rate of depletion, liquidity of the assets, and unusual medical expenses.³⁰

There are exclusions to a claimant's net worth for a personal residence with a reasonable lot area and personal effects.³¹ There is currently no look-back period or asset-transferring penalty, like those that affect Medicaid qualification, that would prohibit a veteran from transferring assets in order to qualify, although this may change in the future as will be discussed below.

2. Income Test

The VA counts all income, unless specifically excluded in the regulations, and the veteran's countable income must not exceed the applicable MAPR.³² For example, the current MAPR for a veteran without a spouse or dependents is \$12,907.³³

While there are several exclusions, the most important to note is the exclusion for medical expenses. Unreimbursed medical expenses can be deducted from countable income if such expenses were incurred on the veteran's behalf, paid by the veteran within 12 months of the annualization periods, and such expenses exceeded 5 percent of the applicable MAPR.³⁴

The scope of medical expense deductions from countable income is broad; consult the VA's Adjudication Procedures Manual for a list of qualifying deductible medical expenses and sources for such medical expenses.³⁵ The medical expense deduction is important to potential A&A claimants because their income can be reduced by the amount spent on their medical care, making it easier to get below the MAPR threshold.

D. The tools for representing a veteran in a claim for Aid & Attendance

Although applying for A&A is not in and of itself more complicated than applying for any other VA benefit, the VA requires additional qualifications to represent a veteran in making claims for benefits. Once accredited, an advocate will need to work closely with the veteran in compiling the information necessary for a successful A&A claim.

1. VA Accreditation for Advocates

In order to represent a veteran before the VA, including making requests for A&A, an advocate must be accredited.³⁶ (A brief overview of the accreditation process is shown in the graphic on this page.) The VA Office of General Counsel accepts applications for accreditation on VA Form 21a. This form may be found on the VA's website.³⁷ Although a lay-person may also apply to be an advocate, the efficacy of having an attorney advocate assist a veteran is undeniable — statistics show the denial rate for a Board of Veterans' Appeals claim drops from the 24.2 percent average rate to 17.7 percent when an attorney is involved.³⁸

There is a one-time exception to the accreditation rule, which provides that any person may help a veteran with a claim one time without being accredited.³⁹ This even includes the veteran's family members. But this person must become accredited before

VA accreditation

An advocate must be accredited in order to represent a veteran before the U.S. Department of Veterans Affairs. Here's how to get accredited:



Step 1

Complete form 21a, filling out all portions. The form is available on the VA website.



Step 2

- Attach recently dated certificate of good standing from all state bars
- Attach detailed answers to specified questions on form 21a



Step 3

- Mail to: Office of the General Counsel (022D), 810 Vermont Ave NW, Washington, DC 20420
- OR fax 202-273-0197

Source: U.S. Department of Veterans Affairs

helping any other veteran after the one-time exception has been utilized.⁴⁰ An attorney does not need to be accredited to provide general legal advice regarding veterans' claims, but only an accredited attorney or agent may give any claim-specific advice.⁴¹

Regarding fees for representing a veteran, only accredited agents or attorneys may charge for services associated with representing veterans before an office where a claim originates or before the Board of Veterans' Appeals; furthermore, charges for services may not be rendered until after a decision on a claim has been issued.⁴² A contingency fee based upon the potential receipt of past-due benefits is generally acceptable, so long as the services billed align with the regulations.⁴³ There is a rebuttable presumption that an attorney with a fee agreement of 20 percent of the veteran's past-due benefits is charging a reasonable fee, whereas an attorney charging 33.3 percent or more for their services is deemed to be charging an unreasonable amount.⁴⁴ Note, however, that when using the one-time exception to assist a veteran with his or her claim, no fees for services rendered may be charged.⁴⁵

The key point to remember when assisting a veteran with an A&A claim is that the veteran is presumed to be a low-income individual. Thus, an attorney's primary goal when taking on a veteran as a client should be to aid a service member in acquiring earned benefits.

2. Applying for Aid & Attendance

First, a veteran wishing to apply for A&A will need to gather the following documents and complete the following forms:

- Discharge/Separation Papers – commonly referred



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to as DD-214 (these can be requested by filling out a Standard Form 180);

- Copy of marriage certificate;
- Copy of death certificate if spouse is filing;
- Copy of current social security award information;
- Net worth information;
- Proof of income, insurance, banking information, and employment history;
- Physician statement of current diagnosis and prognosis with physician contact information included; and
- List of all doctors and hospitals visited in the last year.⁴⁶

After gathering the information listed above, VA Form 21-527EZ and/or VA Form 21-534EZ for Special Improved benefits with Aid & Attendance must be completed. These forms can be found at www.vba.va.gov, and the instructions to file are included on these forms.⁴⁷ When mailing in applications, it is best to include a certificate of service to ensure delivery, keeping a copy of all documents filed, and all correspondence with the VA.⁴⁸ An eager practitioner should note that each application takes a significant length of time to process, and that the average wait time before a decision has been rendered is eight to ten months, while some cases take even longer.⁴⁹ However, the VA is required to give priority processing for pension claims of any claimant who is homeless, experiencing extreme financial hardship, terminally ill, or more than 85 years old.⁵⁰ The claimant should provide documentation, such as medical records, eviction notices, or collection notices from creditors, in addition to the above described documents.⁵¹

Assuming a veteran is already receiving the basic pension, the advocate need only seek an increase in benefits due to the veteran's change in status (i.e., he or she is now in need of regular aid and attendance). In this instance, no special form is required when applying for A&A—an advocate will simply notify the VA that the veteran is seeking entitlement to A&A.⁵² It is suggested that the advocate also submit a private physician's statement supporting the veteran's need for regular aid and attendance to support the increase in benefits.⁵³

E. The VA's proposed changes to Aid & Attendance

In 2012, the Government Accountability Office (GAO) examined the design and management of the VA's pension program to ensure that only veterans with financial need receive pension benefits.⁵⁴ In January 2015, responding to the GAO's report, the VA proposed a noteworthy regulation that would impose look-back and penalty periods for some asset transfers made prior to application for benefits. The intended effect of the changes is to maintain the integrity of needs-based benefit programs.⁵⁵ The proposals include:

- Instituting a 36-month look-back period prior to the date of application would apply to transfers made by the complainant or spouse;
- Subjecting a complainant to a net worth limit equal to the community spouse resource allowance established for Medicaid purposes; and
- Imposing a penalty period of up to 10 years if the complainant transferred assets that would have caused the

complainant to exceed the net worth limitation had the assets been retained.⁵⁶

Some organizations, including VeteranAid.org, have indicated that this proposal will go into effect in the first half of 2017; however, there is no official timeframe for implementing the proposal.⁵⁷ With this in mind, it may be best to try to obtain A&A now, rather than wait. Finally, a practitioner must ensure that he or she is aware of the effective regulations when assisting a veteran client seeking to obtain A&A.

III. CONCLUSION

Montana is one of the top-ranking states for veteran residents per capita, and the number of veterans reaching the age of 65 is continuously increasing. Although the A&A benefit is generally overlooked, the aim of this article is to increase the number of eligible veterans receiving their earned benefits to aid with the cost of long-term services. Advocates will find aiding a veteran with their claim to be a rewarding experience and an excellent opportunity to provide a pro bono service to someone who has earned it through their service.

Hannah Gilbert is class of 2017, and Larissa Anderson, Natalie Black and Molly McCarty are class of 2018 at the Alexander Blewett III School of Law at the University of Montana.

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55 Net Worth, Asset Transfers, and Income Exclusions for Needs-Based Benefits, 80 Fed. Reg. 3840 (Jan. 23, 2015) (to be codified at 38 C.F.R. pt. 3).

56 *Id.*

57 *Proposed Veteran's Admin. Reg. AO73 Update*, VETERANAID (Oct. 29, 2015) <http://www.veteranaid.org/blog/2015/10/29/proposed-veterans-administration-regulation-ao73-update/> (last visited Jan. 22, 2017).

58 *How to Apply for Aid and Attendance*, VETERANAID, <http://www.veteranaid.org/apply.php> (last visited Jan. 19, 2017).

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Joscelyn, from page 13

Among them is Jon Bennion, Joscelyn's successor as chief deputy attorney general. Bennion said that though he has been out of law school for 12 years, he knows he still has a lot to learn about the law. Joscelyn, he said, was always generous in helping him learn.

"Alan never hesitated to take time to explain an area of law to me, draw from his own experiences, and admit when he didn't know the answer to a question," Bennion wrote. "He always took time for me and other younger lawyers that could benefit from his perspective. The kind of mentoring that Alan provided was invaluable."

Others who wrote supporting letters are Stuart Segrest, Dale Schowengerdt, Rob Cameron, William L. MacBride Jr., Dennis Lopach, John North, Donald MacIntyre, K.D. Feeback, Holly Franz, Nathan Bilyeu and Julie Johnson.

Joscelyn said it was humbling and gratifying that those attorneys – all of whom he has great respect for – think he did a good job and took the time to say it.

When asked what professionalism as a lawyer means to him personally, Joscelyn paused and reflected on a question former University of Montana law school Dean Robert Sullivan asked him when he was entering law school in 1972: "Why do you want to be a lawyer?"

"I had to stop and think," Joscelyn said. "I said, 'I want to be in a position to help people with things they couldn't handle on their own.'"

"In a sense, that's what being professional is as a lawyer. You have to want to help, enjoy those people, and feel a real responsibility to them that you're doing everything you can and need to do to help them out."

Joe Menden is editor of the Montana Lawyer. You can reach him at 406-447-2200 or editor@montanabar.org.

Motl, from page 14

professional concerns ahead of personal gain when he took the COPP job, noting that he could have made more money with less stress had he remained as a partner at his former firm, Reynolds, Motl and Sherwood.

"I have known Jon for many years, and his commitment to the rule of law, public participation in government, and fair campaign practices has never wavered or to my knowledge, favored a particular ideology," Mackin wrote. "He behaved professionally and with restraint even when he was personally attacked and professionally nitpicked by legislators and others when he appeared before legislative committees or in court."

In her letter, Hall said Motl personifies professionalism, saying that years ago Motl inspired her to use her law degree to serve those who don't otherwise have a voice in the legal

system.

"Without Jon's professionalism, he would not have been able to endure the challenges that arose over his time in (the COPP) position," Hall said. "I can't think of any attorney more deserving of this award than Jon Motl."

While some who received sanctions for political practices violations were critical of Motl's decisions, his decisions have stood up to court challenges. He said that while he wouldn't say he felt vindicated by that, he did say he was proud of everyone who played a part in the process, from his staff and counsel who worked with him, to the judges and juries who heard the cases.

"Nobody flinched," Motl said. "Everybody who had a role played their role well. I'm proud to have been a part of it."

Joe Menden is editor of the Montana Lawyer. You can reach him at 406-447-2200 or editor@montanabar.org.

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Women's Law Section CLE to feature ABA's Grit Project training program

The Oct. 5 Women's Law Section CLE will feature training on one of the two key traits common among highly successful women lawyers — grit.

The seminar at Chico Hot Springs will include small group discussions using a training program created by the ABA Commission on Women in the Profession.

Each small group will include a justice or judge – women who have used grit and a growth mindset to reach their position.

CLE programming about recent legislation, intellectual property law, and ethics are also on the schedule. The seminar is approved for 6.5 CLE credits, including 2.0 Ethics pending.



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Your time at the podium is precious in oral arguments: Don't waste it

By: Michael Manning
Ritchie Manning LLP

Starting in law school, lawyers hear the same general advice for oral argument repeated over and over again. Start with “may it please the court.” Know your case and the record forward and backward. Stop speaking as soon as the judge starts to ask a question. Answer the judge’s question first, even if you would like to move on to a different point.

Those tips, and others like them, are just as true for appellate arguments as any other court proceeding, and you should be sure to follow them. But appellate arguments are also unique in several important ways. Foremost, your time will be extremely limited, especially in federal appellate courts. In the Ninth Circuit, you will almost always receive 10-20 minutes, which includes rebuttal time if you are the appellant. Accordingly, if you approach the argument in the same way you would an hour-long summary judgment hearing, you could end up sitting down before saying anything particularly meaningful. So here are a few suggestions to maximize the impact of your brief time at the podium.

Think of your presentation as a dialogue, not an argument. Your goal should be to engage the panel in a back and forth about the issues, not to simply give a speech. Not only is that approach infinitely more helpful for the judges, it can help ease the nerves for many lawyers. Having a conversation about a case you know well may seem a lot less intimidating than making a presentation to a multi-judge panel.

Get right to the issues. For your dialogue to be effective, it is essential to launch directly into the issues. Nothing will make an appellate panel’s eyes glaze over faster than a lawyer who starts by introducing co-counsel or clients, or by reciting the factual background. The judges simply don’t care who is sitting at counsel table or in the audience, and if they have any questions about specific facts, they will ask. They are there to decide the legal issues on appeal, so there is no reason to waste their time on anything else. To that end, carefully consider your opening minute or so. You usually will not have much time before you are interrupted by questions, so take the opportunity right out of the gate to tell the judges exactly what you think the case turns on and why you should win. In doing so, you may even be able to steer the first volley of questions in

the direction you would prefer.

Don’t resent the questions. Too often, lawyers leave an argument lamenting that all the questions left them unable to address everything they wanted to discuss. But that attitude ignores that oral argument is designed to assist the judges, not to give lawyers a platform. If the panel has a lot of questions about a certain topic, chances are that the judges either think it is important or need clarification. Either way, you should take the cue and ensure that they are satisfied, even if doing so means that you never get back to the precise points you wanted to make. After all, if those points were important, you (hopefully) made them in your brief.

Consider the context. When preparing for argument, consider the reality that that appellate courts are far more inclined to affirm than reverse. For appellants, that means that you cannot hide from difficult issues or unfavorable standards of review. For example, you do not stand to gain by rehashing

a compelling argument from your briefs on an issue reviewed *de novo* if you also need to win a tough issue reviewed for abuse of discretion. In at least some cases, it can be very effective to directly tell the court the easiest way it can affirm, and then tell it why it should not. The opposite is true for appellees, who should take advantage of the court’s inclination to affirm. Under the same scenario, an appellee might think about starting its argument with a statement like, “This Court can affirm on two independent bases and, regardless of Issue A, [Appellant] cannot overcome the abuse of discretion standard on Issue B.” Of course, the panel may eventually direct the appellee back

to Issue A, but it will have reminded the court that no matter how strong the appellant’s argument is on that issue, there is still an easy path to affirmance.

Here are cases originating in the District of Montana that resulted in published Ninth Circuit opinions from March 2017 through July 2017:

***United States v. Johnson*, 854 F.3d 1098 (9th Cir. 2017)**

Criminal. In cases involving a scheme to defraud, the Mandatory Victim Restitution Act allows a district court to order restitution for all persons directly harmed by the entire scheme; restitution is not confined to harm caused by the particular offenses for which the defendant was convicted.



***United States v. Seminole*, -- F.3d --, 2017 WL 3222926 (9th Cir. July 31, 2017)**

Criminal. Under *Wyatt v. United States*, 362 U.S. 525 (1960), neither the “adverse spousal testimony” privilege nor the “marital communications” privilege apply if the spouse is the victim of the defendant’s crime. Because *Trammel v. United States*, 445 U.S. 40 (1980) did not overrule *Wyatt*, as the defendant contended, the district court correctly compelled a domestic violence victim to testify in a case against her husband.

***Reed v. Lieurance*, 863 F.3d 1196 (9th Cir. 2017)**

Civil Rights. First, the district court improperly invaded the province of the jury by resolving factual disputes about whether a Gallatin County Sheriff’s deputy had probable cause to believe that: (1) the plaintiff’s presence at an observation point would likely obstruct a haze operation to herd buffalo into Yellowstone National Park; and (2) the plaintiff possessed the requisite specific intent. Because a reasonable jury could find for the plaintiff on either point, or find that the deputy issued an obstruction citation for reasons that do not satisfy the Fourth Amendment, the district court erred by granting summary judgment for the defendants on the plaintiff’s Section 1983 claim alleging unlawful seizure. Second, the district court erred by dismissing the plaintiff’s failure to train claim *sua sponte* for failure to satisfy Rule 12(b)(6) without providing the plaintiff notice and an opportunity to respond. Third, the district court erred in excluding the plaintiff’s expert witness for multiple reasons. It wrongly implied that an expert may facts outside the record only if those facts are judicially noticeable; it seemingly imposed a rule prohibiting expert testimony critical of the defendants’ job performance; and incorrectly read the expert report to criticize non-parties. Fourth, the district court “sandbagged” the plaintiff by granting judgment as a matter of law on his First Amendment claim on grounds wholly different from those argued by the defendants. The court also improperly resolved factual issues in granting the defendants’ Rule 50 motion. Fifth, the Ninth Circuit lacked jurisdiction over the defendants’ cross-appeal because the district court made no final decision about whether the defendants were entitled to attorney’s fees. Finally, the Ninth Circuit ordered the case reassigned to a different judge on remand.

***Pinnacle Restaurant at Big Sky, LLC v. CH SP Acquisitions, LLC* (In re Spanish Peaks Holdings II, LLC), 862 F.3d 1148 (9th Cir. 2017)**

Bankruptcy. Section 363(f) of the Bankruptcy Code, 11 U.S.C. § 363(f)—which authorizes a trustee to sell a debtor’s assets free and clear of third-party interests—does not conflict with section 365(h), 11 U.S.C. § 365(h)—which protects the rights of lessees when a trustee rejects an unexpired lease under which the debtor is the lessor. Under the specific facts of the case, Section 365 was not triggered because the leases at issue were not rejected before the sale of the debtor’s assets. Thus, as the district court held, the sale of the debtor’s property was free and clear of the leases.

United States ex rel. Cain v. Salish Kootenai College,

***Inc.*, 862 F.3d 939 (9th Cir. 2017)**

False Claims Act. Like states, Indian tribes are entitled to the interpretative presumption that “person” does not include sovereigns. Accordingly, the Confederated Salish and Kootenai Tribes are not “persons” for purposes of the False Claims Act, and the Act does not apply to them. The district court, however, incorrectly held that the question of whether Salish Kootenai College functions as an arm of the tribe and therefore shares the tribe’s sovereign immunity was controlled by *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006) (en banc). The correct test is set out in *White v. University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014). On remand, the district court should apply the *White* factors and allow appropriate discovery relevant to those factors.

***United States v. Brown*, 859 F.3d 730 (9th Cir. 2017)**

Criminal. By effectively ruling as a matter of law that the closed nature of an online bulletin board where members shared child pornography was irrelevant to the question of whether the bulletin board involved a “notice” or “advertisement” under 18 U.S.C. §§ 2251(d) and (e), the district foreclosed the jury from considering that issue. In doing so, the court violated the defendant’s Sixth Amendment right to present his defense, as well as his right to assistance of counsel. The error was structural and improperly relieved the prosecution of its burden to prove its case beyond a reasonable doubt. Judge Bybee “vigorously” dissented, urging that the majority opinion is inconsistent with *United States v. Grovo*, 826 F.3d 1207 (9th Cir. 2016), which held that posting child pornography on a closed, online bulletin board was — as a matter of “statutory interpretation” — an “advertisement” under § 2251(d).

***Sherrod v. United States*, No. 16-72178**

Habeas. A sentence reduction under 18 U.S.C. § 3852(c) (2) does not qualify as a new, intervening judgment that would permit a prisoner to file a second or successive 28 U.S.C. § 2255 motion without authorization from the Ninth Circuit.

***United States v. Pimentel-Lopez*, No. 14-30210**

Criminal. In convicting the defendant of possession of methamphetamine with intent to distribute and conspiracy to possess with intent to distribute, the jury found beyond a reasonable doubt that the amount of methamphetamine attributable to the defendant was less than 50 grams on a verdict form proposed by the government. At sentencing, however, the district court found that the actual amount attributable to the defendant was much higher and sentenced the defendant to 240 months, a sentence that would have required a significant upward departure had the court relied on the amount found by the jury. Because the panel held that district courts do not have the power to contradict the jury’s findings when the government proposes a jury verdict form asking the jury to make specific findings about the quantities of drugs at issue, it remanded for resentencing on the premise that the quantity of drugs involved was less than 50 grams. Additionally, the district court erred in assessing an organizer enhancement under U.S.S.G. § 3B1.1(c) because two witness hearsay statements

Appellate, next page

Appellate, from previous page

did not meet the “minimal indicia of reliability” standard, and absent those statements there was no evidence that the defendant exercised some control over others. Judge Graber, along with Judges Tallman, Bybee, Callahan, Bea, and Ikuta dissented from the denial of rehearing en banc, arguing that the district court’s finding as to drug weight was permissible under *Apprendi v. New Jersey*, 520 U.S. 466 (2000) and *United States v. Watts*, 519 U.S. 148 (1997) (per curiam).

Bassett v. Lamantia, No. 15-35045

Civil Rights. The Ninth Circuit certified the following question to the Montana Supreme Court: whether, under Montana law, the public duty doctrine shields a law enforcement officer from liability for negligence where the officer is the direct and sole cause of the harm suffered by the plaintiff.

Alliance for the Wild Rockies v. Bradford, No.

14-35786

Environmental. The U.S. Forest Service reasonably interpreted its own Forest Plan in concluding that constructing 4.7 miles of new roads in connection with a project in the Kootenai National Forest would not count toward “linear miles of total roads” because they will be blocked to prevent motorized access upon completion of the project. Accordingly, the district court correctly rejected the plaintiff’s claims under the National Forest Management Act, the Endangered Species Act, and the National Environmental Policy Act.

United States v. Rodriguez-Soriano, No. 15-30039

Criminal. Because the defendant’s original sentence was not “based on” a subsequently lowered guideline range — given that the initial guideline range played no role in the district court’s sentencing determination — the defendant was ineligible for a sentencing reduction under 18 U.S.C. § 3852(c) (2), even though the government concurred with the defendant that he should be resentenced.

Wildwest Institute v. Kurth, No. 14-35431

Environmental. The United States Fish and Wildlife Service (FWS) is not bound to list species as threatened or endangered under the Endangered Species Act based solely on the degree of threat they face as demonstrated by the assigned

Listing Priority Number. Instead, FWS may properly consider factors outside of those listed in the guidelines. Because FWS’ decision that listing the whitebark pine as a threatened or endangered species is “warranted but precluded” contained a sufficient “description and evaluation of the reasons and data on which the finding was based” to satisfy 16 U.S.C. § 1533(b) (3)(B)(iii), the district court correctly granted summary judgment in the government’s favor.

Blixseth v. Yellowstone Mountain Club, LLC, No.

12-35986

Bankruptcy/Sanctions. Rule 38 authorizes an award of “just damages,” meaning that the award of fees and costs under the rule in this case must be limited to the appellees’ direct fees and costs for defending against Blixseth’s frivolous appeal, and may not include the fees and costs incurred regarding the imposition of sanctions. Unlike Rule 38, however, 28 U.S.C. § 1927 is a fee-shifting provision allowing an award of fees-on-fees. Accordingly, the Appellate Commissioner correctly concluded that appellees’ attorney’s fees and non-taxable costs incurred in preparing statements regarding Blixseth’s lawyer’s response to a show cause order were awardable against the lawyer under § 1927.

United States v. Crooked Arm, No. 15-30277

Criminal. The defendants’ arguments that they admitted to only misdemeanor conduct during their plea colloquies and thus should not have been sentenced as felons was, at base, a challenge to their felony convictions. Because the court had already affirmed their convictions in an earlier decision, the law of the case foreclosed the defendants’ arguments and precluded the district court from evaluating the adequacy of their pleas while the case was on remand for resentencing. Judge Nguyen dissented, arguing that because the prior decision did not decide whether the defendants’ sentences were erroneous under *Apprendi v. New Jersey*, 520 U.S. 466 (2000), the law of the case doctrine did not preclude the current panel from deciding that issue.

Michael Manning is a partner at Ritchie Manning LLP. A former law clerk for Ninth Circuit Judges N. Randy Smith and Thomas G. Nelson, his practice focuses on appellate advocacy and complex litigation.



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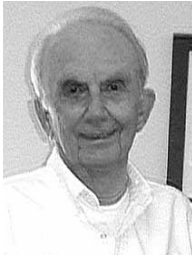
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Longtime client protection board chair dies at 85

James "Jim" Aiken passed away in Missoula, Montana on June 22, at the age of 85.

Jim was born in Glen Rock, Pennsylvania, on April 11, 1932. He received his B.A. from DePauw University in Indiana in 1954. Jim joined the United States Air Force Reserve that same year, and eventually became a jet pilot. He is reputed to be the last individual to have flown the F-106 fighter jet that was placed on display in Lions Park in Great Falls following its decommissioning. Jim spent 23 years in the reserves, retiring with the rank of lieutenant colonel.



Aiken

Jim's interests eventually took him to law school, and he received his J.D. from the University of Wisconsin in 1967. He was admitted to the Montana bar that same year, and began his practice with the Great Falls firm of Jardine, Stephenson, Blewett & Weaver, where he spent his entire legal career. His practice eventually emphasized the defense of physicians and hospitals in medical malpractice cases, where he earned a reputation as one of the best in his field. In addition to his expertise, Jim was acknowledged by his many colleagues as a consummate gentlemen.

He also volunteered his services to the State Bar of Montana's Client Security Board/ Lawyers Fund for Client Protection, serving from its creation in 1976 until his retirement in 2011, during which time he helped resolve a number of claims involving attorney trust accounts.

Jim also took time to pursue his interest in music, singing in the Montana Chorale for several years. He was a member of Opus IV, a sub-group of the Chorale, and that group appeared in numerous venues throughout the state. He took lessons and paid as much attention to the finer details of his music as he did the practice of law, charming audiences with his deep baritone voice.

Prior to his death, Jim expressed a preference for no obituary, summing up his life in these words: *"I loved and was proud of my two sons. I flew a few airplanes, I represented a few doctors in medical malpractice jury trials; I sang a few songs."* To his many friends and colleagues, that simply doesn't do him justice. He was an active participant in the defense of his nation, he upheld the highest standards of the legal profession, giving solace to many clients in the process, and he delighted the many audiences that had the opportunity to hear him sing. All in all, a life well lived.

May he now rest in peace.

Gwendolyn Jo Harsell

Gwendolyn Jo Harsell, 41, a lifelong resident of Missoula, passed away on Friday, June 9, after a long battle with mental illness. Gwen was a happy, joyful, loving, and active child. Gwen loved to climb things and mastered walking on the front yard fence at a young age and eventually became a Montana state champion for the Bitterroot Gymnastic Club in Missoula and competed in gymnastic meets in the U.S., Canada, and Mexico.



Harsell

Gwen attended Whittier and Meadow Hill grade schools. Graduated from Hellgate High School in

1994 and went on to graduate from the University of Montana School of Law in 2001. Gwen was a world traveler. She loved music, dancing, attending her sister's many performances and socializing with her lifelong friends.

In her late 20s, Gwen was diagnosed with schizophrenia, which cut short her law career. After 16 years of trying to quiet the voices, she took her life to find peace.

Gwen strived to follow her Christian faith, often sharing the good word with people who would listen. She loved to read the Bible and always said that God had something special for her.

Survivors include her loving parents, Rod and Toni Harsell of Missoula, sister Andrea Harsell.

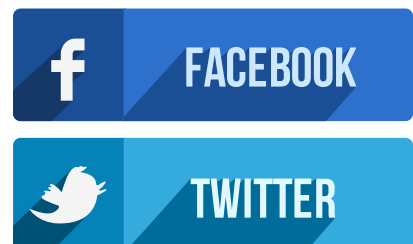
The family suggests that memorials be made to NAMI, National Association of Mental Illness.

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COUNTY ATTORNEY: The Wheatland County Attorney's Office is seeking a part-time (58.5%) County Attorney. Applicants must be licensed to practice law in the State of Montana. Successful applicant will be the only attorney in the office and must handle all matters required by statute. Salary is \$68,800 with applicable County benefits. Submit a letter of interest, curriculum vitae and two (2) Recent letters of recommendation to: Linda Hickman, PO Box 770, Harlowton, MT 59036; (406) 632-5651; or by email to wcatty@itstriangle.com

DEPUTY COUNTY ATTORNEY: The Roosevelt County Attorney's Office is seeking a fulltime deputy county attorney. Applicants must be licensed to practice law in the State of Montana. Advising the Board of County Commissioners will be a primary concern. The position will also require knowledge of criminal law. Salary is set at 85% of County Attorney's salary with applicable County benefits provided. Submit a letter of interest, curriculum vitae and two (2) recent letters of recom-

mendation to: Donna K. Reum, Legal Assistant, Roosevelt County Attorney's Office, 400 Second Ave. South, Suite A, Wolf Point, Montana 59201 or by email to dream@rooseveltcountry.org and rpatch@rooseveltcountry.org. Closing date: Open until filled

PROFESSOR OF LAW: The University of Montana's Alexander Blewett III School of Law is recruiting for a Professor of Law and Director of Blewett Consumer Law & Protection Program. Full-time academic year position beginning fall semester 2018. See full listing at jobs.montanabar.org. Apply online at <https://umjobs.silkroad.com/>

PROFESSOR OF LAW: The University of Montana's Alexander Blewett III School of Law is recruiting for one or more position(s) in Natural Resources/Environmental Law/Clinic Supervisor; Indian Law/Clinic Co-Supervisor. See full listing at jobs.montanabar.org. Apply online at <https://umjobs.silkroad.com/>

PARALEGAL/LEGAL ASSISTANTS

A HELENA-BASED LAW FIRM is seeking a qualified, motivated candidate for the full-time dual position of Legal Assistant and Association Assistant. Required qualifications include two or more years' experience in a law firm and/or legal assistant/paralegal college degree and/or NALS legal assistant/paralegal certification. Assistant will also be trained in managing several state associations involving member relations, dues and registration processing, conventions and board meetings coordination, publication creation, bookkeeping, and some in and out of state travel. Must be proficient in Word, Excel, Outlook, Publisher, Quickbooks, and Adobe Acrobat, and able to perform basic troubleshooting for office computers, phones, copy/scanner/fax machines, printers, and the internet. Must be EXTREMELY detail oriented, conscientious, personable, a quick learner, highly motivated, able to take direction, work in a high-stress environment, and require little supervision.

LITIGATION PARALEGAL: Crowley Fleck is recruiting for a litigation paralegal for its Billings office. This is a professional position responsible to assist attorneys with litigation support. Candidates must have good technical and interpersonal communication skills. Prior Legal Assistant or Paralegal experience is preferred. Please send resumes to Nanette Nolan, Human Resources Assistant, P.O. Box 2529, Billings, MT 59103-2529. No phone calls please.

PARALEGAL: Browning, Kaleczyc, Berry & Hoven is looking for an experienced paralegal to join our litigation team in the Helena office. This is a full-time position with salary DOE and a comprehensive benefit package. Ideal candidates will have at least 2 years of experience reviewing/summarizing medical records, documents for production, and discovery. Associates degree, paralegal certificate, or 4 year degree preferred. Please apply by sending a cover letter and resume to Stephanie Doyle at stephanie@bkbh.com or P.O. Box 1697, Helena, MT 59624 before Nov. 18. See full listing at jobs.montanabar.org.

PARALEGAL: Do you want a challenging career that is supported by a great team? Do you value personal development, customer service, team success and raving clients? Are you looking to work with a great, hard-working team where you will expand your skills and knowledge within the industry? Silverman Law Office is seeking an experienced

and passionate full-time paralegal to strengthen our Helena or Bozeman team. As a member of our team, you will assist attorneys and clients with contracts, probate, estate planning, business, and transactional matters. This position requires expertise in use of Microsoft Word and Excel, as well as outstanding proofreading and writing skills. The right candidate must possess knowledge of legal procedures, organizational skills, ability to prioritize workflow assigned by numerous team-members, and the ability to work independently. Paralegal Degree, NALA, other paralegal certification, or work equivalent is preferred. We offer a fantastic compensation and benefits package. Please send a resume, cover letter, and writing sample to Julie@mttaxlaw.com.

PARALEGAL: Disability Rights Montana seeks to hire an experienced Paralegal. The Paralegal works under the supervision of the Attorney Work Group to support and assist staff attorneys to carry out the legal priorities, objectives, and casework of the agency. Applicant must be self-motivated, have the ability to problem solve through research, demonstrate proficient writing skills, have fluent computer knowledge, and be able to communicate effectively with people with disabilities, family members, and providers. Send letter of interest and resume to: Kelli Kaufman, Director of Finance and Administration, 1022 Chestnut St. Helena, MT 59601. See full listing or apply electronically at jobs.montanabar.org.

ATTORNEY SUPPORT/RESEARCH/WRITING

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

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

OFFICE SPACE/SHARE

LOOKING FOR ATTORNEY to share a fully furnished office, receptionist and the option of legal secretary in downtown Helena office. This thirty year established law firm is moving downtown into a larger office on 6th Avenue (street level). The office is within walking distance of the Federal and County Court Houses. Contact: jane@hullmtlaw.com

KALISPELL: Existing 6-member general practice law firm in Kalispell seeking attorney(s) to share office space and staff or possible lateral merger. Contact dwh@kvhlaw.com.

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

MEDIATION

MEDIATION AND ARBITRATION SERVICES: Please contact Carey E. Matovich, Matovich, Keller & Murphy, P.C., Billings, MT, 406-252-5500, or email at cmatovich@mkmfir.com.

AVAILABLE FOR MEDIATION AND ARBITRATION: Brent Cromley, Of Counsel to Moulton Bellingham P.C., Billings, 406-248-7731, or email at brent.cromley@moultonbellingham.com.

CONSULTANTS & EXPERTS

APPRAISALS: DIL Appraisals, provides personal property appraisals to International Society of Appraisers (ISA) standards and according to the Uniform Standards of Professional Appraisal Practice (USPAP) for Fine Art, Antiques and Residential Contents for Estate Tax and Donation; Equitable Distribution for Estate Planning, Dissolution of Marriage; Insurance, Damage Claims, Bankruptcy and Expert Witness. Contact Dorothy Long, ISA AM, dorothy@dilappraisals.com, www.dilappraisals.com, 954-336-5458 in Billings, MT.

CONSTRUCTION EXPERT: Over 25 years residential and commercial construction experience. Expert services include bid or project document and plan reviews, onsite inspections for code and/or specification compliance or deficiencies, written reports, consultations, and in-person testimony. Work history includes extensive construction and legal experience - large firm construction management, small firm business ownership, and legal firm paralegal work and practice administration. For CV, fee schedule, references or other information call 406-855-1823 or email 406.cbms.llc@gmail.com.

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

ARCHITECTURAL EXPERT, FORENSIC INVESTIGATION & ANALYSIS: 43 years architectural experience. Specializing in Contract Administration; Specifications; and Architect / Owner /Contractor relationships. Extensive knowledge of building systems, materials, construction methods; Accessibility Regulations and Standard of Care; and forensic architectural investigation. Provides consulting and expert witnessing services. Attorney references upon request. Frank John di Stefano, PO Box 1478, Marion, MT, 59925, Phone: 1-406-212-7943.

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

EVICCTIONS

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

WANT TO PURCHASE

MINERALS, OIL/GAS: Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201.

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