

# MONTANA LAWYER

State Bar  
— of —  
Montana

April 2017 | Vol. 42, No. 6

## Nominate deserving peers



> Do you know of a lawyer who deserves recognition? Forms are inside and online for State Bar's Jameson, Bousliman, Pro Bono, Equal Justice Awards.

> Missoula attorneys Brett Schandelson, Colin Stephens honored for exonerations of Montana Innocence Project clients

### Also inside

- > Bar groups, others rally to support funding for Legal Services Corporation
- > Evidence Corner: Clear and Convincing and Beyond Reasonable Doubt -- Montana has amazing attorneys
- > Supreme Court decisions on blood evidence, recanted statement
- > President's Message: Nation should not repeat past mistakes
- > Security Series: Protect your Internal Systems

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

Email: [editor@montanabar.org](mailto:editor@montanabar.org)

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

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# Nation should not repeat our mistakes of the past



State Bar of Montana President Bruce Spencer is a solo practitioner based in Helena. His practice areas emphasize, governmental relations, creditors' rights, commercial law, automotive law, insurance law, and health care law.

I just attended a very interesting presentation on the World War II internment of Japanese Americans presented at the Western States Bar.

At the time, the internment was justified as a security precaution and war-time necessity. The United States Supreme Court upheld the practice.

Later that decision was discredited, and President Ronald Reagan apologized to our fellow countrymen and the United States issued reparations for the internment.

Turns out facts and opinions contrary to the military viewpoint at the time were suppressed and withheld by lawyers from the Court. History has shown that the internment was a grave violation of the rule of law.

All this, of course, got me to thinking. As a Montana citizen I feel it would also be appropriate for the United States government to take a more active role in educating the public about the horrific facts of Native American subjugation. Not glossed-over facts, but the real, uncomfortable facts. When Nations err it is vital that clear unadulterated facts be presented in order to prevent repeat errors.

There are many legitimate reasons not to comment on pressing matters. The State Bar of Montana is a unified Bar and all members do not share the same opinion. I am a lobbyist, and taking political positions could affect legislators' attitudes toward bills in which I have an interest. Taking a position perceived to be anti-administration may adversely impact funding for civil aid, affecting thousands of Montanans.

However, when rule of law is at issue I feel it is incumbent on a lawyer to speak up. I cannot as an officer of the court ignore what I believe to be violations of the rule of law for the sake of political expediency.

With all due respect, I personally urge our elected leaders to examine the true facts of Japanese internment and its aftermath and not to repeat errors of the past.

History has shown that the internment  
of Japanese Americans during  
World War II was a grave violation  
of the rule of law.



**RITCHIE | MANNING LLP**  
ATTORNEYS

### Ritchie Manning LLP opens in Billings

Jason Ritchie and Michael Manning, both formerly of Holland & Hart LLP, are pleased to announce that they have opened Ritchie Manning LLP in Billings effective Feb. 27. The firm's practice emphasizes labor and employment, appellate work, and a wide variety of litigation.

Jason Ritchie is a 2001 graduate of Carroll College and received his law degree from the University of Montana in 2004, with honors. He is recognized for his labor and employment work in Chambers USA, The Best Lawyers in America, and Super Lawyers. He regularly represents clients in cases involving every aspect of the employment relationship, from day-to-day operations to collective bargaining to complex litigation. He also has extensive litigation experience in areas ranging from construction disputes to healthcare. Prior to joining Ritchie Manning, he practiced at Holland & Hart, where he was a partner in the firm's labor and employment group.

Michael Manning is a 2003 graduate of the University of Notre Dame and received his law degree from the University of Montana in 2006, with honors. After law school, he served as a law clerk for Ninth Circuit Judges Thomas G. Nelson and N. Randy Smith. He is recognized in Super Lawyers for appellate work, and in The Best Lawyers in America for environmental litigation. He has extensive appellate experience, including complex appeals in the Ninth Circuit, Tenth Circuit, D.C. Circuit, Federal Circuit, and Montana Supreme Court. He also regularly handles trial-level litigation covering a range of substantive areas. Prior to joining Ritchie Manning, he practiced at Holland & Hart, where he was a member of the firm's appellate group.

Ritchie Manning LLP maintains an office at 175 N. 27th St., Suite 1202, Billings, MT 59101. You can reach the firm by phone at 406-601-1400, by email at [jritchie@ritchiemanning.com](mailto:jritchie@ritchiemanning.com) and [mmanning@ritchiemanning.com](mailto:mmanning@ritchiemanning.com), or via its website at [www.ritchiemanning.com](http://www.ritchiemanning.com).

### Roth joins Crowley Fleck PLLP as senior counsel of firm's Missoula office



Roth

Crowley Fleck PLLP is pleased to announce that Jeffrey M. Roth has joined the firm's Missoula office as senior counsel.

Roth's practice includes commercial litigation, employment law, and health care litigation, among other areas. His work as civil litigator has been repeatedly recognized by Super Lawyers. He is a graduate of the United States Naval Academy and the University of Montana School of Law.

Following law school, Roth clerked for the Honorable Donald W. Molloy, United States District Court, District of Montana. He was a partner at Garlington, Lohn & Robinson PLLP prior to joining Crowley Fleck. He serves as a commissioner for the Missoula County Airport Authority and as a board member for Five Valleys Land Trust.

### Sullivan Miller Law opens in Billings

Michelle M. Sullivan and Adrian A. Miller have opened their new firm, Sullivan Miller Law PLLC, in Billings. The firm specializes in civil litigation, including the defense of lenders and loan servicers, natural resource litigation, and contract disputes.

Prior to opening their firm, Sullivan and Miller practiced together at the Billings office of Holland & Hart LLP. Sullivan graduated from the University of Montana Law School in 2000, and received her accounting degree from MSU-Billings. Miller graduated from Hofstra Law School in New York in 2010, and earned her degree in sociology from MSU. Miller is also licensed to practice in North Dakota.

Sullivan Miller Law is located at 3860 Ave. B, Suite C East, Billings, Montana 59102. You may email Sullivan at [michelle.sullivan@sullivanmiller.com](mailto:michelle.sullivan@sullivanmiller.com), and Miller at [adrian.miller@sullivanmiller.com](mailto:adrian.miller@sullivanmiller.com). Both can be reached by phone at 406-403-7066.



Miller



Sullivan

### Hulling hired as associate at Judnich Law Office

Nathan Hulling has been hired as an associate attorney with the Judnich Law Office in Missoula and Hamilton, Montana.



Hulling

Hulling graduated law school at the University of Tennessee in Knoxville. He commissioned as an officer in the United States Marine Corps in 2009 and served his country as a Marine Corps Judge Advocate until 2017. Nathan's practice will focus on criminal defense, and family law for the Judnich Law Office.

Hulling and his family moved to Montana in 2017 to take advantage of Montana's beautiful scenery and outdoor lifestyle. Nathan loves the outdoors and spending time with his family.

### Have Member News to Submit?

Please email member news and photo submissions to [editor@montanabar.org](mailto:editor@montanabar.org). Email or call 406-447-2200 with any questions about submissions.

### Oie joins Minneapolis firm Moss & Barnett

Joshua P. Oie has joined Moss & Barnett, A Professional Association, in the Minneapolis firm's litigation and accountant law teams. Oie's practice spans many areas of civil litigation and business law.



Oie

As a litigator, Oie focuses primarily on complex commercial disputes, construction litigation, tort claims, accountant law cases, and appellate work. Prior to joining Moss & Barnett, Oie was an attorney and shareholder at a firm in Billings. He received his J.D., magna cum laude, from the University of Minnesota Law School, where he was

a staff member on the Journal of Law and Inequality and a student attorney in the Civil Practice Clinic, and he received his B.A. from Baylor University.

"Josh brings unique and valuable experience as a litigator to us from his practice in Montana, and is a very strong addition to our trial team," said Thomas J. Shroyer, Moss & Barnett's chief executive officer and chair of the Accountant Law practice group at Moss & Barnett.

Moss & Barnett provides a full range of legal services to businesses and individuals, with more than 75 attorneys and

paralegals. For more information, please visit [www.LawMoss.com](http://www.LawMoss.com).

### Lervick joins Felt, Martin, Frazier & Weldon

Jeana R. Lervick recently joined the Billings firm of Felt, Martin, Frazier & Weldon, PC, as an associate.

Born and raised in Billings, Lervick obtained her B.S. from Montana State University and her J.D. from DePaul University College of Law in Chicago. She practiced law in Chicago for several years, focusing on global patent and trademark litigation, before returning home to Billings to raise her family.



Lervick

She served Billings Public Schools as executive director of human resources and board clerk, before joining Felt, Martin, Frazier & Weldon in April 2017.

Her practice focuses on education law and federal and state litigation cases. She will also focus on intellectual property law assisting clients with trademark and copyright issues. She is licensed in Illinois and Montana, and the Federal Circuit and several other state jurisdictions.

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*Kevin K. Kessner, Yonkee & Toner, LLP, Sheridan, WY*



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# Bar groups, law schools rally to oppose plan to defund Legal Services Corp.

Bar groups from across the country, law school deans, the leaders of law firms and general counsel of major firms from around the country have joined a growing chorus opposing a Trump administration plan to defund Legal Services Corp.

The Trump administration's preliminary 2018 budget, released March 16, calls for eliminating all federal funding for LSC.

Defunding LSC would be a major blow to civil legal aid services in Montana. Montana Legal Services Association, the state's only legal services association, received \$1.3 million from LSC in 2015, or 43 percent of its total funding.



McGrath

According to a 2014 legal needs study commissioned by the Montana Justice Foundation, 49 percent of low-income Montana households have at least one civil legal need, and nearly half of those needs are unmet.



Kirgis

A number of national, state and local bar organizations have joined the ABA in its opposition to defunding LSC.

Montana Supreme Court Chief Justice Mike McGrath joined all the current Montana justices and eight retired justices in signing an April 1 letter to Montana's U.S. senators urging them to support funding for LSC and the Corporation for National and Community Service, which runs the AmeriCorps program. (The letter appears on page 31 of this issue.)



Klein

In addition, the deans of 166 law schools — including Dean Paul Kirgis of the University of Montana's Alexander Blewett III School of Law — signed a letter asking Congress to support funding the LSC.

The March 23 letter stresses that — in addition to helping millions who otherwise couldn't afford legal services — funding for legal aid is a wise public investment. The letter notes that civil legal services for low-income Americans help end cycles of domestic violence, allow children to more easily leave foster care, and reduce unjust evictions and foreclosures.

"LSC has been a success story because it reflects a bipartisan affirmation of who we are as Americans," the letter says. "As the late Justice Antonin Scalia stated in his remarks celebrating the organization's 40th anniversary, the LSC 'pursues



## ABA launches campaign backing LSC funding

The ABA in March launched the Legal Aid Defender campaign to urge Congress not to let the LSC be defunded. Through the campaign, individual attorneys can write a personal message, which the ABA will hand deliver to the attorneys' members of Congress. Learn more at [www.americanbar.org](http://www.americanbar.org).

the most fundamental of American ideals,' for 'without access to quality representation there is no justice.'"

The general counsel for 185 companies also wrote a letter to Congress in support of LSC. The signatories are corporate attorneys from leading companies including American Express, General Electric, Google Inc., JP Morgan Chase & Co., Starbucks, and Walt Disney.

Even before Trump's budget proposal had been announced, rumors about cuts to LSC funding led the heads of more than 150 law firm leaders from across the U.S., including Benjamin Cory from Crowley Fleck's Missoula office, to call on the Office of Management and Budget to preserve full funding for LSC.

"Eliminating the Legal Services Corporation will not only imperil the ability of civil legal aid organizations to serve Americans in need, it will also vastly diminish the private bar's capacity to help these individuals," the law firm leaders' letter says. "The pro bono activity facilitated by LSC funding is exactly the kind of public-private partnership the government should encourage, not eliminate."

In a statement, American Bar Association President Linda Klein said the ABA is "outraged" over the proposal and called on every member of Congress to restore full funding to LSC.

"Some of the worthy services the LSC provides include securing housing for veterans, protecting seniors from scams, delivering legal services to rural areas, protecting victims of domestic abuse and helping disaster survivors. Their offices are in every congressional district and they help almost 1.9 million people annually," Klein's statement says.

On March 16, the Trump administration released a preliminary 2018 budget proposal, which detailed many of the changes the president wants to make to the federal government's spending. The proposal covers only discretionary, not mandatory, spending.

# Consider nominating an attorney for bar awards

*"Mediocrity knows nothing higher than itself; but talent instantly recognizes genius."*

— Arthur Conan Doyle (The Valley of Fear)

Each year our profession takes time to honor attorneys who have made a difference in the practice of law. We recognize women and men who make extra effort to lead by example and show us professionalism, honor, sacrifice, and duty. This recognition takes the form of four different awards administered by the State Bar, two of which are selected by the Bar's Past Presidents Committee and one by the Montana Supreme Court's Access to Justice Commission :

- The William J. Jameson Award (recognizing an attorney with the State Bar's highest award for attorney excellence).
- The George L. Bousliman Professionalism Award (recognizing a reputation for and tradition of professionalism as defined by Dean Roscoe Pound: "Pursuit of a learned art as a common calling in the spirit of public service.");
- The Neil Haight Pro bono Award recognizes a person who exemplifies Neil's legacy of providing outstanding legal services to Montanans living in poverty.
- Karla M. Gray Equal Justice Award goes to a judge from any court who has demonstrated dedication to improving access to Montana courts.

More information on these awards can be found on the forms printed on pages 32 to 35 of this issue of the Montana Lawyer. The forms are also available online at [www.montanabar.org](http://www.montanabar.org).

But these awards don't simply happen. They require action — a nomination — by an attorney like YOU. Someone who will take a moment, and complete the nomination form located within this publication. It takes an hour or two of effort and a few telephone calls. The results usually are priceless and sincerely appreciated.

We all know an attorney or judge who is worthy of at least one of the above awards. If you don't, think harder! Take a moment to appreciate your profession and the people who work

## Nomination forms in Montana Lawyer, online

You can find nomination forms for the 2017 William J. Jameson Award, the George L. Bousliman Award, the Karla M. Gray Equal Justice Award and the Neil Haight Pro Bono Award in this month's Montana Lawyer. Forms are also available on the State Bar of Montana's website at [www.montanabar.org](http://www.montanabar.org). Nominations for all four awards are **due by May 31**.

within it. Surely you have experienced a moment of grace given by an adversary, an encouraging word or act, mentorship by a veteran attorney, or help when you desperately needed it. This is your opportunity to highlight that conduct.

And so that your nomination receives favorable review by the reviewing bodies, let us suggest what makes a good nomination package:

1. A completed nomination form with the requisite contact information for the nominee and for you;
2. A statement describing the activities or qualities of the nominee that addresses the criteria for the award. Please tell the committee how the nominee has met the criteria and why the nominee is worthy of the award;
3. A copy of the nominee's resume or curriculum vitae (if available); and
4. Letters of support for the nominee from one to two attorneys and, perhaps, a sitting judge. Please show that others share your esteem for the nominee and attest to the nominee's qualification for the award. These letters may be forwarded separately from the nomination form, but should be postmarked by the nomination deadline.

Please, take the time to recognize a colleague. Submit a nomination today! Let's celebrate the profession and find examples of attorneys we can emulate. Be the attorney who aspires to recognize genius!

# CLE deadline grace period

Attorneys may earn and report CLE credits up until May 15, 2017, without penalty.

**Please send attendance certificates or other documentation of CLE attendance to:**

Montana Commission of CLE  
P.O. Box 577  
Helena, MT 59624

Or you may email documentation  
or any reporting questions  
to [CLE@montanabar.org](mailto:CLE@montanabar.org)

# Blood not evidence till drawn, even when warrant issued

The Montana Supreme Court on March 13 ruled that blood is not evidence until it is removed from the body even if a judge has issued a warrant for a blood draw.

The decision overturns a tampering with evidence conviction arising from a 2013 driving under the influence arrest.

Christina Louise Harrison was taken to a hospital for a blood draw after she was arrested and a search warrant was issued for a blood draw. The arresting officer took off Harrison's handcuffs, and while he was filling out paperwork Harrison fled and was not located until the next day, preventing a blood sample from being drawn.

Harrison argued that the district court should have dismissed the charge on the ground that blood is not evidence until it is removed from the body, citing the court's decision in the 2001 case *State v. Peplow*.

In a 4-3 decision written by Justice Beth Baker, the court agreed.

The state argued that the 2001 case was different because of a law the 2011 Legislature passed allowing for a search warrant for a blood sample. The majority decided, however, that the new law did not change what constitutes evidence in the first place.

"For starters, blood is not a 'sample until it is withdrawn. Plus, the new language references blood samples 'that may yield evidence,'" Baker wrote.

"The issue *Peplow* addressed — and the issue on appeal here — is whether an individual's blood, while still in her body, constitutes 'physical evidence.' The relevant portions of those statutes have not been amended since our decision in *Peplow*."

In his dissent, Justice Michael E. Wheat, joined by Chief Justice Mike McGrath and Justice Laurie McKinnon, noted that in the *Peplow* case, the suspect had consumed alcohol after an

accident and prior to his arrest. In the new case Harrison had already been arrested and officers had secured a warrant for a blood draw.

"Harrison's blood alcohol content within her body became evidence upon her arrest and the issuance of the search warrant. It also became a 'thing' with which she was not allowed to tamper," Wheat wrote.

## Conviction upheld despite recanted statement

The Montana Supreme Court on March 14 upheld a Helena man's 2014 conviction for partner or family member assault despite the fact that the victim in the case at trial recanted her prior statement to the police.

Rick Dennis Strobel was convicted of attacking his wife, who told police that Strobel hit her in the face and tried to force her into a pickup truck. At trial, Bridget Rogers testified that she was drunk at the time of the alleged assault, did not remember what she told the responding officer and that Strobel had not hit her in the face.

Strobel moved to dismiss the charges for insufficient evidence.

Justice Beth Baker wrote for the 4-1 majority that the prior inconsistent statements were sufficiently corroborated by other independent evidence and testimony.

In her dissent, Justice Laurie McKinnon wrote that the majority mischaracterized the precedent it relied upon, saying the independent evidence must corroborate the substance of the prior inconsistent statement to support a conviction, which she said was not true in this case. She would have reversed the conviction.

## Court Order

**Court orders comment period on adding 'civility' to oath of admission. Order No. 11-0244, March 29.**

The Montana Supreme Court has ordered a 90-day comment period on adding language about civility to opposing parties and counsel to the written and oral oaths of admission to the Montana bar. The Montana chapter of the American Board of Trial Advocates requested adding the language to the oath. The revised section would read as follows:

I will be candid, fair, and courteous before the court and with other attorneys, **maintain civility toward opposing parties and their counsel not only in court, but also in all written and oral communications**, and advance no fact prejudicial to the honor or reputation of the party or witness, unless required by the justice of the cause with which I am charged; ... [emphasis added]

Interested parties have until June 27 to file comments, which must be made in writing to the clerk of the Supreme Court.

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# Court to hear oral argument in Bozeman in infant death case

The Montana Supreme Court will hear oral argument in Bozeman in an appeal of a deliberate homicide conviction in the death of his infant daughter.

Matthew Blaz of Butte was found guilty of beating his daughter to death in 2013, who died as a result of two skull fractures sustained in their home.

Oral argument is set for Monday, May 1, at 10:30 a.m. in the Strand Union Building, Ballroom A, on the campus of Montana State University, Bozeman. An introduction to the oral argument will begin at 10 a.m.

The oral argument is in conjunction with the 18th Judicial District's annual Law Day events.

On appeal, Blaz argues that the Second Judicial District Court

erred when it allowed the State to present evidence at trial about an incident that occurred about a month before his daughter died, in which Blaz threw his wife down and pounded her head into the floor while she was holding the baby.

Blaz maintains admission of that evidence violated his right to a fair trial. The state responds that evidence of the prior incident was relevant as to Blaz's disregard for his daughter's well-being, and was properly admitted to rebut Blaz's theory that a neighbor boy dropped the baby and fractured her skull. The issue requires application of the basic evidentiary rule that relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice.

## Attorney Discipline

### Tennant ordered to receive public censure for ethics violations in collection practices

The Montana Supreme Court has ordered a public censure for Kalispell attorney David Tennant, who sought foreclosure on a client's property and then anonymously bought the property at auction.

The Commission on Practice recommended the censure after concluding that Tennant violated multiple provisions of the Montana Rules of Professional Conduct. The commission found that Tennant violated Rule 1.7 by representing concurrent clients with conflicting interests; violating Rule 1.8(a) by acquiring an ownership interest in a current client's property; and that he violated Rule 1.8(b) by not obtaining his client's consent to foreclose on an attorney's lien.

The Office of Disciplinary Counsel objected to the COP's recommendation, instead suggesting a seven-month suspension. ODC argued, among other things, that Tennant violated Rule 1.5 by purchasing the property at a discount, resulting in unreasonable fees in the form of a windfall profit at sale.

Tennant and the client both indicated in their testimony before the Commission that the sale of one of the lots at the now-listed sales price likely would be sufficient to cover Tennant's fees and other liens. Tennant testified that he had no intent to reap a windfall profit, and the conditions recommended by the Commission will prevent a windfall to Tennant.

The ethics complaint **drew attention nationally** when Tennant resigned under pressure shortly after being hired as city attorney in Libby when some in the public and on the Libby City Council questioned whether Tennant had knowledge of a pending complaint prior to being sworn in.

Tennant will receive the public censure at 1 p.m. on April 18 in the Supreme Court's courtroom in Helena.

### LeClaire receives 120-day reciprocal suspension

The Montana Supreme Court ordered a 120-day suspension for attorney Edward T. LeClaire in reciprocal discipline from a suspension out of Oregon.

In the Oregon proceedings, LeClaire, of Lake Oswego, Oregon, admitted to failing to sufficiently or adequately communicate with a client, knowingly failing to respond to a lawful demand from a disciplinary authority, and failing to promptly provide his client with property to which his client was entitled.

LeClaire was granted time to file a response to the petition for reciprocal discipline, but he did not file a response within the time allowed.

### Oaas receives public admonition from COP

Lewistown attorney Torger Oaas was ordered to receive a public admonition from the Montana Supreme Court's Commission on Practice.

Oaas admitted to failing to respond to written discovery and failing to respond to a number of motions – including a motion for summary judgment – during the course of a lawsuit. The district court ultimately issued a judgment of more than \$350,000 in the suit. Oaas also failed to attend a hearing regarding the plaintiffs' request for fees, and the court granted an award of fees and costs of more than \$9,500.

A subsequent bankruptcy was complicated by a finding of constructive fraud, on an allegation effectively unchallenged by Oaas' inaction.

In addition to the admonition, Oaas was ordered to pay \$5,000 restitution to his clients for their increased bankruptcy costs, as well as \$381.34 in costs to the Office of Disciplinary Counsel and the Commission on Practice.

The punishment was in exchange for a conditional admission of violations in the representation of a client.

# Parker appointed Cascade County district judge

Longtime Cascade County Attorney John Parker has been appointed as 8th Judicial District judge.

Parker, 46, was one of three attorneys whose names the Judicial Nomination Commission forwarded to Gov. Steve



John Parker

Bullock for consideration to replace the Honorable Dirk Sandefur, who was elected to the Montana Supreme Court in November 2016. Bullock announced Parker's appointment on March 14. Also nominated were Great Falls attorneys Joe Sullivan and Allen P. Lanning. Five attorneys had applied for the seat.

Parker, a Whitefish native, had worked in the Cascade County Attorney's Office since entering the Bar in 1999. He worked as a deputy county attorney for 10

years before he was appointed county attorney in 2008, winning re-election in 2010 and 2014.

Parker said in a March 22 interview that he has enjoyed being county attorney, but he was excited for the challenge of joining the judicial branch. Having worked his entire career

in criminal law, he expects there to be a learning curve in civil cases, but that he has a good relationship with the other three judges in the district – the Honorable Greg Pinski, the Honorable John Kutzman, and the Honorable Elizabeth A. Best, and they have given him a warm welcome.

"I have plenty to learn," he said, "but the other three judges are all seasoned civil practitioners. They're willing to help me along the way."

Parker also comes into the job knowing that the Cascade County courts have a very heavy workload, something he is comfortable with, having kept a heavy caseload as county attorney.

In addition to being county attorney, Parker held elected office representing Great Falls in the Montana House of Representatives from 2003 to 2008. He is subject to election in 2018, and re-election in 2020.

Parker has received numerous awards in recent years, including the 2013 Dandelion Foundation Community Service Hall of Fame Award in recognition of his contributions to child abuse and family violence prevention; the 2012 Hero of Hope Award from Mental Health America of Montana for dedication and commitment to cases involving crimes against children; and the 2011 Champion's Award from Montana Fight Crime: Invest in Kids.

## 'Human Side of Karla Gray' topic of April 21 Women's Section dinner talk

The Women's Law Section's Annual Spring Dinner to celebrate and honor women in the legal profession will be Friday, April 21, on the University of Montana campus.

This year's guest speaker this year is Chris Wethern, staff attorney for the Montana Supreme Court and a 1985 graduate of the University of Montana School of Law. She will speak about "The Human Side of Karla Gray: Montana's First Woman Chief Justice." Gray died in February at age 69.

The section will announce the winners of the Fran Elge Award and the Margery Hunter Brown Assistantship at the dinner.

A reception will begin at 6 p.m., and dinner will begin at around 7 p.m.

The dinner will be at the Payne Family Native American Center in the

Bonnie HeavyRunner Gathering Place. The center is located on the Oval of the University of Montana campus, next to the Grizzly statue.

Cost is \$35, including hors d'oeuvres during the beer and wine reception, dinner and dessert. The menu includes vegetarian and gluten-free options.

Organizers say a highlight of the evening is hosting student members of the Women's Law Caucus, who give members a fresh perspective on the practice of law. The section does not charge the law students to attend and asks that dinner attendees consider contributing to help with the cost of the students' meals.

RSVP to Cathy Tutty by email at [tuttylawgroup@gmail.com](mailto:tuttylawgroup@gmail.com) or by phone at 406-498-5411 by 5 p.m. on Monday, April 17.

## Fastcase has webinars on tap for April and May

Fastcase provides free live training webinars so you can learn how to use Fastcase from your own computer.

Many of the webinars carry free CLE credit from Montana and other states.

### April-May Webinar Schedule

(All webinars 11 a.m. to 1 p.m. MT)

Thursday, April 6 – Introduction to Legal Research on Fastcase

Thursday, Apr 13 – Advanced Legal Research on Fastcase

Thursday, April 20 – Introduction to Boolean (Keyword) Searches

Thursday, May 4 – Introduction to Legal Research on Fastcase

Thursday, May 11 – Advanced Legal Research on Fastcase

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# INNOCENCE RESTORED

Missoula attorneys honored by MTACDL for their work exonerating Innocence Project clients Raugust, Marble

By JOE MENDEN  
Montana Lawyer

Brett Schandelson and Colin Stephens devoted years of their lives and countless pro bono hours to two men they believed were in prison for crimes they didn't commit.

The Missoula attorneys' dedication finally paid off when Richard Raugust – convicted in 1998 of the murder of his best friend, Joe Tash – and Cody Marble – convicted of raping a fellow inmate in juvenile detention in 2002 – were both exonerated in the past year. The two exonerations represented the first two full success stories for clients of the Montana Innocence Project (MTIP).

Schandelson and Stephens were honored for their efforts recently, sharing the Montana Association of Criminal Defense Lawyers' 2017 Lawyer of the Year Award.

"We are so grateful to Brett and Colin for their amazing work in representing our innocent clients," said MTIP Executive Director Lisa Mecklenberg Jackson. "They worked tirelessly to right the wrong that was committed, and we are so appreciative of their time and efforts. We wholeheartedly agree that these two lawyers exemplify the spirit envisioned by the defense lawyers in presenting this award."

## 'Society made a mistake'

Schandelson said Raugust began fighting his conviction almost immediately after arriving in prison, filing his first petition for post-conviction relief in 2001. His case was one of the very first that MTIP took on after its founding in 2008.

Schandelson said that while he believed in MTIP's cause, he had no preconceived notions of Raugust's guilt or innocence when his friends Jessie McQuillan, MTIP's original executive director, and Brendan McQuillan, MTIP's legal director at the time, first asked him to help with the case. He officially joined on in 2013. It didn't take long before he was convinced a truly innocent man was in prison. Making it even worse



Photo courtesy of Brett Schandelson

Brett Schandelson, left, and Colin Stephens are shown after receiving the 2017 Lawyer of the Year Award from the Montana Association of Criminal Defense Lawyers.

was that the victim, Joseph Tash, was Raugust's best friend.

Unlike with the high-profile exoneration cases of Barry Beach and Jimmy Ray Bromgard, Schandelson said, there wasn't one clear thing you could point to that went wrong with the Raugust case. It was an unintentional Brady violation that ultimately led to the exoneration, he said, but he attributes Raugust's arrest and eventual conviction to what he says is the very real phenomenon of police tunnel vision. Key evidence was never collected or tested. Raugust was arrested within hours of Tash's murder, on the strength of one eyewitness account – a witness the defense team believes was the actual killer.

Schandelson credited now-retired District Court James Wheelis for giving Raugust a fair hearing in post-conviction relief.

"I don't know that all judges would've given us as fair of a chance," he said. "There was a jury verdict. That's a really difficult thing to overcome. It's really difficult for society, I think, to grapple with that."

Wheelis eventually overturned Raugust's conviction and released him. Schandelson says that the state, specifically Assistant Attorney General Mark Fowler, did an exhaustive review of the case before deciding not to appeal Wheelis' ruling.

"They looked at every angle," Schandelson said. "(Fowler) told me he had reviewed every document from both the underlying case and the PCR case. By the time he made a decision it was fully informed. I'm thankful he took that time, because ultimately they came to the conclusion that it wasn't worth pursuing the appeal."

"Richard's case is just that sad situation where society made a mistake, for a whole bunch of factors," Schandelson said. "The lasting import of the Raugust case is that it has helped bring this conversation to the forefront – that the justice system has made mistakes and we need to take them seriously and figure out better ways to prevent them and better ways to find them, and better ways to deal with them when we find them."

### **Marble exonerated after 15 years**

Stephens has been representing Marble in one form or another for eight years. He first worked with him on an appeal of an unrelated conviction, and during the course of that case, Marble told Stephens' interest in the rape conviction and put him in touch with the Innocence Project, which Marble had already been working with.

Marble, like Raugust, never wavered in maintaining his innocence. Stephens, like Schandelson, believed strongly in his client's innocence.

"To me it was an important case because it shows the folly of incarcerating children," Stephens said. "There were I think a total

of eight or 10 kids in the pod the day the rape was alleged to have occurred. I think four of those kids are dead and the rest are either in prison or on some kind of supervision."

Marble's conviction was based largely on the testimony of his accuser, who later recanted the testimony and had since died, casting doubt on whether the rape actually occurred.

Though he believed in his client, Stephens did not have confidence that Marble's appeal to the Montana Supreme Court would be successful. He said Justice Laurie McKinnon's concurrence in the court's 2013 decision sending Barry Beach back to prison was the de facto precedent in the issue on appeal. He was stunned to have even gotten an oral argument, he said.

"When I walked out of there (after oral argument), I thought, that was nice of them to give me my say, but I'm still going to lose," Stephens said.

His reaction when the court reversed the conviction and remanded the case back to district court?

"Stunned profanity," he said.

The Missoula Co Attorney's Office stood back, looked at all the evidence the MTIP had presented. Kirsten Pabst, our county attorney, did absolutely the right thing.

Both Stephens and Schandelson credit their firms – Smith & Stephens P.C. and Tipp Coburn Schandelson P.C., respectively – for their patience in allowing them to devote their time for so many years on their cases.

Both also stress that they didn't do it alone.

Stephens and co-counsel Lars Phillips worked hundreds of hours on the case over the years -- "I definitely filled all my pro bono hours," Stephens said.

Coincidentally, Phillips is the son of retired District Judge Wayne Phillips, who freed Beach in the decision eventually overturned by the Supreme Court.

Schandelson says that at least dozen people worked on the Raugust case, putting in thousands of hours. They include Toby Cook, at the time a law student in the University of Montana School of Law's clinical program and now a staff attorney at MTIP; Sarah Lockwood, then an intern at MTIP and now an associate at Tipp Coburn Schandelson; and Brendan McQuillan, who by that time had left as MTIP legal director but came back to litigate the case with Schandelson after leaving as MTIP. Also playing a key role was Spencer Veysey, MTIP's longtime investigator, who found the evidence that exonerated Raugust. Veysey tragically died in a climbing accident in Colorado in 2015, not living to see Raugust earn his freedom.

**Joe Menden is editor of the Montana Lawyer. You can reach him at 406-447-2200 or at [editor@montanabar.org](mailto:editor@montanabar.org).**

*When I walked out of there (after oral argument), I thought, that was nice of them to give me my say, but I'm still going to lose.*

*Colin Stephens, attorney for Cody Marble*





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## Step 4: Protect Your Internal Systems

In today's digital world, computers can be a treasure trove for an online attacker and can also provide a jumping-off point to reach other systems or online accounts. There are multiple routes into these systems, from open network connectivity to targeted malware. Fortunately, there are a few key tools at your disposal to protect against these threats.

### Keep Your Systems Updated

Many malware threats operate and spread by taking advantage of problems in software for which fixes have long been enabled. Unfortunately, these fixes are often not applied to the vulnerable systems. Modern operating systems, such as Windows and Mac OS X, support automatic installation of critical updates — you just need to enable it. A number of application packages, such as Microsoft Office and Adobe Acrobat, also support automatic updates. Given their widespread use throughout businesses, these applications offer a rich target for hackers. If the applications you use offer automatic updates, make sure this feature is enabled.

### Install Anti-Malware Software

Clicking a link in an email that looked legitimate, downloading a file from a site you thought was secure — these are common actions done every day to infect systems with malware, and the damage can range from keyloggers stealing passwords to ransomware holding your data hostage. You can greatly reduce your risk of falling victim to these attacks by making sure Antivirus/Anti-Malware software is installed and configured properly on all of your systems. Once installed, make sure real-time checking is enabled so that security

analysis is performed immediately as actions are performed. You should also schedule full computer scans weekly at a time that doesn't interfere with your work. If you are using Windows 8 or later, Windows Defender antivirus is pre-installed and needs only to be configured.

### Enable Your Firewall

A firewall inspects the communications coming in and out of your PC and makes a decision to allow the communications to continue or to block them. They can prevent attackers from gaining access to your computer and data, as well as halt the spread of malware from one computer to others. Windows and Mac OS X both have built-in firewalls that you can configure to meet the needs of your office. You should enable your firewall and configure it to block all incoming connections except for applications that you specifically enable. Typical exceptions include instant messaging and file sharing applications. Some software applications may require specific exceptions to be configured to allow access from other computers on your network or the internet, but the vendor documentation should make this clear.

### Limit Access

One final tool for protecting your systems is to limit what users are able to access and modify. In computer security circles, this is known as the Principle of Least Privilege, and states that users should have the minimum privileges necessary to do their jobs. By limiting users in this way, you ensure that

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# Often overlooked motions sometimes can quicken pace of appeals process

By: **MICHAEL MANNING**  
Ritchie Manning LLP

For many lawyers and their clients, the appellate process can be frustrating. Not only do appeals involve different rules, procedures, and standards, they are often accompanied by a nagging feeling that the whole thing is an unnecessary exercise, either because the district court should have gotten it right in the first place or because the opponent should just accept its clear defeat. On top of that, an appeal means delay that is more often measured in years than in months, especially in the Ninth Circuit.

According to the most recent statistics published by the Administrative Office of the U.S. Courts, the median time from filing a notice of appeal to disposition in the Ninth Circuit is 15.2 months. And that includes cases afforded priority like criminal appeals, recalcitrant witness appeals, habeas corpus petitions, and injunctions. See 28 U.S.C. § 1657(a). In ordinary civil appeals, the Circuit Mediators usually tell parties to expect 18-24 months from the notice of appeal to *argument*, with another 3 to 12 months tacked on after that for a published opinion. The timeframe may well be justified—the Ninth Circuit has more than 13,000 pending appeals. But it doesn't make the glacial pace any easier to accept for those forced to seek vindication (or affirmance) on appeal.

The good news is that in at least some civil appeals, motions practice can provide a possible avenue to relief.<sup>1</sup> Substantive appellate motions are often overlooked, but lawyers looking to speed along a case should consider the viability of at least two potential motions early in any appeal.

*First*, either the appellant or the appellee may file a motion to expedite. Motions to expedite are governed by Ninth Circuit Rule 27-12 and require a showing of good cause. In civil cases, good cause includes the possibility of irreparable harm or of the appeal becoming moot absent expedited treatment. There is virtually no law interpreting Rule 27-12, but the court has suggested in other contexts that irreparable harm includes any harm that “is not readily compensable.” See, e.g., *Life Alert Emergency Response, Inc. v. LifeWatch, Inc.*, 601 F. App'x 469, 474 (9th Cir. 2015). Depending on the type of case, that

means things like loss of reputation or goodwill, deprivation of an opportunity to expand business, loss of enjoyment of the environment, unwillingness to engage in collective bargaining, and ongoing constitutional violations might support expedited treatment of an appeal. And those are just a few examples. If you can articulate a reasonable argument that the delay caused by an appeal poses some risk to your client or your case that can't be solved simply by paying money (or more money), moving to expedite is probably worth the effort.

If you file a motion to expedite, there are a few things to keep in mind. The most important is to file as early as possible. Fast-tracking an appeal will seem a lot less pressing to a Ninth Circuit motions panel if the attorney knew about the grounds for seeking expedited treatment well before filing the motion. Similarly, if the basis for a motion to expedite is irreparable

harm, consider whether you need to file the motion on an emergency or urgent basis under Ninth Circuit Rule 27-3. Emergency motions — where the movant certifies that relief is necessary within 21 days to avoid irreparable harm — and urgent motions — where the movant certifies that relief is necessary by a specific date, but not within 21 days — are governed by different rules than ordinary motions. Also, in any motion to expedite, propose a briefing schedule you can stick to. If the court grants the motion, you are exceedingly unlikely to be able to get an extension of time.

*Second*, an appellee looking to avoid a drawn-out appeal should consider the possibility of filing a motion to dismiss. Certainly, not every case is appropriate for dismissal, and there is no reason to waste the court's time on issues that should clearly be decided by the merits panel. Don't reject the idea out of hand though. Jurisdictional issues are especially well-suited for early resolution, and, like all appellate courts, the Ninth Circuit takes jurisdiction seriously. That's not to say that jurisdiction will always be decided without full briefing; merits panels regularly consider jurisdictional arguments. But the issue does not necessarily need to be open and shut to be appropriate for a motion either. For example, in *Western Security Bank v. Schneider Limited Partnership*, 816 F.3d 587 (2016), a motions panel dismissed an appeal based on an issue of first impression involving appellate jurisdiction under the Federal Arbitration Act, shortening the time that the case was pending on appeal dramatically.<sup>2</sup>

If you have solid grounds for moving to dismiss an appeal,



<sup>1</sup> Motions practice is also an option in criminal appeals, but because criminal appeals are already afforded priority in the Ninth Circuit, this article focuses on civil appeals.

<sup>2</sup> Full disclosure: the author was counsel for the appellee.

be aware that doing so will stay both the schedule for preparing the record and the merits briefing schedule. See 9th Cir. R. 27-11(a)(1). But don't be scared off either. Appeals are typically calendared for argument based on priority and how long they have been pending, not how long they have been fully briefed. Given the current timeframe for non-priority civil appeals in the Ninth Circuit, briefing can be delayed by as much as a year with very little risk of impacting the argument date.

It goes without saying that any lawyer thinking about filing an appellate motion should carefully consider the chances of success. After all, there is no reason to spend time and money, or risk losing credibility with the court, on a true longshot. But exploring the possibility of an appellate motion comes with little downside, and you might find a path to a shorter appeal that you never knew existed.

\* \* \*

Here are cases originating in the District of Montana that resulted in published Ninth Circuit opinions from November 2016 through February 2017:

***Blixseth v. Brown (In re Yellowstone Mountain Club, LLC)*, 841 F.3d 1090 (9th Cir. 2016)**

**Bankruptcy.** Under *Barton v. Barbour*, 104 U.S. 126 (1881), suits against members of an Unsecured Creditor's Committee (UCC) for acts performed in their official duties must be brought in bankruptcy court, or in another court only with the bankruptcy court's express permission. But the bankruptcy and district courts erred by holding that Blixseth's claims against

his former lawyer for pre-petition conduct were so intertwined with the lawyer's later actions as the chair of the UCC that they were impossible to separate. Accordingly, Blixseth did not need permission from the bankruptcy court before bringing his pre-petition tort, contract, and fraud claims in district court, and he may do so as he originally intended.

The bankruptcy court, however, did not abuse its discretion by denying Blixseth's *Barton* motion to bring his post-petition claims in district court because those claims sought a personal judgment against the lawyer, thus satisfying at least one of the five factors that may serve as a basis for the bankruptcy court to retain jurisdiction. Nor does *Stern v. Marshall*, 564 U.S. 462 (2011) preclude bankruptcy courts from adjudicating *Barton* claims. In dismissing Blixseth's claims on the merits, though, the bankruptcy court may have wrongly held that Blixseth's lawyer was entitled to derived judicial immunity by virtue of his position as chair of the UCC. On remand, the court must reconsider derived judicial immunity applying the correct standard, which confers derived judicial immunity only if (1) the lawyer acted within the scope of his authority, (2) the lawyer candidly disclosed his proposed acts to the bankruptcy court, (3) the debtor had notice of the proposed acts, and (4) the bankruptcy court approved the acts.

***United States v. Loftis*, 843 F.3d 1173 (9th Cir. 2016)**

**Criminal.** In a wire fraud case, evidence of investor victims and transactions not specifically named in the indictment are

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Alexander Blewett III

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# Understanding Montana AG's authority over charitable trusts

By ED ECK

The supervisory authority of the Montana Attorney General over charities is rooted in the common law *parens patriae* power of a state to protect the interest of the public in assets pledged to public purposes. It has its genesis in proceedings brought in the Chancery Courts of medieval England by the attorney general on behalf of the King to enforce charitable trusts and was carried forward in early English statutes, such as the Statute of Charitable Uses enacted by Parliament in 1601.

In addition to the common law's development of the attorney general's *parens patriae* power, the courts developed a number of other doctrines relating to charitable trusts. For example, the settlor of a charitable trust, or any express trust for that matter, must have expressed an intent to create a trust. Trusts do not arise out of a person's thoughts or drafts of contemplated trust instruments or thoughts about future transfers. The trust property and the charitable purpose must be described with certainty. Furthermore, ambiguities in a trust instrument are often resolved by evidence of the settlor's charitable intent.

The *cy pres* doctrine also arose in the common law and specifically addresses a charitable trust. Unless the terms of the trust instrument provide otherwise, where it becomes unlawful, impossible, or impracticable to carry out the originally designated charitable purpose, the court will direct the charitable assets be used for another charitable purpose that reasonably approximates the originally designated purpose. For example, assume a settlor created a trust and designated a named local, charitable hospital to be the income beneficiary of the trust. The settlor did not name a contingent income beneficiary. Several years after the trust was created and after the settlor's death, the local hospital is dissolved. Under the doctrine of *cy pres*, the court may designate another local, charitable health care facility to be the income beneficiary of the trust.

Further, the common law developed a number of trustee duties. The trustee has a duty to take possession of trust property and administer the property as part of the trust. Also, the trustee owes a duty of loyalty to the beneficiaries' interests, and to exclude from consideration the trustee's own advantages and the welfare of third parties. For example, a conflict of interest question would arise if the trustee leased trust property to himself. Furthermore at a minimum, the trustee has a duty to use ordinary skill and prudence. Thus, a trustee should invest trust property prudently and avoid risky investments. Additionally, trustees must treat multiple beneficiaries impartially. Thus, a trustee should invest prudently so that a reasonable income

**Editor's Note:** This article will run in two installments. Part one discusses the Montana Uniform Trust Code. Part two, which will run in the May Montana Lawyer, will discuss the Montana Nonprofit Corporation Act and the Uniform Prudent Management of Institutional Funds Act.

stream is provided to an income beneficiary and the trust principal is preserved for the remainder beneficiary.

If a trustee of a charitable trust devotes the trust property to his own personal use or for some other personal gain, or uses trust property in a manner inconsistent with the settlor's intent, a question arose: Who could enforce the trust? The common law viewed the public as the real beneficiary of charitable trusts, not the individuals who happen to receive trust distributions or those who possibly could receive distributions in the future. If the public is the beneficiary of charitable trusts, can any member of the public sue when the trustee fails to take possession of the trust property, when the trustee makes imprudent investments, or when the trustee breaches some other trustee duty? The common law resolved that question in the negative and designated the attorney general as the representative of the public who had authority to bring an action to address a breach of a trustee duty and to protect charitable assets and the settlor's intent. Rather than subjecting a charitable trust to potential actions brought by members of the public, only one party who represents the public as a whole could bring such an action.

In modern times, Montana and most other states have adopted trust codes, nonprofit corporation codes, and laws affecting charitable endowments. These statutes codify the Attorney General's authority and articulate related common law doctrines, including those affecting trustee duties. One purpose of this article is to summarize the Attorney General's authority with charities as set forth in the Montana Uniform Trust Code, the Montana Nonprofit Corporation Act, and Montana's Uniform Prudent Management of Institutional Funds Act. When a charitable organization proposes to undertake specified actions, these legislative enactments require the charity to notify the Attorney General and, sometimes obtain the Attorney General's consent. Additionally, these legislative enactments provide the Attorney General with numerous specific powers over a variety of activities undertaken by charitable entities. A second and primary purpose of this article is to offer Montana's charitable institutions and their counsel some practice considerations concerning the charity's interaction with the Office of the



## I. MONTANA UNIFORM TRUST CODE (MT UTC)

The Montana Uniform Trust Code (MT UTC), Mont. Code Ann. §§ 72-38-101 et seq. sets forth the rules governing trusts from their initial creation to their termination and all acts affecting their governance. To a great extent, the MT UTC is based upon the Uniform Law Commission's Uniform Trust Code (UTC). Section-by-section comments prepared by the Uniform Law Commission are often helpful and are available on the Uniform Law Commission's website. When a section of the MT UTC differs from the corresponding provision of the UTC on matters that relate to the Attorney General's oversight of charitable trusts, an explanation of that difference is included in this article.

The MT UTC codifies the duties of a trustee. The trustee is directed to administer the trust:

- expeditiously and in good faith, in accordance with the trust terms and purposes and in the interests of the beneficiaries;
- solely in the interest of the beneficiaries;
- impartially if there are two or more beneficiaries; and
- as a prudent person would, exercising reasonable care, skill, and caution.

Additionally, the trustee must:

- incur only costs that are reasonable in relation to the trust property, the trust purpose, and the skills of the trustee;
- utilize the trustee's special skills or expertise, if any;
- take reasonable steps to control and protect the trust property;
- keep adequate records of the administration of the trust and keep trust property separate from the trustee's own property;
- take reasonable steps to enforce claims of the trust and to defend claims against the trust;
- take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to redress a breach of trust committed by a former trustee; and
- inform beneficiaries and others and to report aspects of trust administration as required by Mont. Code Ann. § 72-38-813.

Like the common law concerning charitable trusts, the MT UTC provides that the Attorney General has authority to petition the court to redress a trustee's breach of duties. Mont. Code Ann. § 72-38-221 reads in pertinent part:

**Enforcement of beneficiary's rights under charitable trust by attorney general.**

In a case involving a charitable trust subject to the jurisdiction of the attorney general, the attorney general may petition under this chapter.

Additionally, the MT UTC permits the settlor, if living, and a charitable organization expressly named in the trust instrument, if any, to bring an action to enforce a charitable trust. Mont. Code Ann. § 72-38-405(3) reads:

- (3) A proceeding to enforce a charitable trust may

be brought by the settlor, the attorney general, a charitable organization expressly named in the trust to receive distributions, or any other person with standing.

### A. The Attorney General's Role in Trust Modification and Trust Termination

Proposals to modify or terminate charitable trusts most frequently trigger interaction between the trustee and the Attorney General. The MT UTC requires the Attorney General's consent to modify or terminate a charitable trust under Mont. Code Ann. § 72-38-411. Mont. Code Ann. § 72-38-411(1) applies to a modification or a termination by the settlor and all the beneficiaries. Mont. Code Ann. § 72-38-411(2) applies to a termination by all the beneficiaries without the settlor. Both subsections (1) and (2) require the express consent of the Attorney General.

Additionally, when a charitable trust is terminated under subsection (1), the Attorney General may have a role in determining the recipients of trust property upon the termination of a charitable trust under specified circumstances. Mont. Code Ann. § 72-38-411(4) reads in part:

In the case of a charitable trust, the trust property must be distributed in accord with the terms of the trust, and in the absence of applicable terms, consistent with the charitable purposes of the trust as agreed by the attorney general and the beneficiaries or, if there are no charitable organizations with the rights of a beneficiary and the termination is pursuant to subsection (1), then as agreed by the settlor and the attorney general. . .

Mont. Code Ann. § 72-38-411 is substantially different from § 411 of the UTC as promulgated by the Uniform Law Commission. Section 411 of the UTC expressly only pertains to modification or termination of noncharitable trusts. Rather than consent by the settlor, beneficiaries, and the Attorney General as provided for in Mont. Code Ann. § 72-38-411, the

#### Practice Suggestion

Given the requirement of Attorney General consent and the role of the Attorney General in determining the recipients of trust property upon termination, early communication with the Attorney General's office is advisable. The Attorney General would likely request a copy of the original trust instrument, all trust amendments, a copy of the proposed modification, and, ultimately, a statement signed by all of the beneficiaries and the settlor, if living, setting forth their reasons for the proposed modification or termination, and, in the case of a termination, the names of the proposed distributees of the trust property and the amounts to be distributed. Although trustee consent is not required under Mont. Code Ann. § 72-38-411(1), the Attorney General would likely request the trustee's opinion concerning the proposed modification or termination.

UTC relies primarily upon courts' *cy pres* powers for modifications or termination of charitable trusts. See § 413 of the UTC and Mont. Code Ann. § 72-38-413. The court's *cy pres* authority under both of these sections applies only when a charitable trust purpose becomes unlawful, impracticable, impossible to achieve, or wasteful. There are no similar express statutory limitations in Mont. Code Ann. § 72-38-411, although the concept still serves as a guidepost for Attorney General review.

## B. Other Powers of the Attorney General over Charitable Trusts

The Attorney General has the following specific powers and rights concerning charitable trusts having their principal place of administration in Montana:

- **Right to Information.** The Attorney General may request information about a charitable trust and the trustee is obliged to promptly respond to that request.<sup>1</sup>
- **Right to Trust Instrument.** The Attorney General, as a beneficiary, has the right to request and receive a copy of portions of the trust instrument that describe or affect the charitable trust.<sup>2</sup>
- **Right to Annual Report.** The Attorney General may request a copy of a charitable trust's annual report and the trustee is obliged to send that report to the Attorney General. Mont. Code Ann. § 72-38-110(4)(b)(ii) and § 72-38-813(3).<sup>3</sup>
- **Right to Enforce.** The Attorney General may initiate a proceeding to enforce a charitable trust.<sup>4</sup>
- **Right to Petition to Remove the Trustee.** Mont. Code Ann. § 72-38-110(4)(a) grants the Attorney General the rights of a beneficiary of a charitable trust. As such, the Attorney General has the right to petition to remove the trustee.<sup>5</sup>
- **Right to Petition to Modify or Terminate a Trust.** The Attorney General, as a beneficiary, has the right to commence a proceeding to modify or terminate a trust.<sup>6</sup>
- **Right to Notice of Hearings.** If a hearing relates to a charitable trust, the Attorney General is an "interested person" within the meaning of Mont. Code Ann. § 72-38-103(8)(c) and is therefore entitled to notice of the hearing pursuant to Mont. Code Ann. § 72-38-209(1). For example, the Attorney General would be entitled to notice of a proceeding requesting a court to modify or terminate a charitable trust under the *cy pres* doctrine of Mont. Code Ann. § 72-38-413.
- **Right to be a Party to Trust Reformation Proceedings.** The Attorney General must be named a party to a proceeding brought to reform or excuse compliance with the

trust instrument in order to comply with IRC § 4940 (excise tax on private foundation net investment income).<sup>7</sup>

## C. Notices to the Attorney General

In addition to notice of hearings mentioned above, the Attorney General must be given notice in other specified circumstances. The UTC requires notice to the Attorney General of significant events in the course of a charitable trust's existence. The UTC does so by giving the Attorney General "qualified beneficiary" status. UTC § 110(d) provides:

The Attorney General of this State has the rights of a qualified beneficiary with respect to a charitable trust having its principal place of administration in this state.

However, the corresponding section of the MT UTC, Mont. Code Ann. § 72-38-110(4)(c), gives the Attorney General "qualified beneficiary" status under narrower circumstances. While the MT UTC's definition of qualified beneficiary status will be explained later, the result is that the Montana Attorney General is entitled to notices of significant events in the lifetime of a smaller number of charitable trusts.

If the Attorney General is treated as a "qualified beneficiary" under the MT UTC (or the UTC generally), the Attorney General is entitled to notices of the following events in the life of a charitable trust:

- The creation of an irrevocable charitable trust<sup>8</sup>
- The conversion of a revocable trust into an irrevocable charitable trust<sup>9</sup>
- A trustee's resignation<sup>10</sup>
- A trustee's intent to combine or divide a trust<sup>11</sup>
- A trustee's proposed action or proposed inaction<sup>12</sup>
- A trustee's intent to modify or terminate an uneconomic trust<sup>13</sup>
- A trustee's intent to transfer the trust's principal place of administration to another jurisdiction<sup>14</sup>
- A change of trustee's compensation<sup>15</sup>

Each of these notices is explained in more detail below:

1. **The creation of an irrevocable trust or the conversion of a revocable trust into an irrevocable trust.** Within 60 days of acquiring knowledge of the creation of an irrevocable trust or the conversion of a revocable trust into an irrevocable trust, the trustee must notify the qualified beneficiaries (including the Attorney General if the Attorney General is a qualified beneficiary) of the trust's existence, the identity of its settlor, and the qualified beneficiaries' right to request portions of the trust instrument.<sup>16</sup>

2. **Trustee's resignation.** One could conceive a circumstance when a trustee's resignation would violate the

1 Mont. Code Ann. § 72-38-110(4)(b)(i) and § 72-38-813(1).

2 Mont. Code Ann. § 72-38-110(4)(a) and § 72-38-813(2)(a).

3 The Internal Revenue Service requires private foundations to send a copy of the annual IRS Form 990-PF (Return of Private Foundation) and the IRS Form 4720 (Return of Certain Excise Taxes Under Chapters 41 and 42 of the Internal Revenue Code), if applicable, to the attorney general of the state in which the foundation was created and the state in which the foundation's principal office is located. This automatic annual reporting requirement is not dependent on the attorney general's request.

4 Mont. Code Ann. § 72-38-221 and § 72-38-405(3).

5 Mont. Code Ann. § 72-38-706.

6 Mont. Code Ann. § 72-38-110(4)(a) and § 72-38-410(2).

7 Mont. Code Ann. § 72-38-825.

8 Mont. Code Ann. § 72-38-813(2)(c).

9 Ibid.

10 Mont. Code Ann. § 72-38-705.

11 Mont. Code Ann. § 72-38-417.

12 Mont. Code Ann. §§ 72-38-130 through 72-38-134.

13 Mont. Code Ann. § 72-38-414(1).

14 Mont. Code Ann. § 72-38-108.

15 Mont. Code Ann. § 72-38-813(2)(d).

16 Mont. Code Ann. § 72-38-813(2)(c).

trustee's duty of prudent administration,<sup>17</sup> or some other fiduciary duty. For example, a trustee's resignation in the middle of complex negotiations concerning the sale of trust property might not be prudent. Having received a trustee resignation notice as a qualified beneficiary, the Attorney General could object and petition the court pursuant to Mont. Code Ann. § 72-38-221.

3. Combination or division of a trust. After notice to qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts if the result does not impair any beneficiary's rights or adversely affect the achievement of the trust purposes. It is possible a proposed trust combination or division would violate the trustee's fiduciary responsibility. For example, the combination with another trust owing property which subjects that trust to liability under environmental statutes, might not be prudent. Having received a notice to combine or divide a trust as a qualified beneficiary, the Attorney General could object and petition the court pursuant to Mont. Code Ann. § 72-38-221.

4. Notice of proposed action or inaction. A number of situations may arise where a trustee believes one or more beneficiaries may potentially assert claims against the trustee for taking a specific action or for failing to undertake a specific action. Mont. Code Ann. §§ 72-38-130 through 134 permit a trustee to notify qualified beneficiaries of a proposed action or proposed inaction.<sup>18</sup> The notice must provide qualified beneficiaries at least 30 days to object.<sup>19</sup> If the qualified beneficiaries do not timely object, the trustee is not liable to those qualified beneficiaries with respect to the proposed action or inaction.<sup>20</sup> However, if the Attorney General, or any other qualified beneficiary, timely objects, the trustee would be liable for any actual breach of trust. If the trustee does not provide notice to the Attorney General because the Attorney General is not a qualified beneficiary or for any other reason, the Attorney General is nonetheless free to assert a claim against the trustee.<sup>21</sup>

5. Termination of an uneconomic trust. After notice to qualified beneficiaries, a trustee may terminate a trust holding less than \$100,000 of assets, if the trustee determines the value of the assets is insufficient to justify the costs of trust administration.<sup>22</sup> Having received such a notice as a qualified beneficiary, the Attorney General could object and petition the court pursuant to Mont. Code Ann. § 72-38-221.<sup>23</sup>

6. Transfer of a trust's principal place of administration. After notice to qualified beneficiaries followed by a failure of those beneficiaries to timely object, a trustee may transfer a trust's principal place of administration.<sup>24</sup> If the Attorney General is a qualified beneficiary and timely objects, the trustee may not transfer the principal place of administration without court approval.<sup>25</sup>

7. Change of trustee compensation. The trustee must provide qualified beneficiaries (including the Attorney General if the Attorney General is a qualified beneficiary) notice in advance of any change in the method or rate of the trustee's compensation.<sup>26</sup>

## D. Qualified Beneficiary Status

Both the MT UTC and the UTC recognize that some trust beneficiaries hold remote and contingent interests in the trust and, as a result, are less likely to have much interest in the day-to-day affairs of the trust. Both the MT UTC and the UTC distinguish these beneficiaries from those beneficiaries who hold more significant stakes in the trust. This latter group of beneficiaries is referred to as "qualified beneficiaries." They are accorded greater rights and powers than those accorded other beneficiaries.

As discussed above, the MT UTC's classification of the Attorney General as a qualified beneficiary of a charitable trust is narrower than the comparable UTC's classification provision. Mont. Code Ann. § 72-38-110(4)(c) reads in part:

The attorney general of this state has all of the rights of a qualified beneficiary if, on the date that a determination is being made as to the rights of the attorney general under this subsection:

(i) any charitable organization:

(A) is a distributee or permissible distributee of trust income or principal; or

(B) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date; and

(ii) no charitable organization expressly designated to receive distributions under the terms of the charitable trust:

(A) is a distributee or permissible distributee of trust income or principal; or

(B) would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

Put differently, the MT UTC grants the Attorney General all of the rights of a qualified beneficiary only in those charitable trusts where no charitable organization is expressly designated to receive distributions.<sup>27</sup> Further, because circumstances affecting a charitable trust may change, that is, an expressly

17 Mont. Code Ann. § 72-38-804.

18 The UTC does not include comparable notice of proposed action or inaction provisions that are found in Mont. Code Ann. §§ 72-38-130 through 134.

19 Mont. Code Ann. § 72-38-132(5).

20 Mont. Code Ann. § 72-38-133(2).

21 Mont. Code Ann. § 72-38-221 and § 72-38-405(3).

22 Mont. Code Ann. § 72-38-414.

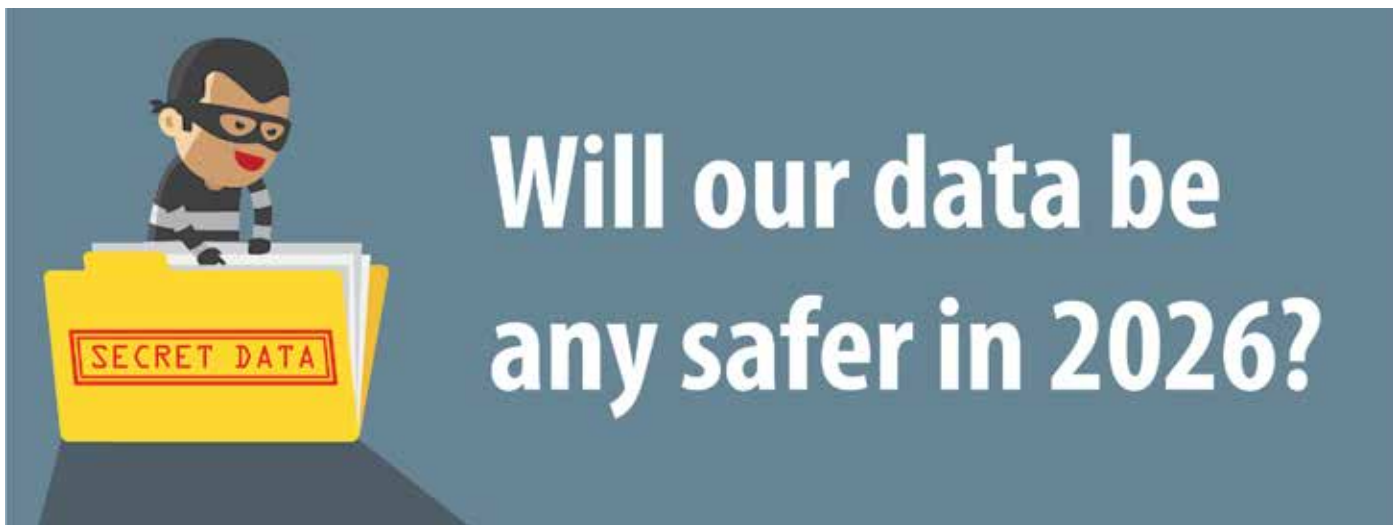
23 Regardless of whether the Attorney General is a qualified beneficiary, the Attorney General responds to inquiries by trustees about uneconomical, charitable trusts. Frequently, the Attorney General suggests trustees terminate the trust and distribute the trust assets to operating charities, so as to avoid administrative costs and better use trust assets in accordance with the settlor's intent. See Mont. Code Ann. § 72-38-805.

24 Mont. Code Ann. § 72-38-108(4).

25 Mont. Code Ann. § 72-38-108(5) and § 72-38-201.

26 Mont. Code Ann. § 72-38-813(2)(d).

27 The corresponding subsection of the UTC as promulgated by the Uniform Law Commission, § 110(d), grants the attorney general broader "qualified beneficiary" status. Under that subsection, the attorney general has all the rights of a qualified beneficiary, whether or not a charitable organization is expressly designated to receive distributions.



By Sharon D. Nelson, Esq. and John W. Simek  
Sensei Enterprises, Inc.

I was asked that question at the College of Law Practice Management's 2016 Futures Conference. As part of a great legal technology panel, my answer was quick and decisive. No, it will not be.

Look how the cone of silence (check mentions of Maxwell Smart if you don't recognize the reference) around law firm breaches has shattered in 2016 alone. It turns out that law firms, even major law firms, have been breached again and again. Do we really believe that there will be any respite from the attacks?

Law firms, by their very nature, are honey pots. If you target a corporation, you may get that corporation's data, but probably not a lot of data from other companies. On the other hand, law firms hold the data of many individuals and corporations. That's what makes us such an attractive target. And our security is, in general, not as good as that of major business entities – though we are getting better.

Think about it – hackers are motivated largely by money (think insider knowledge that can be used to leverage stock market profits or ransomware, which has become increasingly profitable) and by espionage motives. These days, all nations seem to be spying on each other, also for economic motives to protect their own countries, but additionally for political and military intelligence. I can only foresee escalation in the motivation to hack.

As we have already witnessed, attacks are increasing in number and sophistication – and the good guys are always limping badly behind the bad guys. Even the good guy countries, and I hope the U.S. is one, really believe they have the absolute right to know what we are doing. The Fourth Amendment is looking more and more like a hunk of Swiss cheese.

Worse yet, our younger generation doesn't seem to care, which makes it even easier for governments to snoop without protest.

Though encryption is a lawyer's best friend, there have been recent rumblings that AES-256 (the most common strong encryption standard) may have predictable factors that will make it easier to crack. Add that to the easy ability of governments to ramp up supercomputers and we are pretty much screwed if those rumblings are accurate.

One question from the audience involved cloud computing. Roughly 50 percent of lawyers embrace and roughly 50 percent

are in the "never, ever" camp. The truth is that clouds often protect confidential data far better than law firms do. And without going totally "into the weeds", there are ways that sophisticated cloud providers (whose cybersecurity talent most law firms could NEVER afford to buy) can protect data by dispersing it into segments across multiple clouds which has to be reassembled before you can read it. Way too simple an explanation but perhaps easier to understand.

And just wait until the day when affordable quantum computing arrives. It is in its infancy now, but think of an abacus compared to one of today's supercomputers and you may be talking about something that is a billion times more powerful than our supercomputers. And that's as technical as I will get because even my eyes glaze over when I read about quantum computing. But rest assured, quantum computing will change everything we think we know about cybersecurity.

Scary? Oh yeah. Welcome to the future of trying to protect law firm data!

**Sharon D. Nelson, Esq. and John W. Simek are the president and vice president of of Sensei Enterprises, Inc., a legal technology, information security and digital forensics firm based in Fairfax, VA. 703-359-0700 (phone) [www.senseient.com](http://www.senseient.com)**



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# Clear, convincing and beyond a reasonable doubt: Montana lawyers are amazing!

## Volunteer participation from all corners of the bench and bar ensure success of Regional Trial Competition in Missoula

By Professor Cynthia Ford

The secret is out: Montana's bar is the reason our law students are so successful in national competitions. In February, 22 teams from 11 law schools<sup>1</sup> came to Missoula for the Regional Trial Competition. After a total of 39 trials, the verdict from the participating students and their coaches was unanimous: the quality of the competition in general and judging specifically was astounding. The coaches, in particular, were amazed that so many great lawyers and judges would volunteer so much of their time, in many cases driving long distances and spending the entire weekend hearing (over and over) the criminal case of *U.S. v. Stevie Tyler*. That's Montana, and that is why this is the best place, last or not, to study and practice law.

### Participation by Montana lawyers and judges

For each trial, the ideal is to have one presiding judge and three scoring judges. If the presiding judge does not have to score, s/he can concentrate on rulings, and the scoring judges can concentrate on assessing presentation skills rather than the merits of the case. In my two decades of coaching the trial team, I have participated in trial competitions across the country, observing first-hand the problems the organizers have in getting volunteers to serve as judges. It is exceedingly rare to find the full panel of four volunteers per trial, especially in the preliminary rounds. My guess is that the national average is two scorers, one of whom has to preside as well, and necessitating some fancy arithmetic to construct a mythical third ballot. I don't think the lawyers in all those other places are busier than we; I do think they are less committed to the advancement of the bar.

Of the 39 Missoula competition trials, 38 had the full complement of four "judges." The single exception occurred on the first day, Thursday, when one of the volunteers called to report that he was on his way to emergency surgery, but would try to get better in time to judge later in the weekend. That's the Big Sky spirit! In total, more than 80 Montana lawyers and judges served in the

mock trials. Obviously, to fill the 156 total spots, some served multiple times. Five stalwart supporters sat on all five rounds of the weekend: Max Davis (Great Falls), Randi Hood (Helena), Mike Lamb (Helena), Mike Meloy (Helena), and Justice James Shea (Helena by way of Butte).

In addition to sheer numbers, the quality of the attorneys and actual judges who shared their time and experience to help these nascent trial lawyers improve their skills was unbeatable. Again in contrast to many competitions where I have heard "judges" critiquing students with the preface "I have never tried a case, but I think you should have done this differently..." the competitors in Missoula got constructive criticism from folks with significant time in the trenches, who know what works and what does not. The roster reads like a "who's who" of the Montana trial bar, with many members both of the American College of Trial Lawyers and ABOTA appearing. Significantly in this criminal case, the [then] U.S. Attorney, Mike Cotter, and the Federal Public Defender, Tony Gallagher, as well as several from each of their offices, served. The judiciary also was exceedingly generous, with judges from the federal bench (Chief Judge Dana Christensen), the Montana Supreme Court (Justice Shea, Justice Beth Baker, former Justices Patricia Cotter and Terry Triewiler), Montana District Courts (Judges Robert Deschamps, Leslie Halligan, John Kutzman<sup>2</sup>, and Brad Newman, with Master Amy Rubin as well) and Justice Court (Justice of the Peace Marie Andersen).

The Montana trial team, year in and year out, regularly benefits from the help of judges and lawyers across Montana. One out-of-state student who appeared in a round before Judge Christensen said: "I am so glad I didn't know who he was during the trial: I would have been too intimidated." Montana trial team members are not fazed, because they annually perform practice trials in both state and federal courtrooms before real judges. They also practice against real trial lawyers throughout the season, learning both skills and substance to prepare them for their trials at the regional competition. After the students graduate, they pay it forward, returning to do those practice trials and to give the current team the benefit of their competition experience as well as their real-world experience. Thus, this trial competition was just an expansion, albeit an intense one, of the tradition of Montana trial lawyers reaching down to help those on the lower rungs of trial practice climb the ladder, to the good of the profession and the public.

### Great volunteer witnesses too

Montana used to compete in the ATLA competition, where each team brings its own mock witnesses, but switched to the

<sup>1</sup> Arizona, Arizona State, BYU, Colorado, Denver, Montana, New Mexico, Oklahoma, Oklahoma City, Tulsa, and Utah.

<sup>2</sup> Judge Kutzman was the Trial Team Manager in his last year, and my first year, at the law school.

National Trial competition, jointly sponsored by the American College and the Texas Young Lawyers Association (TYLA), several years ago. This competition relies instead on locally recruited witnesses who do not meet the student advocates until 10 minutes before the trial begins. In the *U.S. v. Tyler* case, the four witnesses in each trial were a DEA agent, a confidential informant named (not-so-confidentially) “Crazy 8,” the defendant’s friend, and an expert psychologist who testified about the mental (dis)ability of the defendant. Law students (perhaps by compulsion in substantive trial-related courses) filled most of these roles. Rumor has it that a couple of real detectives were strongly encouraged to volunteer by Judge Karen Townsend, as a condition of obtaining search warrants. Dean Paul Kirgis contributed his support by hosting a reception at the law school for the volunteer judges, but he contributed his actual time also in the witness box as a very convincing expert. And you haven’t lived until you have seen Randy Cox in a mullet wig playing drug dealer Crazy 8....

### The organizing committee

The last time Montana hosted a regional trial competition was in 1989. A committee of Missoulians who had extensive experience coaching the Montana team, but not in putting an actual competition together, volunteered to do the work, and spent more than a year on the task. The organizers included Judge and former coach Karen Townsend, former team member and former coach Katie DeSoto, former team members and current coaches Tim Dailey and Briana Schwandt, and myself. I have left Randy Cox, another former coach, for last, because he contributed several times his body weight: countless bottles of great wine (no boxes there!) at our frequent meetings; the extraordinary mathematical skills of his better half, Theresa, who did all the calculations of points once the judges turned in their scoresheets; and his very detailed paralegal Karen Stephan who did all the work Randy so cavalierly assumed.

### MT’s team was great, but we wish we had better news

This year, unfortunately, neither the 3L nor the 2L team advanced into the elimination rounds. While this proves the efficacy of the many measures we took to eliminate hometown advantage, it was disappointing. Tim Dailey, who coached this year’s team with Briana Schwandt, summarized the results:

Our 3L Team, Brian Geer, Abby Rogers, and Vince Luparell, was very strong. After winning their first round 3-0 by the judges, they had a tough draw and were eliminated in heartbreaking fashion. In the second round, they split the first two judges but lost the swing judge by one point against New Mexico. In their third round, they lost the exact same way to BYU, again by one point. Had that one point gone the other way in either round, they would have advanced to the semifinals, where I am confident they would have made a run at winning it all.

Our 2L Team, Jenna Lyons and Jake Schwaller, got valuable experience that will help them next year. While they did not prevail, they lost in split decisions, which means at least one judge thought they were the better team. Next year, they will compete in Albuquerque, and we expect they will use

this experience to have a great competition as 3Ls.

There are two “winners” in each region, who qualify for the National Trial Competition, held in Texas. Arizona and BYU who emerged victorious from the final trials in Missoula.

Montana Law School, under both its former and current names, has a tradition of success in its many<sup>3</sup> competition teams. We have always packed a huge punch for a little place in what some view as “the sticks.” Our secret recipe is now public. It’s still not clear whether Stevie Tyler was a drug kingpin, offloading a kilo of heroin in that red cooler, or just a schmuck who did whatever his friend Crazy 8 told him. It is indisputable that the selflessness and quality of Montana’s lawyers made the competition in Missoula such a roaring success, and makes all of the law school’s competitors better both in their competitions and as lawyers.

### Feedback

The most gratifying result of the competition was the flow of emails from both competition teams and volunteers afterwards. The Denver University coach, a frequent winner wrote to Cox:

Simply, thank you. This was a great tournament. Having hosted an annual national high school tournament myself here in Denver these past 10 years, I know a well-run tourney when I see one. This one was more than that. With all hyperbole aside, the judging was consistently the best I think I have ever seen in a tournament. Kudos to the good folks of Montana.

While it was disappointing that our squad lost again in the Finals, I can find no ground for complaint (other than I did not get to see you in the famed wig! Lol).

Many of the volunteers took even more time from their schedules to write to the committee afterwards. Justice Baker emailed:

Thank you for the very nice letter and for the information about the winning teams. I was sorry to miss the announcement of the winners.

It was a privilege to participate with such an auspicious group of lawyers and judges, and I really enjoyed it.

Judge Kutzman wrote:

I was on the team the last time Missoula hosted this event. It was really gratifying to see the event back there, to see how much effort your county commissioners have poured into that courthouse, and to overhear the competitors and coaches in the hall talking about how well organized the event was.

A lawyer who drove halfway across the state thanked us for

### EVIDENCE, page 36

<sup>3</sup> In addition to the Trial Advocacy competition, in the past twelve months, Montana entered teams in at least six competitions: Moot Court (regional winner); Environmental Moot Court; Native American Law Student Association Moot Court; National Cultural Heritage Law Moot Court Competition; ABA Negotiation Competition (2<sup>nd</sup> in the nation); and Jessup International Moot Court.

designated charitable organization may be in existence at one time and not in existence at another time, the phrase “on the date that a determination is being made” is critical to the understanding of Mont. Code Ann. § 72-38-110(4)(c). See Examples Three and Four below. The same charitable trust has an expressly-designated charitable organization in existence in Example Three, but not in Example Four.

The existence of a designated charitable organization to receive distributions can be flushed out with the following examples:

**Example One.** The governing instrument provides: “To A for life, remainder to Two Dot University (TDU), an IRC 501(c)(3) organization, of Two Dot, Montana.” Because TDU is expressly designated and would be a distributee of trust income and principal if the trust terminated, it is a qualified beneficiary under Mont. Code Ann. § 72-38-103(16). The Attorney General would not be treated as a qualified beneficiary under Mont. Code Ann. § 72-38-110(4)(c).

**Example Two.** The governing instrument provides: “To A for life, remainder to one or more non-profit colleges selected by the trustee.” A would be a qualified beneficiary under Mont. Code Ann. § 72-38-103(16). Because no expressly designated charitable organization is entitled to any of the remainder (the charitable portion of the trust), the Attorney General would have all the rights of a qualified beneficiary under Mont. Code Ann. § 72-38-110(4)(c).

**Example Three.** The governing instrument provides: “To A for life, remainder to Two Dot University (TDU), an IRC 501(c)(3) organization, of Two Dot, Montana. However, if TDU is not in existence at the time of A’s death, to one or more non-profit colleges selected by the trustee.” TDU would be treated as a qualified beneficiary under Mont. Code Ann. § 72-38-103(16). Although it is possible TDU might not be in existence at the time of A’s death, TDU is an expressly designated remainder beneficiary that would be a distributee of trust income or principal if the trust terminated on that date and therefore could enforce the trust and protect the charitable interest. The existence of a means to select a contingent charitable remainder beneficiary would not alter this result. Thus, the Attorney General would not have all of the rights of a qualified beneficiary under Mont. Code Ann. § 72-38-110(4)(c).

**Example Four.** The governing instrument includes the same language as Example Three. Ten years after the creation of the trust and during A’s lifetime, TDU is dissolved. Because no expressly designated charitable organization is entitled to any of the remainder (the charitable portion of

the trust), the Attorney General would have all of the rights of a qualified beneficiary under Mont. Code Ann. § 72-38-110(4)(c) as of the date TDU is dissolved and thereafter during A’s lifetime.

As illustrated by the preceding examples, the MT UTC gives the Attorney General “qualified beneficiary” status in fewer instances than the UTC, which may have a practical effect upon the Attorney General’s enforcement of charitable trusts. How can a Montana Attorney General enforce a charitable trust if the Attorney General does not know of its existence? How can a Montana Attorney General object to a proposed significant event such as the trustee’s resignation, the combination or division of a trust, the termination of an uneconomic trust, the transfer of a trust’s principal place of administration, or a change of trustee compensation, if the Attorney General is unaware of the charitable trust’s existence or unaware of the proposed significant event? Who will protect the public’s interest in the charitable assets if the Attorney General is not a qualified beneficiary?<sup>28</sup>

## **E. Additional Rights and Powers if the Attorney General is a Qualified Beneficiary**

If the Attorney General is classified as a “qualified beneficiary,” the Attorney General has additional rights and powers:

Right to be reasonably informed. If the Attorney General is a qualified beneficiary, the trustee must keep the Attorney General reasonably informed so that the Attorney General can protect the charitable interest.<sup>29</sup>

Right to trustee’s name and contact information. If the Attorney General is a qualified beneficiary, the trustee must provide the Attorney General with the trustee’s name, address, and telephone number within 60 days of accepting the trusteeship.<sup>30</sup>

Right to request information and tax returns. If the Attorney General is a qualified beneficiary, the trustee must provide the Attorney General with income, estate, or transfer tax returns relevant to the administration of the trust if requested by the Attorney General.<sup>31</sup>

Power to fill a trustee vacancy. If there is a vacancy in the trusteeship and no person designated in the trust instrument acts as successor trustee, the qualified beneficiaries may unanimously appoint a successor trustee.<sup>32</sup>

**See the May Montana Lawyer for part two of this article.**

***Former University of Montana School of Law Dean Ed Eck is professor emeritus at the law school.***

28 Perhaps the Attorney General could become aware of some of these events from sources other than the trustee, such as a complaint filed with the Attorney General. But it is likely that many of the events will escape the Montana Attorney General’s notice.

29 Mont. Code Ann. § 72-38-813(1).

30 Mont. Code Ann. § 72-38-813(2)(b).

31 Mont. Code Ann. § 72-38-813(3).

32 Mont. Code Ann. § 72-38-704(3)(b).

# Strong communication with beneficiaries about will, trust can help ease stress of grieving process

Attorney's role critical in providing perspective, helping beneficiaries understand the estate plan

By Steve Condon  
D.A. Davidson

As Montana baby boomers age and pass away, attorneys and other professionals are increasingly facing the challenge of ushering their deceased clients' beneficiaries through a particularly difficult and emotional process: making sense of the trust that remains.

Many baby boomers have chosen to execute their estate plans either through a revocable living trust or through a will that may ultimately fund an irrevocable trust. Estate attorneys work hard to memorialize their clients' wishes in their documents. However, the challenge begins when the creator of the estate plan passes away and the revocable trust now becomes irrevocable or a new testamentary trust is formed and funded through the execution of the will.

Compounding the issue is the fact that no one likes to discuss "what if" when it comes to dying and the many subjects related to dying. Remember, the baby boomers generally grew up with Lucy and Desi or the Brady Bunch as family role models — families that did not exactly discuss weighty matters openly. So, many members of the baby boomer generation were adamantly taught not to discuss money in general or their own private money matters specifically.

Additionally, families often have not outlined their family values or shared information about their preferred legacies. Their children, who are usually the beneficiaries, often not only receive funds, but also can inherit some confusion with the emotional and financial issues involved in their inheritance.

Consequently, beneficiaries are left trying to figure out what is theirs and what processes will take place before they receive any distributions and/or their final inheritance. Confusion over the type of trust, trustees, restrictions and distributions can be commonplace.

New statements and tax forms add further confusion, and all of this is happening at a time when the same beneficiaries are grieving. With a loss in the family, nerves and emotions can feel particularly raw, and so the confusion added by a trust can amplify the sense of loss. Lack of control over what is now a final plan can also cause distress.

This is where an attorney's role is critical in building a bridge between the decedent's document and the remaining

beneficiaries, as you can hopefully provide perspective on your deceased client's decisions. Your more difficult role after a client's death probably involves working alongside those beneficiaries and helping them to understand the estate plan. You need to manage people while also working alongside others to manage the process.

For professionals working with these families, it is important to start with strong communication. While providing the appropriate (and polite) time for grieving, you as a professional can reach out early to beneficiaries and provide a basic education about your role. You can help beneficiaries dismiss any unrealistic expectations and better understand the reality of the trust details, including how long it will take to administer the estate and fund the trust, and what the process is and isn't.

Beneficiaries might have questions such as, "What was my mother trying to communicate to me through this restrictive trust?" "Why was my brother named as trustee and not me?" or "I don't think this is what he/she would have done if still alive," and "Why is my share held in a trust while my sibling's portion isn't?"

These types of questions make it important to show the beneficiaries the terms of the trust and to help them understand it, while (of course) managing the sensitivity that can be involved. Hopefully the trust was drafted to reveal clues as to what the maker really intended. And obviously, the answers to some of the beneficiaries' questions — and the rights that the beneficiaries have — depend on when the trust was created or became irrevocable.

To help the communication and strengthen the relationship of the beneficiaries with everyone involved, it will be important to meet in tandem with the other professionals who will be part of the trust's administration. At times, the jargon used in the trust and estate world just adds further confusion among beneficiaries. The communication becomes increasingly complex because of the different industry specialties and specialists involved — legal, tax, trust and investments — often each with its own technical terminology.

The challenge then, for advisers, is how to answer tricky or technical questions about the document while also keeping the beneficiaries fully informed and educated about the terms. Beneficiaries need a team of professionals to guide them through this process, helping the bereaved to maximize the benefit of a well-crafted estate plan.

**Steve Condon is president of asset management and trust for D.A. Davidson in Great Falls and Seattle. Condon joined D.A. Davidson in 2015 after previously serving as head of a Colorado-based family office and prior experience with other asset management firms.**

# Applicants sought for chief water judge position

The Judicial Nomination Commission is seeking applicants for the office of Montana's chief water judge.

Current Chief Judge Russell McElyea's term expires on July 31. Montana statute requires him to reapply for a new term.

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 Chief Water Judge. The application form is available electronically at the commission's website. Applications must be submitted electronically as well as in hard copy. The deadline for submitting applications is 5

p.m., Thursday, May 4. The Commission then will announce the names of the applicants and accept comment from the public for 30 days.

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 Chief Justice Mike McGrath for appointment. The person appointed will serve a four-year term subject to Senate confirmation at the next special or regular legislative session. The annual salary for the position will be \$132,567.

## Court Orders

# 4 attorney members, 1 non-attorney named to COP

### APPOINTMENTS

#### Summarized from orders in Case No. 11-0244, March 29

Four attorneys were appointed to four-year terms on the Montana Supreme Court's Commission on Practice on April 4.

Heather Perry of Stanford replaces James Hubble representing Area F (Fergus, Judith Basin, Petroleum, Golden Valley, Meagher, Musselshell, and Wheatland Counties) on the commission. Dan O'Brien of Malta replaces Stephen Brown representing Area D (Liberty, Hill, Chouteau, Daniels, Sheridan, Roosevelt, Blaine, Phillips, and Valley Counties),

Brad Belke of Butte and Robert J. Savage of Sidney were reappointed to new four-year terms. They represent Area B (Silver Bow, Deer Lodge, Granite, Powell, Beaverhead, Jefferson, and Madison Counties) and Area H (Dawson, McCone, Prairie, Richland, Wibaux, Carter, Custer, Fallon, Garfield, Powder River, Rosebud, and Treasure Counties), respectively.

The appointments were made after elections were held in March in the three areas. The top three vote-getters in each area were forwarded to Chief Justice Mike McGrath, who made the final selections.

In addition, Lori Maloney was appointed to fill the remainder of the term formerly held by non-attorney member James

Jacobsen. Maloney retired in January as clerk of district court in Butte-Silver Bow County.

### 3 REAPPOINTED TO COMMISSION ON TECHNOLOGY. SUMMARIZED FROM ORDER IN CASE NO. 06-0216, APRIL 4

Justice Mike Wheat, Court Administrator Beth McLaughlin, and Clerk of the Supreme Court Ed Smith were reappointed to three-year terms on the Supreme Court's Commission on Technology.

Their terms expired on March 31. Their new terms will expire on March 31, 2020.

### Two new members named to District Court Council. Summarized from orders in Case No. AF 06-0536, March 28, April 4.

The Supreme Court has appointed two new members to the District Court Council.

The court appointed Custer County Clerk of District Court Hazel Parker, nominated by Montana Association of Clerks of District Court, to replace Lori Maloney on the council. Maloney's term ended in January when she retired as clerk of court for Butte-Silver Bow County. Parker will serve the remainder of Maloney's term, which expires June 30, 2018.

### APPEALS, from page 17

part of the charged offense — the fraudulent scheme — and not “other” crimes or “other” acts evidence. Accordingly, Federal Rule of Evidence 404(b) does not preclude the government from introducing evidence of uncharged transactions to prove the first element of wire fraud: the existence of a scheme to defraud. Moreover, even if the uncharged transactions were not part of the crime charged, they are “part of the same

transaction” as the specific transactions charged in the indictment. The inextricably intertwined doctrine thus provides an alternative basis for holding that the evidence should not be excluded under Rule 404(b).

**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.**





# MLSA receives funding for domestic violence programs

Montana Legal Services Association (MLSA) recently received funding for three domestic violence programs.

The Women's Resource Center and MLSA recently received a grant to the Women's Resource Center from the Office of Violence Against Women Rural Domestic Violence program in the amount of \$327,918, to be disbursed over three years.

This funding has helped MLSA hire attorney Bree Williamson, a resident of Dillon, to provide comprehensive legal services to survivors of domestic violence, sexual assault, stalking, and dating violence for referrals from the Women's Resource Center. Williamson will work in the Women's Resource Center offices in Dillon.

Last year, the Women's Resource Center worked with 129 survivors in the Beaverhead and Madison Counties. Services the Women's Resource Center provides includes crisis intervention, counseling and advocacy, safe shelter, emergency financial and material assistance, civil legal and criminal justice advocacy and representation, court accompaniment, hospital and law enforcement accompaniment, and safety planning. MLSA helped 2,341 survivors and their children statewide in 2016, providing representation and help with orders of protection, property settlement, child support, and other domestic violence related civil legal matters. One landmark study has concluded that the single most important factor in determining whether a woman escapes domestic abuse is her access to civil legal services. The collaboration between the Women's Resource Center and MLSA will help reach even more individuals experiencing domestic violence and provide them with more comprehensive legal services.

MLSA also received a competitive award from the Mary Byron Project for its innovative domestic violence prevention efforts. MLSA received a cash award of \$10,000.

MLSA's award was in recognition of the Survivor's Legal Project, which works to provide civil legal services free of charge to empower domestic violence survivors. Project attorneys help low-income survivors obtain orders of protection, parenting plans, child support orders and other family law court orders distributing property and ensuring family security and stability. Research shows that the number one public service that reduces domestic abuse in the long term is women's access to legal assistance. MLSA utilizes innovative technology to expand the Project's reach to survivors in isolated and remote areas of Montana that otherwise could not be reached. MLSA's website, [www.MontanaLawHelp.org](http://www.MontanaLawHelp.org) provides information on a variety of legal issues relevant to survivors and includes informational articles, links to various resources and interactive court forms. To reach people without Internet access or who are fearful of using home computers, MLSA partners with the Montana Supreme Court to establish legal information kiosks in libraries, court-houses and other public places.

MLSA also received a contract from the Northern Cheyenne Tribe under their Coordinated Tribal Assistance Solicitation Grant from the U.S. Department of Justice. MLSA will receive \$40,604 over two years to fund the Tribal Survivors Legal Project to provide civil legal assistance to survivors of domestic violence, sexual assault, stalking, and dating violence on the Northern Cheyenne Reservation.

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## SECURITY, from page 14

confidential information is accessible to specific individuals and non-administrative users cannot make system changes that may threaten the security of your office. We suggest that you create an Administrator user with full privileges to configure your PCs, and then individual, non-administrator accounts for each user in your office, including yourself (avoid using an administrator account for your own primary account). Then, you can share files and folders with specific users based on their need to access the information.

The above steps will help ensure that your systems are

significantly less vulnerable to hacks and data exfiltration from within and without.

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***Members of the State Bar of Montana typically save 20-25 percent off standard credit card fees. To learn more, call 866-376-0950 or visit <https://lawpay.com/montanabar/>.***

# 406-683-6525

## Montana's Lawyers Assistance Program Hotline

Call if you or a judge or attorney you know needs help with stress and depression issues or drug or alcohol addiction .

# Is Congress' protecting or impeding access to safe health care with proposed reform bills?

By Steve Harman

How would it feel, while filling out the usual paperwork in the waiting room, to sign a waiver that you won't sue your doctor? Under a pair of bills recently introduced by Republicans in the U.S. House, that is what would happen without your knowledge or consent. Congress is seeking to pile federal regulations pertaining to medical malpractice on top of 40 years' worth of Montana laws that already protect doctors.

Under H.R.1215, a benevolent-sounding bill titled: "Protecting Access to Care Act of 2017," and Title V of H.R. 277: "Reforming Medical Liability Law," patients would surrender even more rights than they already have under state law. The bills would deprive patients of their right to present their cases in state courts in front of a jury of their peers, with jurisdiction transferred to federal courts.

Under the proposed bills, patients would be required to submit their case to a panel of three doctors. That panel would decide whether the doctor's conduct complied with certain professional rules. If the panel determined that the rules of practice were followed, the case would be dismissed, unless the patient could overcome the finding by "clear and convincing evidence," an onerous burden of proof.

If the patient were able to overcome the panel's finding, then the case could proceed to a jury trial, but the panel's adverse findings would be presented to the jury. Additionally, the panelists would not be subject to cross-examination by the patient's attorney — another important right patients would lose under the new legislation.

Other notable changes include the following: a severe reduction of the patient's legal fees, but not the doctor's legal fees; a cap on non-economic damages at \$250,000; and, immunity to doctors who use defective products or prescribe drugs that harm patients.

The legislation would trump state laws where they are in conflict and defer to state laws that are more restrictive. This is a one-two punch, forcing patients to fight with both hands tied behind their backs.

From 1977 to the present, the Montana Medical Association has successfully lobbied or supported 46 statutes which restrict a patient injured by malpractice from obtaining full legal redress, a right which is guaranteed to us by the Montana Constitution. In fact, in 2009, the MMA boasted that, when compared to other states, Montana's tort reform "is qualitatively 'better' than measures in most states."

In 2016, over 400,000 patients died from medical errors, while 40,000 people were killed in car crashes. Medical errors

are the third leading cause of death in the U.S., behind heart disease and cancer. Even so, full legal redress is available to victims of car crashes in Montana, while it is not for victims of medical malpractice.

Montana's legislature embarked on tort reform in medical malpractice 40 years ago. Frivolous lawsuits and huge increases in medical malpractice insurance premiums were purportedly driving doctors to quit practice or leave the state. In response, the Montana Medical Legal Panel was created. The panel screens all malpractice claims before a lawsuit is filed in state District Court. The panel consists of three lawyers and three doctors. A new panel is selected for each case. The doctors are chosen from the same specialty area as the defendant doctor. The lawyers typically follow the lead of the doctors. The proceedings at the panel are confidential, no transcript is made, and the decision is not binding or admissible in court. The proposed bills would change all of that — the findings would be binding and admissible in court.

Most of the decisions of the Montana panel favor the doctor. The purpose of the panel is to weed out frivolous claims. In general, the panel works by encouraging patients and their lawyers not to pursue a weak case. Records show that the number of practitioners has tripled in the past 30 years, while the number of malpractice claims has steadily decreased. In 2015, the panel recorded 114 claims. Only 52 went to a hearing, and of those, only three went on to a lawsuit. In the past decade, 18 cases have gone to trial. Only two have resulted in verdicts in favor of the patient. Despite the success of the panel, the MMA has continued to press for more protection.

In recent years, the Montana Legislature has enacted many more laws that restrict a patient's rights of recovery. In other words, it is already an uphill battle to sue for medical malpractice in Montana. So why should the feds pile on more regulations? Isn't Congress "punishing" access to affordable health care, rather than "protecting" such a right? Who will hold doctors accountable for their errors? Conservatives promised to cut federal regulations and to return power to the states. Isn't tort reform at the federal level the height of hypocrisy? Tell Congress we have enough rules and regulations and to stay out of our business. Piling on regulations that are more restrictive than those we already have in Montana erodes our right to full legal redress.

**Steve Harman represents patients harmed by unsafe medical practice. He is a member of the prestigious American College of Trial Lawyers. He also serves on the faculty of the University of Montana Law School Advanced Trial Advocacy School. He practices law in Billings.**

## MT justices urge senators to support Legal Services, AmeriCorps

*Dear Senators Tester and Daines:*

As current and former Justices of the Montana Supreme Court, we write to express our deep concern with the proposal to eliminate funding for the Legal Services Corporation and the Corporation for National and Community Service. These programs are critical partners in ensuring that the Montana justice system meets the Constitution's command to "establish Justice ... and secure the Blessings of Liberty" to all Montanans.

For 50 years, the Montana Legal Services Association (MLSA) has provided civil legal aid to Montanans with basic human needs. MLSA helps protect domestic violence victims and obtain support for their children; secure housing for veterans; relieve seniors from consumer scams; and obtain access to justice in rural Montana where few, if any, other legal services are available.

And for nearly a decade, dozens of AmeriCorps members have devoted a year or two years of service to Montana's Court Help Program, giving tens of thousands of Montanans legal information to help understand and navigate the court system to resolve their own legal issues when they cannot afford an attorney.

Together, these programs help meet a vital need in a Montana court system that is simply overwhelmed with record-setting caseloads, self-represented litigants, and alarming

increases in time-intensive cases involving abused and neglected children. When people show up in court unprepared and with their lives in crisis, the system becomes inefficient and hurts all court users. Because children and families in crisis take the courts' priority, other cases move to the back of the line, and justice waits.

The plain truth is that MLSA and AmeriCorps' Justice For Montanans Program are an incredibly effective use of a small amount of federal dollars that deliver results to Montana every day. Our justice system depends on them, as partners with the courts, the private bar, and non-profit community organizations to address the demands on Montana courts and to achieve our Nation's promise of Justice for All.

We encourage your leadership and strong support for current-level funding of the Legal Services Corporation and the Corporation for National and Community Service.

**Chief Justice Mike McGrath, Justice Beth Baker, Justice Laurie McKinnon, Justice Michael E. Wheat, Justice Jim Rice, Justice Dirk Sandefur, Justice James Jeremiah Shea**

**Retired Justice Patricia Cotter, Retired Justice James C. Nelson, Retired Justice W. William Leaphart, Retired Justice John Warner, Retired Justice Jim Regnier, Retired Justice Terry N. Trieweller, Retired Justice Russell C. McDonough, Retired Justice John C. Sheehy**

## Modest Means

### Would you like to boost your income while serving low- and moderate-income Montanans?

**We invite you to participate in the Modest Means program** {which the State Bar sponsors}.

If you aren't familiar with Modest Means, it's a reduced-fee civil representation program. When Montana Legal Services is unable to serve a client due to a conflict of interest, a lack of available assistance, or if client income is slightly above Montana Legal Services Association guidelines, they refer that person to the State Bar. We will then refer them to attorneys like you.

### What are the benefits of joining Modest Means?

**While you are not required to accept a particular case, there are certainly benefits!**

You are covered by the Montana Legal Services malpractice insurance, and will receive recognition in the Montana Lawyer. State Bar Bookstore Law Manuals are available to you at a discount and attorney mentors can be provided. If you're unfamiliar with a particular type of case, Modest Means can provide you with an experienced attorney mentor to help you expand your knowledge.

### Questions?

**Please email:** [ModestMeans@montanabar.org](mailto:ModestMeans@montanabar.org). You can also call us at 442-7660.

# William J. Jameson Award

This is the highest honor bestowed by the State Bar of Montana. The Past President's Committee will be guided in its selection by the extent to which, in its judgment, the candidate:

- 1 | Shows ethical and personal conduct, commitment and activities that exemplify the essence of professionalism.
- 2 | Works in the profession without losing sight of the essential element of public service and the devotion to the public good.
- 3 | Possesses an unwavering regard for the Rules of Professional Conduct, the Creed of Professionalism, the State Bar's Guidelines for Relations Between and Among Lawyers, and the State Bar's Guidelines for Relations Between Lawyers and Clients.
- 4 | Assists other attorneys and judges in facing practical and ethical issues.
- 5 | Participates in programs designed to promote and ensure competence of lawyers and judges.
- 6 | Supports programs designed to improve the discipline process for judges and attorneys.
- 7 | Participates in programs that aid the courts in ensuring that the legal system works properly, and continually strives for improvements in the administration of justice.
- 8 | Is actively involved with public and governmental entities to promote and support activities in the public interest.
- 9 | Actively participates in pro bono activities and other programs to simplify and make less expensive the rendering of legal services.
- 10 | Actively participates in programs designed to educate the public about the legal system.

On a separate sheet of paper, please describe activities you believe qualify your nominee for the Jameson Award. Please attach additional pages as needed, and other supporting documents. Also, attach the nominee's resume. Note: Awards will not be made posthumously and may be given to more than one person.

Nominee: \_\_\_\_\_

Address: \_\_\_\_\_

Your signature: \_\_\_\_\_ Print your name: \_\_\_\_\_

Your address: \_\_\_\_\_ Phone: \_\_\_\_\_

Nominations and supporting documents will not be returned. Send them no later than May 31 to:

Jameson Award  
State Bar Past Presidents Committee  
P.O. Box 577  
Helena MT 59624  
or email [mailbox@montabar.org](mailto:mailbox@montabar.org)

# George L. Bousliman Professionalism Award

The award will recognize lawyers or law firms who have:

- 1 | Established a reputation for and a tradition of professionalism as defined by Dean Rufus Pound: pursuit of a learned art as a common calling in the spirit of public service; and
- 2 | Within two years prior to the nomination, demonstrated extraordinary professionalism in at least one of the following ways:
  - Contributing time and resources to public service, public education, charitable or pro bono activities.
  - Encouraging respect for the law and our legal system, especially by making the legal system more accessible and responsive, resolving matters expeditiously and without unnecessary expense, and being courteous to the court, clients, opposing counsel, and other parties.
  - Maintaining and developing, and encouraging other lawyers to maintain and develop, their knowledge of the law and proficiency in their practice.
  - Subordinating business concerns to professional concerns.

Nominee/individual or firm \_\_\_\_\_

Address \_\_\_\_\_

In a separate document, please describe the nominee's activity that you believe brings great credit to the legal profession. Please attach the description and other supporting documents to this nomination form.

Your signature \_\_\_\_\_ Print your name \_\_\_\_\_

Your address \_\_\_\_\_ Phone \_\_\_\_\_

Nominations and supporting documents will not be returned. Send them no later than May 31, 2017 to:

Bousliman Professionalism Award  
State Bar Past Presidents Committee  
P.O. Box 577  
Helena MT 59624  
or email to [mailbax@montanabar.org](mailto:mailbax@montanabar.org)



# Karla M. Gray Equal Justice Award

This award honors a judge from any court who has demonstrated dedication to improving access to Montana courts. Consideration for this award will be given to nominees who demonstrate this dedication and commitment with a combination of some or all of the efforts described below:

- Personally done noteworthy and/or considerable work improving access of all individuals, regardless of income, to the Montana court system.
- Instrumental in local Access to Justice efforts, including program development, cooperative efforts between programs, and support for community outreach efforts to improve understanding of and access to the courts.
- Active support of citizen involvement in the judicial system.
- Active support and commitment to increasing involvement of volunteer attorneys in representing the indigent and those of limited means.
- Other significant efforts that exhibit a long-term commitment to improving access to the judicial system.

The Access to Justice Commission selects one award winner. Nomination materials will be retained and considered by the Access to Justice Commission for three years.

Nominee: \_\_\_\_\_

Address: \_\_\_\_\_

**On a separate sheet of paper**, please describe how the nominee has demonstrated dedication to improving access to Montana courts. Please attach additional pages as needed, and other supporting documents.

Your signature: \_\_\_\_\_

Print your name: \_\_\_\_\_

Your address: \_\_\_\_\_

\_\_\_\_\_

Your phone number: \_\_\_\_\_

**Please mail the nomination by May 31, to:**

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

# Neil Haight Pro Bono Award

This memorial award is named in honor of Neil Haight, the Executive Director of Montana Legal Services Association for more than 30 years.

Through Neil's leadership, MLSA survived numerous attacks during his many years at its helm. His effort left a solid foundation which eventually led to the current MLSA structure as a statewide law firm. His optimism carried MLSA staff through the darkest years when many thought all hope of civil legal assistance to the poor was lost. Despite numerous and endless attacks, Neil never lost faith in the vision and goal of MLSA.

After his retirement in 2002, Neil remained the icon of MLSA until his death in 2008. His passion for justice and his compassion for Montanans living in poverty was a model many lawyers, both within and outside MLSA, in those early years of "legal aid" in Montana.

The Neil Haight Pro Bono Award recognizes a person who exemplifies Neil's legacy of providing outstanding legal services to Montanans living in poverty. The nominee is a lawyer, other individual or organization which has provided pro bono services to those in need in Montana. While the nominee may be a lawyer who has provided direct pro bono legal representation, he or she may also be a court employee, paralegal, psychologist, or social worker who has provided pro bono services in aid of direct pro bono legal representation in Montana.

Nominations are also accepted for law firms, teams of lawyers, and associations of Montana lawyers and pro bono programs receiving no form of compensation or academic credit for doing pro bono work and whose work was not a non-legal public service.

Attorney nominees must be admitted to practice in Montana. Nominees cannot be employees of organizations which provide free or low-cost services to the poor.

The Neil Haight Pro Bono Award is conferred periodically after review of all nominations, by the State Bar Justice Initiatives Committee. Individual or organizations which submit the nomination may submit more than one nominee.

**In honoring Neil, the recipient of this award should demonstrate some of the following:**

- a. *be a dedicated, committed leader instrumental in the delivery of civil legal services to Montanans living in poverty; or*
- b. *be a key person in the development of a pro bono program for a bar association or community organization; or*
- c. *contribute significant work toward creating new and innovative approaches to delivery of volunteer civil legal assistance through a new or existing pro bono program sponsored by a bar association; or*
- d. *perform significant and meaningful civil pro bono activity which resulted in satisfying previously unmet needs or extending services to underserved segments of the population; and/or*
- e. *Successfully litigated pro bono civil cases which favorably resulted in the provision of other services to Montanans living in poverty.*

## **Nominee Information:**

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Organization (if applicable) \_\_\_\_\_

## **Nominator Information:**

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Organization \_\_\_\_\_

Phone: \_\_\_\_\_

Email: \_\_\_\_\_

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## **On separate pages, please describe the following:**

- 1) Please describe the ways in which the nominee has provided outstanding pro bono services. This may include a compelling case that the nominee assisted with or litigated on a pro bono basis. Alternatively, this may include a history of dedication to the pro bono cause including expansion of pro bono effort in an under-served area, a willingness to continually accept pro bono work or difficult cases on a pro bono basis, or some other qualitative improvement to legal services for Montanans in need. If possible, please quantify the nominee's pro bono contribution by detailing the approximate number of hours donated or the number of cases in which he or she is or was involved. Please be comprehensive in your response, including details of the

individual's or organization's work which mirrors Neil Haight's dedication to pro bono.

- 2) Please briefly describe the nominee's professional career including a history of dedication to serving the under-served in Montana.

Nominations and supporting documents will not be returned. Send them no later than May 31 to:

Neil Haight Pro Bono Award  
Justice Initiatives Committee  
PO Box 577  
Helena, MT 59624

**EVIDENCE**, from page 25

that dubious privilege: “I just wanted to personally thank you for allowing me to be a part of the Trial Competition. I really enjoyed myself.”

Judge Townsend sent a summary report on the competition to all who judged and otherwise participated. In part, she reported:

this competition has again demonstrated that when Montana lawyers are asked to step up to help mentor law students and young lawyers, we do not hesitate. As the vice chair of the National Committee [of the American College of Trial Lawyers] said to me after reviewing the recap I sent and telling me that he was blown away by

the participation of Montana lawyers, “I want to be a Montana Fellow.” It is a tribute to our legal profession here in Montana.

Dean Kirgis responded to Judge Townsend’s report by writing: “thanks for this summary. As impressive as it is, it still doesn’t do justice to the quality of this competition. This was an amazing event. It did our University and our State proud.”

As usual, the Dean is not wrong. It took a state, and Montana did it. Thanks for being you.

Next month, Evidence Corner will continue, with the next two columns devoted to the two big differences between the MRE and FRE which were illustrated in the trial competition problem, Rules 609 and 704(b).

*Professor Cynthia Ford teaches Civil Procedure, Evidence, Family Law, and Remedies at the University of Montana’s Alexander Blewett III School of Law.*

# Lawyer Referral & Information Service

When your clients are looking for **you** ... They call **us**

**How does the LRIS work?** Calls coming into the LRIS represent every segment of society with every type of legal issue imaginable. Many of the calls we receive are from out of State or even out of the country, looking for a Montana attorney. When a call comes into the LRIS line, the caller is asked about the nature of the problem or issue. Many callers “just have a question” or “don’t have any money to pay an attorney”. As often as possible, we try to help people find the answers to their questions or direct them to another resource for assistance. If an attorney is needed, they are provided with the name and phone number of an attorney based on location and area of practice. It is then up to the caller to contact the attorney referred to schedule an initial consultation.

**It’s inexpensive:** The yearly cost to join the LRIS is minimal: free to attorneys their first year in practice, \$125 for attorneys in practice for less than five years, and \$200 for those in practice longer than five years. Best of all, unlike most referral programs, Montana LRIS doesn’t require that you share a percentage of your fees generated from the referrals!

**You don’t have to take the case:** If you are unable, or not interested in taking a case, just let the prospective client know. The LRIS can refer the client to another attorney.

**You pick your areas of law:** The LRIS will only refer prospective clients in the areas of law that you register for. No cold calls from prospective clients seeking help in areas that you do not handle.

**It’s easy to join:** Membership in the LRIS is open to any active member of the State Bar of Montana in good standing who maintains a lawyers’ professional liability insurance policy. To join the service simply fill out the Membership Application at [www.montanabar.org](http://www.montanabar.org) -> Need Legal Help-> Lawyer Referral and forward to the State Bar office. You pay the registration fee and the LRIS will handle the rest. **If you have questions or would like more information, call 406-442-7660 or email [edavis@montanabar.org](mailto:edavis@montanabar.org).**

### Bruce A. Measure

Bruce A. Measure, 64, died peacefully early Monday morning, June 6, 2016, with family by his side in Kalispell. He was a loving father, grandfather, husband, partner, brother, uncle and friend. Bruce also was a skilled attorney and speaker, an expert on energy and water resources, a brilliant thinker and an avid politician.



Measure

Bruce was born Aug. 14, 1951, in Kalispell to Ambrose and Laura Jo Measure. He earned a Juris Doctorate from the University of Montana in Missoula where he was elected president of his law school class.

Bruce worked as forest resource manager for the Chippewa Cree tribe in Box Elder in 1979-80 and assistant forest manager for Plum Creek Timber Company from 1980 to 1985. He practiced law with his father,

Ambrose, at the law offices of Ambrose Measure and after his father's death as a partner in the firm of Measure, Sampsel, Sullivan and O'Brien.

Bruce's father Ambrose believed we all owe a debt to our community and the more we are given the larger the debt. Bruce practiced this philosophy with enthusiasm and generosity. He was one of a group of visionaries who looked at the abandoned rail lines in the Flathead Valley and saw, instead of

rusty tracks and rotten ties, the foundation for miles and miles of pathways for hiking, biking, jogging, walking and snowshoeing. Bruce did all the legal work for the original organization which achieved phenomenal success as Rails to Trails of Northwest Montana and currently, and still growing, miles and miles of year-round recreational trails.

Bruce was elected and served one term in the 52nd State Legislative Assembly representing House District 6. He was a member of the Kalispell City Government Study Commission in 1995-96 and hearing officer and mediator for the Montana Office of Public Instruction from 1990-2001. He was very proud when he was admitted to practice before Montana State Courts in 1988.

Bruce served on the Flathead Electric Co-op board of trustees from 2002-2003 and as president in 2004. He also served as the representative from Flathead Electric to the statewide co-operative association. In 2004, Montana Gov. Brian Schweitzer appointed Bruce to be one of two Montana representatives to the Northwest Power and Conservation Council where he served two four-year terms including two years as vice chairman and two as chair of the council. At the time of his death Bruce was again a member of the Flathead Electric Co-op board and had recently served as board president.

Memorials can be made to the Rails to Trails of Northwest Montana, Glacier Park Conservancy and the Flathead Valley Community College Scholarship Fund.

### James C. Bartlett

One month shy of his 68th birthday James C. Bartlett of Kalispell collapsed with liver cancer and went so fast and too soon.

Jim was born to John and Edith Bartlett and grew up in Whitefish.

On October 25, 1969, he married Linda Lee Pfefferkorn. After he graduated from the University of Chicago, they moved to Missoula so Jim could go to law school at the University of Montana. He graduated in 1974, passed the bar and moved to Kalispell to practice with the law firm of Hash, O'Brien & Bartlett. In 1997, Jim established his private law practice. He practiced law for 43 years in the valley, touching many lives.

Jim and Linda had 2 children, Joshua Colin Bartlett born Feb. 2, 1974, and Jacy Maren Bartlett born Jan. 30, 1978.

Jim loved the law and was a respected source of legal knowledge. He loved to golf in the spring, summer and early fall and ski in the late fall and winter.

Memorial donations may be made in Jim's name to the following organizations: Kalispell Lakers Baseball, Buffalo Hills Golf Course Memorial Program or University of Montana Law School. Johnson-Gloschat Funeral Home and Crematory is caring for the Bartlett family.



Bartlett

### Jim Donahue

Jim Donahue, attorney, animal activist and lifelong resident of Great Falls passed away in September 2016.

The son of Jim and Ida Donahue, Jim attended Great Falls High School then Stanford University where he received a degree in electrical engineering in 1987. After graduating Stanford, he was a chip design engineer at NCR and was awarded U.S. patents for his

contributions.

He earned a law degree at the University of Minnesota Law School. He served as a deputy county attorney for Cascade County and a Cascade County justice of the peace.

In lieu of flowers, memorial donations can be made to the Humane Society of Cascade County (hscg.org) or by mail at P.O. Box 1774, Great Falls, Montana 59403.



Donohue

### Submitting an obituary

If you know of an attorney who has passed away, you can submit an obituary to [editor@montanabar.org](mailto:editor@montanabar.org). There is no charge for obituaries.

**CLASSIFIEDS Contact** | Joe Menden at [jmenden@montanabar.org](mailto:jmenden@montanabar.org) or call him at (406) 447-2200.

### ATTORNEYS

**EXECUTIVE DIRECTOR:** The State Bar of Montana (State Bar) is seeking an Executive Director with a start date of January 2, 2018. The State Bar is a unified, integrated bar organized in 1975 by the Montana Supreme Court. Membership represents the entire spectrum of the Montana legal community from private practitioners to judges, government and legal services attorneys and corporate counsel. Direct letters of interest, inquiries and resumes by July 1, 2017, to [cmanos@montanabar.org](mailto:cmanos@montanabar.org). See full listing at [jobs.montanabar.org](http://jobs.montanabar.org).

**CHIEF DISCIPLINARY COUNSEL:** Please forward a cover letter, resume, the names of three professional references and a legal writing sample to the: Montana Supreme Court, Court Administrator's Office HR, P.O. Box 203005, Helena, Montana 59620-3005. This position will close and application materials must be postmarked by May 15, 2017. See full listing at [jobs.montanabar.org](http://jobs.montanabar.org).

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



### LITIGATION ATTORNEY

Garlington, Lohn & Robinson, PLLP, a midsize law firm in Missoula, Montana has an immediate need for an experienced litigation attorney. The ideal candidate will have at least four years' experience in civil defense litigation. More senior candidates are also encouraged to apply.

New attorneys at GLR have significant client contact and responsibility as well as reasonable billable hour expectations. Pro bono and community service activities are encouraged.

The firm offers competitive compensation, a collegial culture, and excellent benefits.

Please send resume, cover letter, and references to John DeArment, Chief Operating Officer, P.O. Box 7090, Missoula, MT 59807-7909.

**JUDGE PRO TEMPORE:** Missoula Municipal Court is looking for attorneys who are interested in serving as Judge Pro Tempore. To qualify, you must be a member of the bar in good standing and must not appear regularly in Missoula Municipal Court. Experience in Criminal Law is preferred. Please send letters of interest to Judge Kathleen Jenks, 435 Ryman St, Missoula, MT 59802 or email to [kjenks@ci.missoula.mt.us](mailto:kjenks@ci.missoula.mt.us).

**CITY ATTORNEY:** The City of Deer Lodge, Montana, is requesting proposals for a City Attorney, either as a part-time employee or an independent contractor basis. The successful applicant must be a member of the Montana State Bar and admitted to practice in the state courts in Montana. For questions, call Mayor Cozby, 406-846-1226, or City Administrator Brian Bender, 406-846-2238. Mailing address is 300 Main St., Deer Lodge, MT 59722.

**PLAINS:** Great opportunity for general practice attorney. Great small town lacks attorney. Attractive office available at reasonable rate. View at [www.ponderosamontana.com](http://www.ponderosamontana.com). 406-887-2662.

**ASSOCIATE ATTORNEY:** Elk River Law Office, PLLP, established Billings firm, seeks Attorney, three-years-experience in civil & Federal Indian law preferred. Montana Law License required. Must have strong research/writing skills. Competitive salary based upon experience. Send Resume, Cover Letter, three References to: Georgette Boggio, P.O. Box 928, Billings, Montana 59103, or you can submit your information by e-mail to [gboggio@elkriverlaw.com](mailto:gboggio@elkriverlaw.com). All applications confidential.

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

**ASSOCIATE/PT CONTRACT ATTORNEY:** Busy Estate Planning and Elder Law firm needs P/T Contract Attorney to assist with periodic litigation. Could lead to F/T Position. Telecommuting ok but requires occasional office time and court appearances. Submit via email: resume, cover letter, and hourly compensation requirement. [steve@missoulaestatelaw.com](mailto:steve@missoulaestatelaw.com)

### PARALEGALS/LEGAL ASSISTANTS

**LEGAL ASSISTANT / ASSOCIATION MANAGER:** 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. Must be proficient in Word, Excel, Outlook, 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. Email resume to [thunderdomelaw2@gmail.com](mailto:thunderdomelaw2@gmail.com). Full listing at [jobs.montanabar.org](http://jobs.montanabar.org).



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

## ATTORNEY SUPPORT/RESEARCH/WRITING

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

**ON-DEMAND RESEARCH AND WRITING:** Need some assistance with plaintiff's or criminal defense matters in your small firm or solo practice? Contact David Sulzbacher, an attorney with over six years of clerkship, civil litigation, and criminal defense experience in Montana courts, for thoroughly researched and persuasive briefs or any other remote assistance that can help you provide the best possible representation for your clients. [david@sulzbacherlaw.com](mailto:david@sulzbacherlaw.com); [www.sulzbacherlaw.com](http://www.sulzbacherlaw.com); (206) 734-4615.

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

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

**COMPLICATED CASE?** I can help you sort through issues, design a strategy, and write excellent briefs, at either the trial or appellate level. 17+ years' experience in state and federal courts, including 5 years teaching at UM Law School and 1 year clerking for Hon. D.W. Molloy. Let me help you help your clients. Beth Brennan, Brennan Law & Mediation, 406-240-0145, [babrennan@gmail.com](mailto:babrennan@gmail.com).

**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](http://www.meguirelaw.com); e-mail [robin@meguirelaw.com](mailto:robin@meguirelaw.com); or call 406-442-8317.

## 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](mailto:cmatovich@mkmfir.com).

**JOE ANDERSON, TRAINED MEDIATOR** -- "Conflict Free" -- Joseph B. Anderson Legal & Mediation Services, recently opened in Missoula,

is new to Montana, although Shelby High graduate Joe is not. With over 25 years litigation and entertainment/tech transaction practice, keen insight, and competitive rates, Joe delivers a fresh neutral opinion. 406-880-5587. [www.joeandersonlaw.com](http://www.joeandersonlaw.com). [joe@joeandersonlaw.com](mailto:joe@joeandersonlaw.com).

## OFFICE SPACE/SHARE

**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](mailto:dwh@kvhlaw.com).

## CONSULTANTS & EXPERTS

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

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

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

# MONTANA LAWYER

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