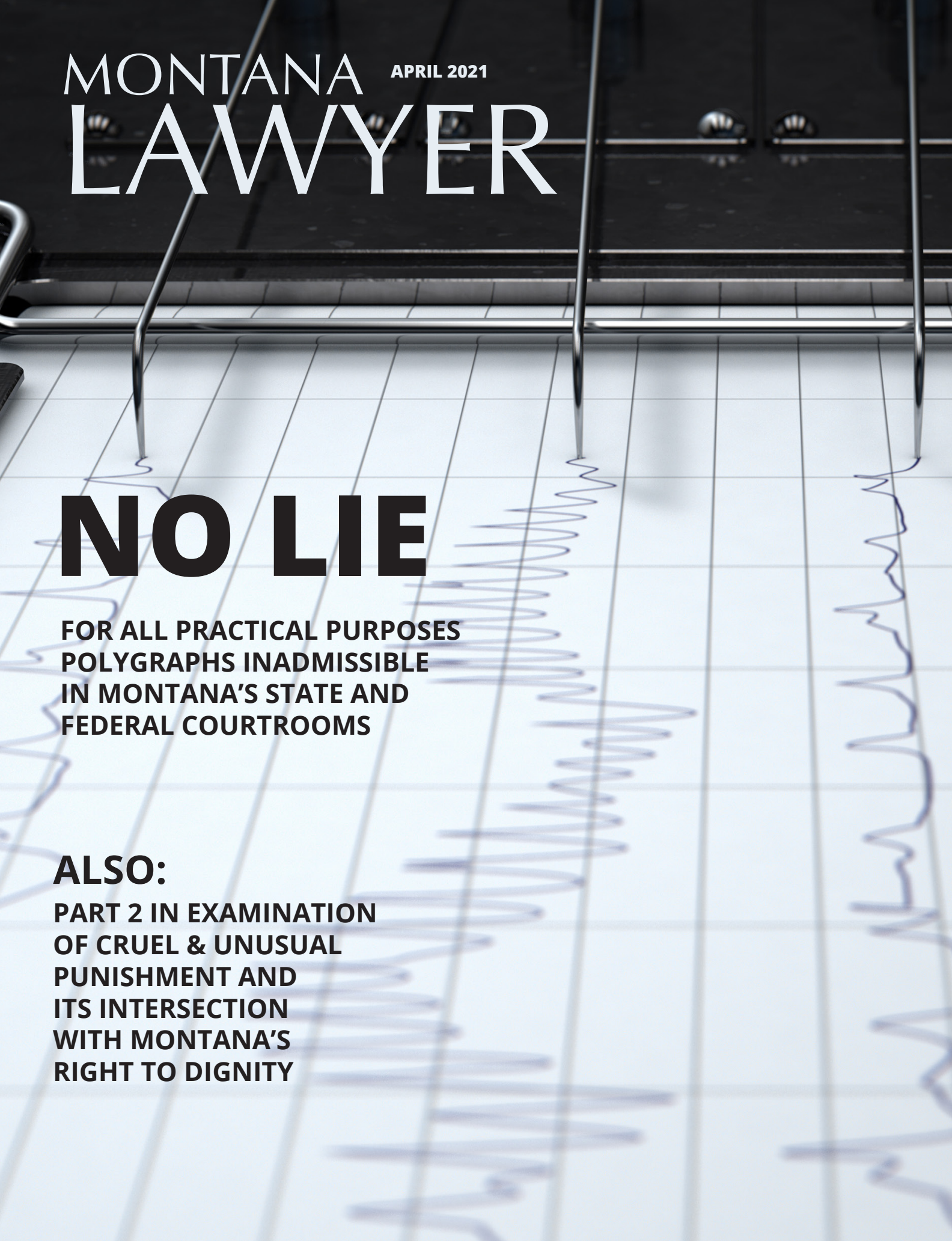
MONTANA LAWYER
APRIL 2021



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FOR ALL PRACTICAL PURPOSES POLYGRAPHS INADMISSIBLE IN MONTANA'S STATE AND FEDERAL COURTROOMS

ALSO:

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2021

VOL. 46 ISS. 4

FEATURE ARTICLES

THE TRUTH ABOUT POLYGRAPH ADMISSIBILITY

Lie detectors are basically inadmissible for all intents and purposes in both state and federal courts in Montana. And that's no lie! **Page 12**

CRUEL & UNUSUAL PUNISHMENT

Part two of James Park Taylor's article looks at the hybrid issue of cruel and unusual punishment and Montana's right to dignity, where it stands and where it may be heading.

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RURAL INCUBATOR PROJECT FOR LAWYERS

RIPL issues call for new class of fellows. Plus, meet the 2020 class of RIPL fellows

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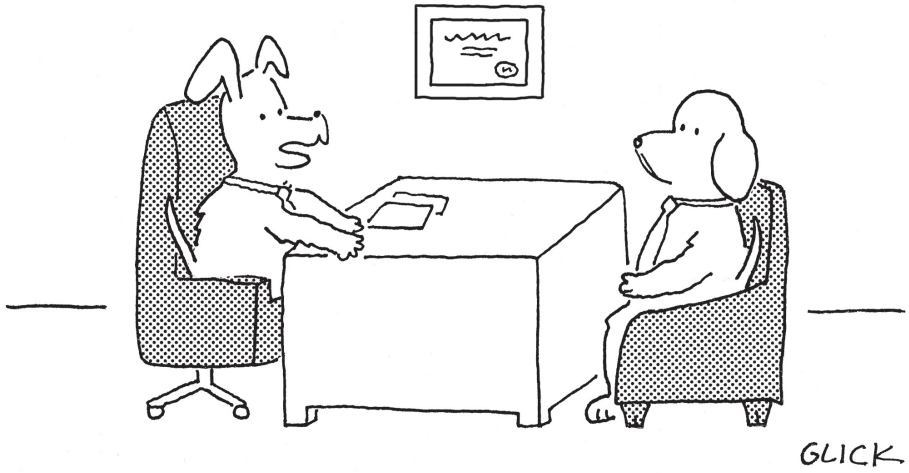
JEST IS FOR ALL BY ARNIE GLICK



"Always remember the first rule of settlement negotiations: If a really good offer is made, don't wag your tail!"

Bridging the social distance after pandemic isolation

KATE McGRATH ELLIS

Kate McGrath Ellis is a staff attorney with the Montana Auditor's Office in Helena.

As the April issue of the Montana Lawyer goes to press, Montana is making COVID-19 vaccines available to everyone over age 16. With that development comes the promise of a return to "normal work" and perhaps an opportunity to begin to draw some lessons from the last year of remote work, delayed trials, Zoom depositions and a year away from colleagues.

That last item, the distance that the pandemic created in our own workplaces and among professional colleagues, including even those with whom we frequently interact with as opposing counsel, is perhaps one of the more difficult impacts to gauge.

More senior members of the profession often lament to me about newer members who forgo telephone communication for email, and sometimes even text messages. To some degree, that was probably also the case when the fax letter entered the profession's mindset decades ago, a not insignificant evolution over a letter delivered by U.S. Mail.

However, add in a global pandemic and the effect of these changing styles of communication are magnified, presenting both opportunities for quick, remote collaboration – think Teams, Slack and the like – while at the same time further stretching the time between authentic, human connection. Don't we all experience "Zoom fatigue" now, often glued to our screens for hours of endless meetings without so much as a cup of coffee between colleagues? Long gone are the days when grabbing doughnuts for everyone on the way into work created fun break room conversations.

A recent Harvard Business Review article by three Microsoft executives – Nancy Baym, senior principal research manager, Jonathan Larson, principal data architect, and Ronnie Martin who leads Microsoft's efforts around the future of work communications – discussed how all this change has affected work environments. The authors noted the importance of social capital in the workplace, which they define as the benefits you get from knowing people. Citing Microsoft's annual Work Trends Index, they said remote work has resulted in a marked decrease in workplace relationships and that younger workers who are new to the workplace may be feeling social isolation more.

That should have us thinking about our own legal organizations, law firms, governmental organizations, nonprofits, in-house counsel shops, and even the profession as a whole. One can quickly

> "Those of us who have been at this a while understand that is often the relationships we form, and not just the technical skills we possess, that help most in meeting our clients' legal needs."

President, next page

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Still time to earn and report CLE credits

The 2020-2021 CLE reporting year ended March 31, but you may still earn and report CLE credits without penalty during the six-week grace period. To avoid a late fee Active Attorneys must earn and report their required CLE credits by May 15. Visit **www.mtcle.org** to access your transcript, and find the CLE Credit Reporting Form under the website's Lawyer tab.

UPCOMING STATE BAR OF MONTANA CLE

Register for State Bar CLE by going to the calendar at www.montanabar.org. Email salpert@montanabar.org with questions.

Trends in Montana Natural Resources, Energy, and Environmental Law CLE

Thursday, April 8 | 5.5 CLE credits (1.0 Ethics): Topics include Perspectives on the Future of Energy Law and Policy in Montana; Changing of the Guard: State and Federal Transitions and Priorities; Developments in State and Federal Natural Resources and Environmental Law; the Lucky Minerals Decision and its broader implications; Federal Appointment Process, Vacancy Reform Act, and Implications.

Public Utilities Law Section CLE

Thursday, April 15 | 1.0 ethics CLE: Party or Ex Parte? Practical Considerations under MCA 6-4-613. concerns arising under the statutory prohibition against ex parte communications under the Montana Administrative Procedures Act

Indian Law Section CLE - Session 1

Friday, April 23: .5 CLE credits (pending): Topics - Health Care Issues and Negotiating 638 Contracts; Federal Tribal Recognition Process: Successes & Challenges

Indian Law Section CLE - Session 2

Friday, May 7 | 3.5 CLE credits (pending): Topics - The Death Penalty in State & Federal Courts; Holistic Responses in the Tribal Justice Systems

Save the Date - Free CLE

Friday, April 16: 2.0 credits. Details TBA

Save the Date - Law Practice Boot Camp

May 10-14: Details TBA

Save the Date - Bankruptcy Law Section CLE

July 30-31: Details TBA

Save the Date - BETTR Section CLE

Friday, Aug. 6: Details TBA

Family Law Section CLE canceled

The Family Law Section CLE originally scheduled for Friday, April 16. has been canceled.

President, from previous page

discern that new lawyers, many of whom experienced a significant part of law school in a remote setting, are entering the legal profession with reduced social capital at an already challenging time in their careers.

Thus, as we begin returning to "normal" work after this historic pandemic, it seems a good time for those of us with established connections, friendships and professional relationships to renew our efforts to reconnect with the newer members of our firm and our profession. Those of us who have been at this a while understand that is often the relationships we form, and not just the technical skills we possess, that help most in meeting our clients' legal needs.

And if you have been feeling isolated, why not take the initiative? Make a list you would like to connect with – a 3L you looked up to as a first year, a seasoned colleague in your organization, or someone you have worked with or against who influenced you positively – and contact someone each day.

Ultimately, reaching out to new lawyers and checking in on old friends in the coming months will only serve to benefit our collective success.

CAREER MOVES

Driscoll Hathaway welcomes Taryn Gray as new attorney

Taryn Gray is an attorney at Driscoll Hathaway Law Group. Taryn is originally from Southern California and received her B.A. from Chapman University. She earned her J.D. at Loyola Law School of Los Angeles in 2017. Taryn moved to Montana in March of 2019.

During law school, Gray focused her work on advocating for children with disabilities and their families. She interned at the Special Education Clinic at Lanterman Regional Center and the Youth Justice Education Clinic, where she attended Individualized Education Program meetings as the parents' advocate. She also interned at the Alliance for Children's Rights, where she ensured infants with special needs in foster care ages 0-5 were receiving appropriate services from regional centers and school districts. After law school, she worked in family law in California including dissolution, child custody, child support, spousal support, minor's counsel, and adoption.

Gray

Gray is thrilled to be living and working in Missoula. In her free time, she enjoys running, yoga, spending time with her husband, cat, and dogs, and taking advantage of every recreational activity the Treasure State has to offer.

Ostrye opens general civil practice in Fort Benton

Michelle Ostrye opened Ostrye Law Firm LLC in Fort Benton in February 2021, where she has a general practice that includes wills and probate, business law, commercial litigation, and issues concerning farmers and ranchers.

Ostrye grew up on a farm near Benchland and graduated from Hobson High School. She then graduated from the University of Montana with honors in 1991 and earned her J.D. at Texas Tech University School of Law in 1997.

After law school, Ostrye worked for 24 years for large and small firms in Texas and New Mexico. She returned to Montana in the summer of 2020. She obtained her Montana law license and enjoys practicing law and living in a small rural town. She and her husband have twin daughters who are 8 years old and attend Fort Benton Elementary School. You can reach her at 1216 Front St., Fort Benton, MT 59442, 406-622-9060 and Michelle@Ostryelaw.com.

Ostrye

Zimmerman joins Josephson Law Firm in Big Timber

Josephson Law Firm is proud to welcome **Caity Zimmerman** to the firm as an estate planning associate in their Big Timber office.

After attending Shields Valley High School, Zimmerman received a Bachelor of Arts in Communication from Pacific Lutheran University in 2014 and then completed two years of volunteer corps service. Zimmerman graduated with honors from Alexander Blewett III School of Law at the University of Montana in 2019 and had the opportunity to clerk for the Honorable Justice Jim Rice at the Montana Supreme Court before joining Josephson Law Firm in October of 2020.

Zimmerman

Zimmerman's practice will focus on estate planning and administration, business and agricultural entity planning, real property transactions, and tax law. She can be reached at 406-932-5900 or caity@bigtimberlaw.com.

Raph Graybill joins Graybill Law Firm, opens Helena office

Raph Graybill joined the Graybill Law Firm in its 101st year of continuous operation, establishing the firm's first Helena office.

Graybill was the 2020 Democratic Nominee for Montana Attorney General and recently served as Chief Legal Counsel to former Montana Gov. Steve Bullock. As Chief Legal Counsel, Graybill successfully led major cases challenging unlawful federal regulations, removing the acting director of the U.S. Bureau of Land Management, protecting the integrity of mail voting during the 2020 election from a challenge by the president of the United States, and defending Montana's leading conservation easement program, among other cases. He litigated appeals before the Montana Supreme Court, the U.S. Court of Appeals for the 9th Circuit, and the U.S. Supreme Court.

Graybill

A fifth-generation Montanan from Great Falls, Graybill is a graduate of Yale Law School, Columbia University, and the University of Oxford, where he studied as a Rhodes Scholar. Graybill previously worked for the litigation boutique Susman Godfrey LLP and served as a judicial law clerk to Chief Judge Sidney R. Thomas of the U.S. Court of Appeals for the Ninth Circuit.

His practice focuses exclusively on civil litigation, including personal injury, medical malpractice, insurance coverage denials, litigation against government agencies, constitutional violations, and complex commercial litigation. He splits his time between Great Falls and Helena and represents clients statewide.

Simank joins Argent Trust as vice president and trust officer

Argent Financial Group has announced that **Megan Simank** has joined Argent Trust Company as vice president and trust officer in the Austin, Texas, office. She will be responsible for administering and developing trusts and estate planning strategies for businesses and individuals.

Simank

News, page 8

Using Opportunity Zones and 1031 Exchanges For Maximum Benefit

Matt Mellott, CCIM/SIOR
Sterling CRE Advisors

1031 Exchanges and Opportunity Zones provide favorable tax treatment and deferral of capital gains. In practice, the two are very different in terms of mechanics, benefits and restrictions on each.

SterlingCRE ADVISORS

At Sterling CRE, we've helped investors find and close on properties suitable for 1031 exchanges or QOFs throughout Montana. We're available to consult on your client's investment goals and to discover which deferral strategy works best for their unique circumstances. Contact Sterling CRE Advisors for more info.

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406-203-4547
www.SterlingCREadvisors.com

Wondering which works best for your clients?

Much ink has been spilled in the last year regarding the possibilities that Opportunity Zones bring to investors across the country. Missoula, Kalispell, Bozeman and other cities throughout Montana have designated Opportunity Zones that open up possibilities to investors that were not previously available.

The IRC Section 1031 exchange has been an important driver of commercial real estate investment for almost 70 years. It originated in the 1950s as a way to incentivize the sale of farm land into more productive uses and has remained a centerpiece of many investors' strategies to minimize their tax exposure ever since.

However, there is some confusion out there as to what an Opportunity Zone can mean for an investor and how that stacks up against a 1031 exchange. Both provide favorable tax treatment and deferral of capital gains. In practice, the two are very different in terms of mechanics, benefits and restrictions on each.

1031 EXCHANGE

A 1031 exchange (1031x) of like kind property (real estate for real estate) permits deferral of capital gains and recapture tax. One of the more attractive features of a 1031x is that such gains can be deferred indefinitely if desired by the investor. However, there are strict requirements on how the disposition proceeds are used, how they are tracked and when they are reinvested. It also provides some challenges for members of a partnership who do not necessarily want to stick together on an exchange.

QUALIFIED OPPORTUNITY FUNDS (QOF)

Section 1400Z-2 of the 2017 Tax Cut and Jobs Act allows for the creation of Qualified Opportunity Fund investments. Such QOF investments provide another useful, albeit different, avenue for deferring capital gains from a wide variety of assets, not just from real estate.

Appreciated stock and business interests are also open to deferral through QOF investments which provides a chance for some investors to rebalance their portfolio without creating major tax events in the short term. If done properly, a QOF investment also provides a means to reduce the taxable gain by up to 15% going into the deal and 100% of the gain going out of the deal if the property is held for 10 years or more.

Although QOFs provide flexibility not available in a 1031 in some instances, there are other tradeoffs associated with them that may or may not fit your specific needs. For instance, a QOF requires additional investment ("substantial improvement") into a given property that is not required in a 1031 exchange. Finally, QOFs are limited geographically to designated census tracts and locks an investor into a given property for 10 years to realize the full benefit of an opportunity zone investment.

News, from page 6

Simank joins Argent after five years at Wells Fargo Bank in Austin, where she served as the Mid-Atlantic team leader and vice president and estate settlement administrator. Prior to that, she practiced law for six years, most recently at Granstaff, Gaedke & Edgmon.

Simank earned her Juris Doctor and Master of Business Administration from Texas Tech University. She is a certified trust and financial advisor and is a member of the state bars of Texas and Montana. She is active in her community and has served as a member and volunteer for several local organizations.

HONORS

Rogers selected to National Academy of Distinguished Neutrals

Guy Rogers has been selected to the Montana Chapter of the National Academy of Distinguished Neutrals (NADN). NADN is an invitation-only professional association whose membership consists of mediators and arbitrators distinguished by their hands-on experience in the field of civil and commercial conflict resolution, and by their commitment to the practice of alternative dispute resolution. All Academy members have been found to meet stringent practice criteria and are amongst the most in-demand neutrals in their respective states, as nominated by both peers and litigation firms. Rogers is a senior partner in the Billings office of the Brown Law Firm.

Rogers

HAVE NEWS TO SHARE?

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

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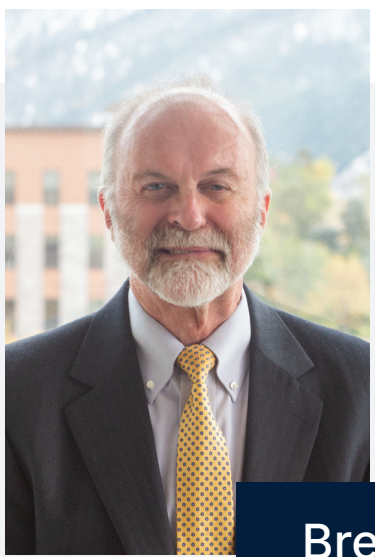

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- Construction Law
- Contracts
- Employment and Discrimination Law
- Governmental Relations

Brent Brooks

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2021 RIPL fellow applicants sought

The Rural Incubator Project for Lawyers is now accepting applications on a rolling basis for a new round of fellows.

RIPL is a 24-month program designed to train and support attorneys as they develop and launch new solo and small firm law practices.

One five-day Boot Camp for new fellows is happening virtually May 10-14. Visit **https://www.mtlsa.org/rural-incubator-project-for-lawyers/** or email ripl@mtlsa.org for more information. Montana Legal Services Association is grateful for our RIPL partnerships with Montana Justice Foundation, State Bar of Montana, Supreme Court of Montana, Alexander Blewett III School of Law at the University of Montana, and Driscoll Hathaway Law Group.

RIPL has trained 10 new solo lawyers, providing intensive training, education, mentoring, and practice-building tools. In its first two years, RIPL has helped 519 clients and their family members. These clients live in 38 counties, including 30 counties outside the state's six biggest urban areas. Fellows have addressed legal issues touching on basic life needs such as family law, housing, consumer, tax, wills and probate, and employment issues. The first two fellows, Jennifer Williams and Walter Clapp, completed their fellowship terms in early 2021.

Jessica Wiles began her RIPL Fellowship in October 2019. "As an attorney whose background was focused on administrative and environmental law, I always felt nervous about getting involved in pro bono and modest means legal work because I did not feel I had even basic legal knowledge in the areas of the law affecting the everyday lives of low and modest means Montanans," Wiles said. "Now, after only a year in the RIPL program, I feel confident that I am able to provide competent and high-quality legal advice and services to individuals in need across our state.

RIPL, page 28

2020 CLASS OF RIPL FELLOWS

Kathy Coleman is licensed to practice law in Montana and North Dakota. She grew up in Havre, and then lived and worked in the Pacific Northwest before deciding to go to law school at mid-career.

Coleman graduated from the University of Wyoming College of Law in Laramie and began her legal career as a public defense attorney in North Dakota. She established a private practice in Miles City in 2019 and currently practices in eastern Montana and western North Dakota. Her legal practice focuses primarily on family and criminal law along with availability for additional areas of civil practice. She is honored to participate in the Montana Legal Services Association (MLSA) RIPL program to provide limited scope representation, sliding scale fees, telephone advice and pro bono services in an effort to make legal representation affordable for a greater number of families and individuals. Kathy thoroughly enjoys spending her free time with her husband, Mike, and their little dog, Rusty.

■ ■ ■

Morgan Handy grew up in Billings, Montana. She earned her undergraduate degrees in English and Music at Gonzaga University in Spokane, Washington, in 2013. She attended law school at the University of Montana School of Law, where she earned her Juris Doctor in 2017. During law school, Handy was a member of the Montana Law Review and the National Cultural Heritage Moot Court team. Following law school, Morgan clerked for the Honorable Luke Berger of the Montana Fifth Judicial District Court and the Justice James Jeremiah Shea of the Montana Supreme Court. She is grateful for the opportunity to participate in the RIPL fellowship and expand access to justice for Montanans by providing full representation, limited scope, and pro bono legal services in the areas of family law, estate planning, and landlord/tenant law. Outside of work, she enjoys spending time with her husband, Kyle, their two children, and new puppy.

■ ■ ■

Before law school **Chase Rosario** drove double-trailered semis for harvest, drove buses of fire-fighting crews up mountains, ran a Yellowstone National Park guide company, taught business English to foreign professionals, and did a variety of other odd jobs. In law school, she experienced everything she could, including writing on two law reviews, publishing in one, arguing as a member of the international moot court team, and serving as the elected law school representative to the American Bar Association. She designed an independent study program based on the premise that basic legal concepts and research techniques could be included in regular English and Civics high school classes. After graduating, she worked 4 years clerking for a district court judge, did misdemeanor trial work for 3 years and then appeals to the Montana Supreme Court for 3 years. In private practice, she spent the last 7 years focused on representing children in the foster care system, and assisting the disabled in hearings before the Social Security Administration. She recently married and left Great Falls to join her husband in Lewistown, where they live with her two children. Chase continues to serve her passion for children in foster care by serving as the state coordinator for the National

Fellows, page 28

MLSA seeks attorneys to help in eviction cases

By Rachel Turnbow

For most Montanans, the past year has brought varied degrees of hardship, stress, and uncertainty. Despite the impact the COVID-19 pandemic has had on all of us, our low-income neighbors have been hit especially hard. For those living paycheck to paycheck, one week of illness or quarantine can deliver a devastating blow that can have long lasting consequences. The Montana Legal Services Association has been working to respond to the civil legal needs that have arisen because of COVID-19, providing individuals and families with civil legal advice and representation as a direct result of the pandemic.

One of the most pressing legal needs arising from a full year of economic hardship due to COVID-19 is the rise in evictions across the state. In response to this increase in demand for housing related legal assistance, The Montana Department of Commerce partnered with MLSA to develop the Montana Eviction Intervention Program. Launched in the fall of 2020, MEIP aims to provide representation to tenants at risk of eviction. To provide representation to as many tenants as possible, MLSA partners with attorneys statewide to offer services to qualifying Montanans who are facing eviction. Thanks to the CAREs Act Funding through the Department of Commerce, MLSA can pay attorneys to provide advice and direct representation for individuals and families who are at risk of eviction or in the midst of an action for possession that puts their family's housing at risk.

This past February alone, MLSA had 175 open housing-related cases. That is a 35% increase from February 2020. Attorneys have reported that in 80% of the cases they have taken for MEIP, the clients are behind on rent as a direct result of the pandemic. The average income of a household in the MEIP program is $13,000.

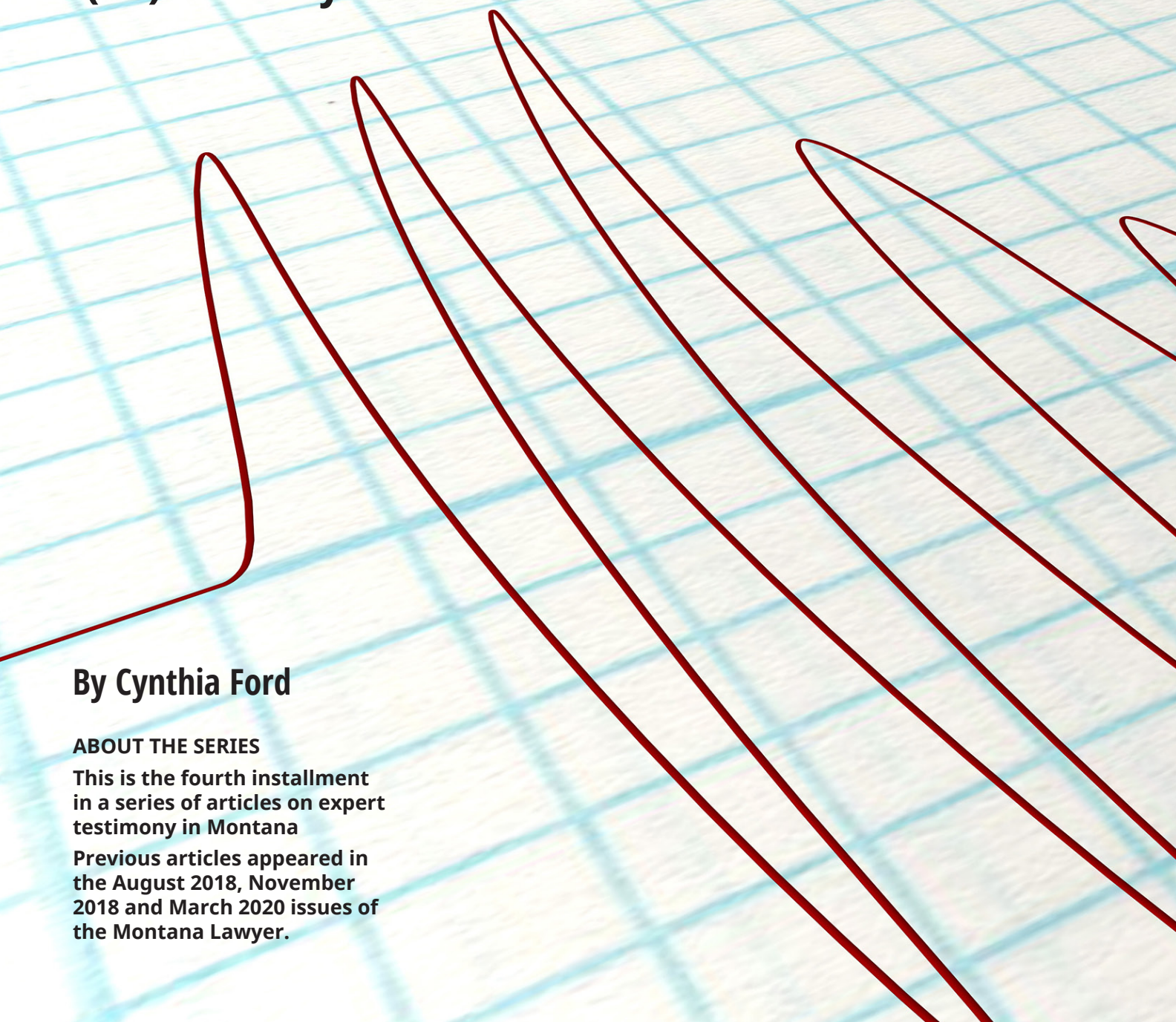
In a time of uncertainty and fear, housing is a baseline necessity that requires the attention of those with the means to help. As the demand for eviction assistance increases, MLSA is looking for attorneys to partner with across the state to help respond. Please apply to be a Montana Eviction Intervention attorney today. Your hours and expenses are reimbursable and MLSA provides malpractice insurance. Your time and talent are essential and priceless to a family, a veteran, or a person with a disability, who is at risk of homelessness.

WANT TO HELP?

For more information, or to apply to be a part of MEIP, contact Rachel Turnbow at MLSA: rturnbow@mlsa.org

NO LIE

Polygraph evidence is inadmissible — again and still — regardless of (un)reliability under 702/*Daubert*

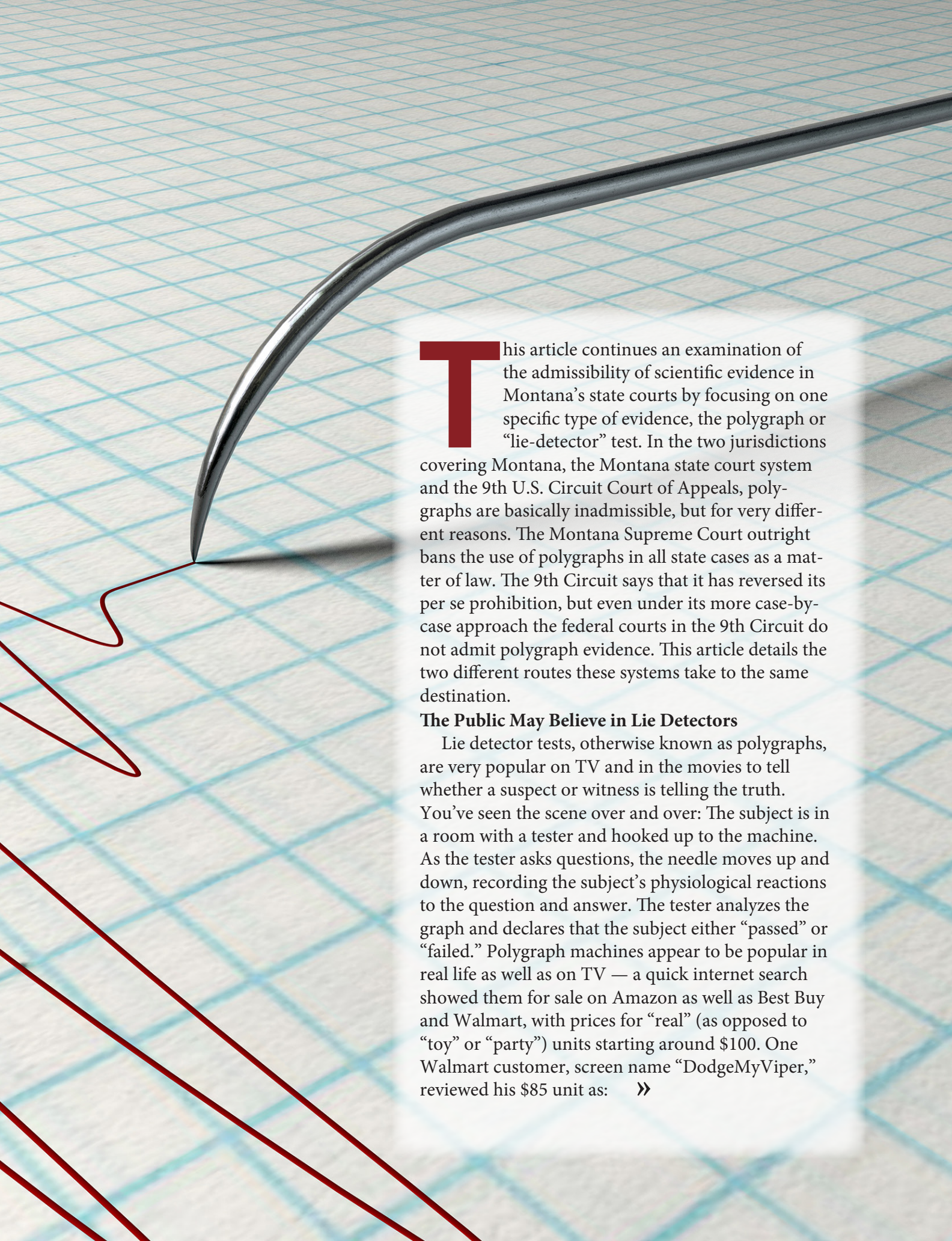


By Cynthia Ford

ABOUT THE SERIES

This is the fourth installment in a series of articles on expert testimony in Montana

Previous articles appeared in the August 2018, November 2018 and March 2020 issues of the Montana Lawyer.



This article continues an examination of the admissibility of scientific evidence in Montana's state courts by focusing on one specific type of evidence, the polygraph or "lie-detector" test. In the two jurisdictions covering Montana, the Montana state court system and the 9th U.S. Circuit Court of Appeals, polygraphs are basically inadmissible, but for very different reasons. The Montana Supreme Court outright bans the use of polygraphs in all state cases as a matter of law. The 9th Circuit says that it has reversed its per se prohibition, but even under its more case-by-case approach the federal courts in the 9th Circuit do not admit polygraph evidence. This article details the two different routes these systems take to the same destination.

The Public May Believe in Lie Detectors

Lie detector tests, otherwise known as polygraphs, are very popular on TV and in the movies to tell whether a suspect or witness is telling the truth. You've seen the scene over and over: The subject is in a room with a tester and hooked up to the machine. As the tester asks questions, the needle moves up and down, recording the subject's physiological reactions to the question and answer. The tester analyzes the graph and declares that the subject either "passed" or "failed." Polygraph machines appear to be popular in real life as well as on TV — a quick internet search showed them for sale on Amazon as well as Best Buy and Walmart, with prices for "real" (as opposed to "toy" or "party") units starting around $100. One Walmart customer, screen name "DodgeMyViper," reviewed his $85 unit as: »

> Really great machine, worked perfectly. Had troubles with a roommate stealing. He said he'd take a polygraph. Got this, hooked him up. Machine detected lies, when prompted more he confessed. Software is easy to use. It was this or hire a polygraph expert but they charge a ton ($1,200) and they hate that this machine can give you unlimited accurate tests at home.[1]

The cases discussed below show that many criminal defendants (or their counsel) appear to share the public's faith in polygraphs. In these cases, it is the defense rather than the prosecution that offers polygraph evidence, after the defendant takes a lie detector test indicating that they[2] "are telling the truth" when they deny involvement in the crime.

The Courts? Not So Much

Despite apparent consumer confidence, there is much scientific skepticism about the reliability of polygraphs,[3] which the courts share. Most, but not all, court systems base their denial of polygraph evidence on Rule 702's reliability requirement; others do so based on Rule 403's "unfairly prejudicial" rubric. Both approaches involve several factors and balancing by the trial court. The 9th Circuit is in this camp, requiring extensive analysis to get to the conclusion that polygraph evidence is not admissible in a particular case. Montana prohibits polygraphs, too, but on another, easier-to-apply ground altogether. The Montana ban is long-standing and absolute, making refusal of polygraphs a black-and-white matter.

Under the Pre-*Daubert* "General Acceptance" Test, Polygraphs were Inadmissible in Most Courts, Including Montana and the 9th Circuit

Prior to 1993, most courts applied the "general acceptance" test announced in *Frye v. United States,* 54 App. D. C. 46, 47, 293 F. 1013, 1014 (1923), to all scientific evidence. *Frye* itself involved evidence derived from a systolic blood pressure deception test, described later by the U.S. Supreme Court as "a crude precursor to the polygraph machine."[4] *Frye* held that the evidence was inadmissible because the deception test had "not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made." 54 App. D. C. at 47, 293 F. at 1014.

After *Frye,* most courts followed suit and similarly rejected polygraph evidence.[5] This includes the Montana Supreme Court, which in 1991 summarized its multitudinous earlier cases: "In the thirty-two cases since 1960 in which this Court has mentioned or discussed polygraph examinations, the results thereof have never been specifically approved for introduction into evidence over objection." *State v. Staat,* 248 Mont. 291, 811 P.2d 1261, 1261 (1991). *Staat* explained that its and prior holdings stemmed from "the lack of trustworthiness of the results of polygraph tests," and held, again and with some asperity, that "We take this opportunity to clarify the following simple rule of law: Polygraph evidence shall not be allowed in any proceeding in a court of law in Montana." 811 P.2d at 1262.

***Daubert*'s More Flexible Test for Reliability under Rule 702 Presented a Possible Avenue for Admission of Polygraph Evidence**

The *Frye* restrictive test for reliability was rejected in 1993, when the U.S. Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993). *Daubert* was based on the language of F.R.E. 702, which had been adopted since *Frye*, and which the Court held supplanted *Frye. See,* 509 U.S. at 588. *Daubert* required the federal courts to do a more flexible analysis of the reliability of proffered scientific evidence under F.R.E. 702, considering multiple factors in addition to general acceptance, to comply with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony." *Ibid.* Responding to criticism that the then-new approach would result in a "free-for-all," the Supreme Court commented:

> In this regard respondent seems to us to be overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

509 U.S. at 596.

Daubert thus opened the door to re-examination of the admissibility of all sorts of scientific evidence. F.R.E. 702 was amended in 2002 "in response to *Daubert*, and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*…. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful." Federal Advisory Committee Note to 2000 Amendment.

Although the excluded evidence in *Daubert* was epidemiological, the case's rationale and holding clearly apply also to polygraph evidence. Parties across the country, in both federal and state courts, were quick to move for admission of polygraph evidence under the more flexible *Daubert* standard. My recent Westlaw search for "Daubert polygraph" yielded 476 results, 319 of which were in the federal system; 155 cases were from 41 states.[6] (Notably, Montana is not on this list, for reasons which will be discussed below.) Two of these cases are especially significant: one from the U.S. Supreme Court and one from the

1 https://www.walmart.com/ip/USB-Polygraph/109984600.

2 As in my prior and all future articles, I have moved from the singular gendered pronoun to "they" but want you to know I recognize the dissonance with traditional grammar rules.

3 E.g., "The Truth About Lie Detectors (aka Polygraph Tests)," American Psychological Association, https://www.apa.org/research/action/polygraph, concluding "Most psychologists agree that there is little evidence that polygraph tests can accurately detect lies."

4 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 585 (1993).

5 Giannelli, "Forensic Science: Polygraph Evidence: Part II," 30 Crim. L. Bull 366 (1994).

6 The remaining 2 cases were in the Grand Ronde Tribal Trial Court and the Northern Mariana Territory Supreme Court.

9th Circuit.

Post-*Daubert*, the U.S. Supreme Court Affirmed the Military's Blanket Prohibition of Polygraph Evidence, Partially Because of the Ongoing Lack of Scientific Consensus as to Its Reliability

U.S. v. Scheffer, 523 U.S. 303 (1998), was decided five years after the Supreme Court announced the *Daubert* test. *Scheffer* involved the offer of a polygraph test result by an accused in a military court martial. Scheffer was charged with, *inter alia*, wrongfully using methamphetamine while working as an undercover informant in an Air Force drug investigation. Scheffer's defense to that charge was unknowing ingestion, which he hoped to support with the opinion of a polygraph examiner that the test "indicated no deception" when respondent denied using drugs since joining the Air Force. 523 U.S. at 306. The military judge denied admission of this evidence because Military Rule of Evidence 707 contained an absolute prohibition against admission of polygraph evidence.[7] On appeal, the defendant argued that this provision unconstitutionally denied him the right to present a defense. The 6th Circuit agreed, but the U.S. Supreme Court did not, reversing the 6th Circuit and reinstating the conviction. The court held that Rule 707 served "several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the court members' role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial." 523 U.S. at 309.

As to the reliability factor, the Supreme Court observed:

> The contentions of respondent and the dissent notwithstanding, there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques….
>
> This lack of scientific consensus is reflected in the disagreement among state and federal courts concerning both the admissibility and the reliability of polygraph evidence. Although some Federal Courts of Appeals have abandoned the per se rule excluding polygraph evidence, leaving its admission or exclusion to the discretion of district courts under *Daubert*, see, e.g., *United States v. Posado*, 57 F.3d 428, 434 (C.A.5 1995); *United States v. Cordoba*, 104 F.3d 225, 228 (C.A.9 1997), at least one Federal Circuit has recently reaffirmed its per se ban, see *United States v. Sanchez*, 118 F.3d 192, 197 (C.A.4 1997), and another recently noted that it has "not decided whether polygraphy has reached a sufficient state of reliability to be admissible." *United States v. Messina*, 131 F.3d 36, 42 (C.A.2 1997). Most states maintain per se rules excluding polygraph evidence. See, e.g., *State v. Porter*, 241 Conn. 57, 92–95, 698 A.2d 739, 758–759 (1997); *People v. Gard*, 158 Ill.2d 191, 202–204, 198 Ill.Dec. 415, 421, 632 N.E.2d 1026, 1032 (1994); *In re Odell*, 672 A.2d 457, 459 (R.I.1996) (per curiam); *Perkins v. State*, 902 S.W.2d 88, 94–95 (Ct.App. Tex.1995). New Mexico is unique in making polygraph evidence generally admissible without the prior stipulation of the parties and without significant restriction. See N.M.Rule Evid. § 11–707.8 Whatever their approach, state and federal courts continue to express doubt about whether such evidence is reliable. See, e.g., *United States v. Messina*, supra, at 42; *United States v. Posado*, supra, at 434; *State v. Porter*, supra, at 126–127, 698 A.2d, at 774; *Perkins v. State*, supra, at 94; *People v. Gard*, supra, at 202–204, 198 Ill. Dec. 415, 632 N.E.2d, at 1032; *In re Odell*, supra, at 459.
>
> The approach taken by the president in adopting Rule 707 — excluding polygraph evidence in all military trials — is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence. Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams. Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. We cannot say, then, that presented with such widespread uncertainty, the president acted arbitrarily or disproportionately in promulgating a per se rule excluding all polygraph evidence.

523 U.S. at 310–12. *Scheffer* did not deal with F.R.E. 702's application to polygraphs, nor did it establish a per se rule that introduction of polygraphs is error under *Daubert*. It did stand for the proposition that doubt about the reliability of polygraph evidence warrants a decision to exclude it.

The 9th Circuit Abandoned Its Per Se Ban After *Daubert*, and Now Purports to Examine Rule 702 Objections to Proposed Polygraph Evidence on a Case-by-Case Basis, But Still Doesn't Admit It

As the Supreme Court observed in *Scheffer*, "some Federal Courts of Appeals have abandoned the per se rule excluding polygraph evidence, leaving its admission or exclusion to the discretion of district courts under *Daubert*." Ibid. The Supreme Court specifically cited as one example the 9th Circuit's decision in *United States v. Cordoba*,

7 The 2012 version of Military Rule of Evidence 707 continues to prohibit polygraph evidence: "Rule 707. Polygraph examinations (a) Prohibitions. Notwithstanding any other provision of law, the result of a polygraph examination, the polygraph examiner's opinion, or any reference to an offer to take, failure to take, or taking of a polygraph examination is not admissible.
(b) Statements Made During a Polygraph Examination. This rule does not prohibit admission of an otherwise admissible statement made during a polygraph examination."

104 F.3d 225, 228 (C.A.9 1997). That opinion, written by Montana's own Chief Judge Sidney Thomas,[8] succinctly stated: "This appeal requires us to decide whether our per se rule excluding the admission of unstipulated polygraph evidence was effectively overruled by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). We conclude it was." *United States v. Cordoba*, 104 F.3d 225, 227 (9th Cir. 1997), as amended (Feb. 11, 1997).

Before considering the effect of *Daubert,* Judge Thomas summarized the 9th Circuit's past approach to polygraph evidence:

> We have long expressed our hostility to the admission of unstipulated polygraph evidence. See *United States v. Givens*, 767 F.2d 574, 585–86 (9th Cir.), cert. denied, 474 U.S. 953, 106 S.Ct. 321, 88 L.Ed.2d 304 (1985); *United States v. Demma*, 523 F.2d 981, 987 (9th Cir.1975) (en banc). This antipathy culminated in the adoption of a "bright line rule" excluding all unstipulated polygraph evidence offered in civil or criminal trials. See *Brown v. Darcy*, 783 F.2d 1389, 1396 n. 13 (9th Cir.1986).

104 F.3d 225, 227. The court concluded that Daubert required reconsideration of the per se ban:

> The per se *Brown* rule excluding unstipulated polygraph evidence is inconsistent with the "flexible inquiry" assigned to the trial judge by *Daubert*. This is particularly evident because *Frye*, which was overruled by *Daubert*, involved the admissibility of polygraph evidence.

Ibid. Finally, the Court held that *Daubert* also overruled any per se rule under F.R.E. 403 that polygraphs are always inadmissible. As a result, the circuit reversed Cordoba's conviction and remanded the case with directions for the district court to "conduct a particularized inquiry consistent with *Daubert* and to determine admissibility. If the district court concludes that the evidence is still inadmissible after conducting the inquiry, it may reinstate the conviction."

Judge Thomas cautioned that *Cordoba* was not an endorsement of admitting polygraph evidence, just a relaxation of the per se ban:

> With this holding, we are not expressing new enthusiasm for admission of unstipulated polygraph evidence. The inherent problematic nature of such evidence remains. As we noted in *Brown*, polygraph evidence has grave potential for interfering with the deliberative process. *Brown*, 783 F.2d at 1396–97. However, these matters are for determination by the trial judge, who must not only evaluate the evidence under Rule 702, but consider admission under Rule 403.

104 F.3d at 228. On remand, the trial judge held a two-day hearing that included both expert testimony and affidavits and then again found that the defendant's proffered polygraph evidence failed both Rule 702/*Daubert* and Rule 403 analyses, and again ruled it inadmissible. *U.S. v. Cordoba*, 991 F.Supp. 1199 (C.D. Cal., 1998). Cordoba's conviction was reinstated, and he again appealed. This time, the Circuit Court affirmed the trial judge on both grounds. *U.S. v. Cordoba*, 194 F.3d 1053 (9th Cir., 1999). The U.S. Supreme Court denied cert. *Cordoba v. U.S.*, 529 U.S. 1081 (2000).

Three years later, Judge Thomas wrote another opinion for the circuit, again affirming the District Court's exclusion of polygraph evidence offered by the defendant. *U.S. v. Benavidez-Benavidez*, 217 F.3d 720 (9th Cir., 2000). This decision confirmed the role of the trial judge as gatekeeper with discretion in applying *Daubert*'s standards to polygraph evidence. It also held that a trial court need not do a *Daubert* analysis at all, if it found the evidence inadmissible under Rule 403. In *Benavidez-Benavidez,* the judge actually had found the polygraph inadmissible under 3 different rules of evidence--403, 702, and 704(b)--after a "searching inquiry." On appeal, the Circuit affirmed the Rule 403 exclusion. The Circuit specifically took the opportunity to tell trial judges that they need not analyze all possible grounds for exclusion if they found the Rule 403 objection valid at the outset:

> Having found exclusion of the evidence proper under Rule 403, we need not reach the issue of whether the district court also properly excluded the evidence under Rules 702 or 704(b), or improperly credited the government's polygraph expert. The reason for this is that, unlike other evidentiary exclusions which may bar evidence for one purpose only to have it admitted for another purpose, exclusion under Rule 403 is absolute. Once the probative value of a piece of evidence is found to be substantially outweighed by the danger of unfair prejudice, there is no other evidentiary rule that can operate to make that same evidence admissible. In this way, Rule 403 can be viewed as a gateway, albeit a very wide one, through which all evidence must pass prior to admission at trial. Although a trial court may choose to analyze admissibility by assessing the effect of other rules of evidence first, it is under no compulsion to do so. It is equally acceptable to perform a Rule 403 analysis prior to undertaking any other evidentiary inquiry.

217 F.3d at 725–26. Judge Thomas followed his own advice, and having affirmed the trial judge's decision to exclude the polygraph evidence under Rule 403, held that the Circuit need not go on to review the other rules relied on

8 Judge Thomas cited the dissent of another great Montanan who similarly became an icon of the 9th Circuit: "Thus, we adopt the view of Judge Jameson's dissent in Brown that these are matters which must be left to the sound discretion of the trial court, consistent with Daubert standards." United States v. Cordoba, 104 F.3d 225, 228 (9th Cir. 1997), as amended (Feb. 11, 1997). Judge Thomas recently celebrated the 25th anniversary of his appointment to the 9th Circuit. "Tempus fugit."

by the appellant, Rules 702 and 704(b): "In a case such as this one, where evidence has been ruled inadmissible under Rule 403, and the district court has not abused its discretion in so doing, there is no need to proceed with further evidentiary analysis." *Ibid*. *See also, U.S. v. Jernigan*, 44 Fed.Appx. 127 (9th Cir. 2002); *U.S. v. Skavinsky*, 14 Fed.Appx. 846 (9th Cir. 2001).

The upshot is that the 9th Circuit now purports to have reversed its outright ban on polygraph evidence in favor of the more flexible, and time-consuming, *Daubert* test when the objection is based solely on F.R.E. 702. However, as a practical matter, polygraphs are still not admissible. If the objector cites another rule, such as F.R.E. 403, the trial judge can avoid the time and effort required for a full *Daubert* analysis if that other ground independently justifies exclusion of the polygraph evidence. I have not found a single 9th Circuit case reversing a judge who excluded polygraph evidence, nor have I found a single 9th Circuit case where the judge below admitted polygraph evidence. The Circuit itself has noted this trend: "As we previously have emphasized, 'a trial court will rarely abuse its discretion by refusing to admit [polygraph evidence], even for a limited purpose and under limited conditions.'" *United States v. Raygosa-Esparza*, 111 F. App'x 902, 904–05 (9th Cir. 2004). I would bet, every time, against admission of polygraph evidence in the 9th Circuit, no matter how flexible the test.

Montana Absolutely Prohibits Polygraph Evidence in All Court Cases, Without Entering the Rule 702 Debate or the Rule 403 Scale

In Montana there is no doubt: polygraph evidence is inadmissible in Montana state cases, whether civil or criminal, and whether offered by the plaintiff, prosecutor, or defendant. Montana prohibited admission of polygraph evidence rule before the adoption of the Montana Rules of Evidence, and the Montana Supreme Court has held numerous times since then that the prohibition continues without exception.

As discussed in earlier articles in this series, the Montana Supreme Court has rejected the test used in federal (and many other state) courts to assess scientific and technical opinion evidence, first announced in *Daubert v. Merrell Dow* and now partly codified in F.R.E. 702, discussed above. "In contrast to its status in the federal system, *Daubert* is not generally applicable in Montana." *McClue v. Safeco Ins. Co. of Illinois*, 2015 MT 222, ¶ 21, 380 Mont. 204, 210, 354 P.3d 604, 609. The exception to the general rule is for the rare case of "novel" scientific evidence, to which *Daubert* **does** apply: "*Daubert* does not apply to all expert testimony; instead, it applies only to 'novel scientific evidence.'" *Ibid.* The line between novel and non-novel science is murky, as are the applications of the Montana standard for 702 to non-novel evidence and the *Daubert* test to novel scientific evidence. I have not found a Montana case that places polygraph evidence on one side of this line or the other, because Montana prohibits polygraphs on another ground altogether.

The Montana Supreme Court recently reiterated and reinforced its polygraph prohibition, rejecting M.R.E. 702 as a basis for the rule. In *State v. Walker*, 2018 MT 312, 394 Mont. 1, 433 P.3d 202, it was the defendant who proffered the polygraph evidence. The state moved in limine to preclude the polygrapher as a witness and to prohibit any reference to the polygraph examination, citing a line of Montana Supreme Court cases (discussed below). In the trial court, Walker ingeniously responded to the motion by distinguishing the fact that he had offered to take the lie detector test from its results:

> "If *Walker* testifies, he will seek to *offer the fact he volunteered to take the polygraph test* as evidence relevant to his state of mind—more specifically, evidence relevant to his consciousness of innocence." (Emphasis added.) Walker further argued that, because the jury would know that he offered to take the polygraph examination, it would also need to know the examination's results.

2018 MT 312, ¶ 14. Walker proposed that each side "present evidence concerning the general science of polygraph evidence" to assist the court in determining whether the results were admissible under M. R. Evid. 702. (He also argued that the lie detector results should be admissible to counter any impeachment of his testimony.) The trial court granted the State's motion in limine, prohibiting any mention of a polygraph: "The District Court found Walker's argument unpersuasive in view of this Court's precedent clearly prohibiting polygraph evidence. Walker appeals the District Court's decision, arguing it should have admitted the polygraph evidence pursuant to M. R. Evid. 702." 2018 MT 312, ¶ 16.

On appeal, Walker apparently abandoned his argument below that his offer to take the test should be treated as a separate legal issue from the admissibility of the test's results.[9] Instead, Walker urged that the Supreme Court "reconsider the scientific reliability of polygraph testing," 2018 MT 312, ¶ 17, and thus reconsider its wholesale ban on polygraph evidence. In essence, Walker was hoping that Montana would follow the 9th Circuit's approach to polygraphs under Rule 702 and apply the flexible standard of *Daubert,* at least giving him a chance to show the reliability of the evidence and a hope of its admission.

The Montana Supreme Court began its analysis with a recap of its prior cases denying admission of polygraph tests either directly or indirectly:

> This Court has long held that polygraph test results are inadmissible in all Montana court proceedings. See, e.g., *Hameline*, ¶ 20 ("We repeat yet again our blanket prohibition on

9 "In his argument to the District Court, Walker argued that his offer itself should be admissible, but we do not discern a similar argument on appeal. Walker only mentions his offer in passing, urging us to 'consider' the fact that he 'willingly submitted' to the polygraph test. Accordingly… [w]e do not consider Walker's ancillary argument concerning the admissibility of his offer to take a polygraph test, which would involve evidentiary considerations other than M. R. Evid. 702."

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the use of polygraph test results in any way in any Montana court proceeding."); *State v. DuBray*, 2003 MT 255, ¶ 105, 317 Mont. 377, 77 P.3d 247.1 The prohibition on polygraph test results extends to a defendant's sentencing. See, e.g., *Anderson*, ¶ 12; *State v. Hensley*, 250 Mont. 478, 482-83, 821 P.2d 1029, 1032 (1991). Even the indirect admission of polygraph test results is prohibited. *Anderson*, ¶ 12 (stating that "any evidence which would otherwise be admissible may be rendered inadmissible where a polygraph is used in the production of or for the purpose of influencing the outcome of such evidence"); *In re N.V.*, 2004 MT 80, ¶ 20, 320 Mont. 442, 87 P.3d 510 (emphasizing that "polygraph results, even if indirectly presented to a district court, are inadmissible"); *State v. Craig*, 262 Mont. 240, 242-43, 864 P.2d 1240, 1242-43 (1993). The only instances in which we permit polygraph testing is when a court imposes therapeutic polygraph testing as a probation condition. See, e.g., *State v. Smart*, 2009 MT 1, ¶ 12, 348 Mont. 274, 201 P.3d 123; *State v. Heddings*, 2008 MT 402, ¶ 20, 347 Mont. 169, 198 P.3d 242; *Hameline*, ¶¶ 19-20.

2018 MT 312, ¶18. Although the *Walker* Court recognized that one basis for exclusion of polygraphs in the earlier cases was concern about their reliability, it did not actually rely on Rule 702 for its holding: "Thus, apart from considerations of M. R. Evid. 702, the evidence is inadmissible." 2018 MT 312, ¶22. "While frequently premised upon a determination that polygraph examinations are unreliable, this strict prohibition also stems from a concern that polygraph test results invade the province of the fact-finder by improperly commenting on a witness's or defendant's credibility." 2018 MT 312, ¶19.

Walker distinguished polygraph from all other types of scientific evidence such as fingerprints, based on the impact of polygraph evidence on the jury:

> There is a distinction between polygraph test results and most other types of admissible scientific evidence. *Bashor*, 188 Mont. at 414-16, 614 P.2d at 480-81. After the jury receives other types of scientific expert testimony, such as fingerprint comparisons or handwriting analyses, it "has the additional responsibility of reviewing other facts which tend to prove or disprove [a] defendant's connection with the crime and, if participation is shown, the jury may further ... ascertain the defendant's mental state at the time of the crime...." *Bashor*, 188 Mont. at 415, 614 P.2d at 480 (quoting *Alexander*, 526 F.2d at 169). A polygraphist's testimony, on the other hand, comments directly on the question the jury must answer: "Is the defendant innocent or guilty?" *Bashor*, 188 Mont. at 415, 614 P.2d at 481 (quoting *Alexander*, 526 F.2d at 169). "If the expert testimony is believed by the jury, a guilty verdict is usually mandated." *Bashor*, 188 Mont. at 415, 614 P.2d at 480 (quoting *Alexander*, 526 F.2d at 169). Presentation of scientific expert testimony that the defendant credibly denied committing the offense goes to the issue of the defendant's guilt or innocence.

2018 MT 312, ¶ 20. The Montana Supreme Court adopted the reasoning of the 8th Circuit that polygraph evidence invades the province of the jury as an independent reason for its exclusion:

In *Alexander*, the 8th Circuit Court of Appeals explained:

> The most important function served by a jury is in bringing its accumulated experience to bear upon witnesses testifying before it, in order to distinguish truth from falsity. Such a process is of enormous complexity, and involves an almost infinite number of variable factors. It is the basic premise of the jury system that twelve men and women can harmonize those variables and decide, with the aid of examination and cross-examination, the truthfulness of a witness. But a [polygraph] machine cannot be examined or cross-examined; ... [The court is] not prepared to rule that the jury system is as yet outmoded. [The court prefers] the collective judgment of twelve men and women who have sat through many weeks of a trial and heard all the evidence on the guilt or innocence of a defendant….

Alexander, 526 F.2d at 168-69 (quoting *United States v. Stromberg*, 179 F.Supp. 278, 280 (S.D.N.Y. 1959)); see also *United States v. DeBetham*, 348 F.Supp. 1377, 1390-91 (S.D. Cal.), aff'd, 470 F.2d 1367 (9th Cir. 1972).

2018 MT 312, ¶19.

The court emphasized that Montana already has lie-detecting methods in place, proven over time, which admission of polygraph evidence could, but should not, supplant:

> "[t]he only acceptable lie detection methods in Montana court proceedings reside with the court in bench trials, the jury in jury trials, and the skill of counsel in cross-examination in all trials." *Staat*, 248 Mont. at 293, 811 P.2d at 1262….
>
> A jury must decide the guilt or innocence of a defendant, and it was exclusively within the province of the jury to weigh the credibility and veracity of each witness at Walker's trial. See *Bashor*, 188 Mont. at 416, 614 P.2d at 481. **We find no basis to depart from the sound reasoning expressed in our precedent that polygraph test results invade the province of the jury and are inadmissible in all Montana court proceedings.** [Emphasis added]

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Intersection of hybrid rights: Dignity and protection against excessive punishment

By James Park Taylor

Editor's note: This is the second in a two-part article on cruel and unusual punishment through the lens of Montana's constitutional right to dignity.

The single most important case in Montana to address the hybrid issue of a violation of both Article II, Section 4, and Article II, Section 22, is *Walker v. State*, 2003 MT 134, 316 Mont. 103, 68 P.3d 872. *Walker* was not a challenge to a criminal conviction but was a case about conditions at the Montana State Prison in Deer Lodge. Mark Edward Walker pled guilty to negligent arson and felony forgery on July 25, 1995. He had a history of attention deficit hyperactivity disorder for which he had been prescribed Ritalin. Walker received a five-year suspended sentence and was placed on probation. Prior to the revocation proceeding Walker absconded. He was eventually arrested in Colorado and extradited to Montana. While in Colorado he received a mental health evaluation and was diagnosed with hebephrenic schizophrenic disorder. The diagnosis was later changed to bipolar disorder and was prescribed 300 mg of lithium three times a day. During the seven months he was incarcerated in Colorado and being treated with lithium he received no major disciplinary infractions. Walker was returned to Montana in November of 1998. His revocation hearing took place on Dec. 8, 1998, and he was sentenced to five years with the Department of Corrections. On February 5, 1999 Walker was transferred to the Montana State Prison in Deer Lodge.

In addition to Walker's mental health condition, he is also legally blind. He has no peripheral vision and uses special lenses to obtain an amount of vision. While Walker was at the Cascade County Detention Center he was not regularly taking his lithium as prescribed. When he arrived at the prison he informed the medical staff of his bipolar diagnosis and prescription for lithium. He also said he was experiencing stomach pains and he attributed this to the lithium. Walker stopped taking his lithium and his behavior deteriorated significantly. Walker attempted suicide three times while at the prison, including two attempts to hang himself. The staff at the prison at the time had a policy of responding to these kinds of incidents by putting an inmate on a Behavior Management Plan, or BMP. When an inmate was placed on a BMP they were placed in a cell with a cement bed, a cement table, a stainless steel sink, a stainless steel toilet, and a piece of metal that substitutes for a mirror. There was a light fixture in the ceiling which the inmate could not control and the light was left on 12-16 hours a day. There were no windows. The food the inmate received was passed through the same slot in the door that toilet cleaning supplies were passed through.[1]

When Walker was placed on a BMP, all his clothing was taken from him and he was naked in the cell. He was not permitted bedding or a pillow. The water to the cell was turned off. He was given a "suicide blanket" for warmth. In the fall of 1999 and on into 2000 he was placed on five separate BMPs for

self-harming behavior and for disruptive behavior. Walker filed a *pro se* petition with the Montana Supreme Court in January 2000 alleging violations of the prohibition against cruel and unusual punishment. The Montana Supreme Court ordered counsel be appointed for Walker, who filed a subsequent petition with the court. A hearing eventually took place over ten separate days in August, September and October of 2000. The District Court ruled against Walker, finding no violations of either the Eighth Amendment or Article II, Section 22 of the Montana Constitution and Walker appealed.

Justice James C. Nelson wrote the majority opinion. Walker had argued that the punishments inflicted on the mentally ill through the system of BMPs amounted to cruel and unusual punishment under the Eighth Amendment and under Article II, Section 22 of the Montana Constitution. Justice Nelson agreed with that premise and went on to interpret Article II, Section 22, in light of the right to dignity under Article II, Section 4. Justice Nelson acknowledged that rights implicated under Montana's Declaration of Rights in Article II were entitled to the highest level of protection and scrutiny.

Just as we read the privacy provisions of the Montana Constitution in conjunction with the provisions regarding search and seizure to provide Montanans great protection from government intrusion, so too do we read the dignity provision of the Montana Constitution together with Article II, Section 22 to provide Montana citizens greater protections from cruel and unusual punishment than does the U.S. Constitution.

> We have repeatedly recognized the rights found in Montana's Declaration of Rights as being "fundamental" meaning that these rights are significant components of liberty, any infringement of which will trigger the highest level of scrutiny, and thus, the highest level of protection by the courts (citations omitted).
>
> Thus, while we will analyze most cruel and unusual punishment questions implicating Article II, Section 22 of Montana's Constitution by reference to that section alone, in certain instances where Montana's right to individual dignity (Article II, Section 4) is also specifically implicated, we must, of necessity, consider and address the effect of that constitutional mandate on the question before us. *Walker*, 2003 MT 134, ¶73-75, 316 MT 103, 119-120, 68 P.3d 872, 883
>
> In coming to this interpretation of Article II, Section 4, Justice Nelson remarked favorably on the article by Matthew O. Clifford and Thomas P. Huff, "Some Thoughts on the Meaning and Scope of the Montana Constitution's 'Dignity' Clause, with Possible Applications" (Summer 2000), 61 Mont. L. Rev. 301, 307.

Justice Nelson was joined in the majority opinion by Justices James Regnier, Patricia Cotter, Terry Trieweiler, William Leaphart, and Jim Rice. The lone dissenting opinion was by then Chief Justice Karla Gray.[2]

Montana Cases Since *Walker*

Only a few cases discuss *Walker* in the context of criminal cases. One such case is *State v. Herrick*, 2004 MT 323, 324 Mont. 76, 101 P.3d 755. A leading indicator of what the eventual ruling would be comes from the assignment of the case to Chief Justice Gray (the lone dissenter in *Walker*). Herrick was tried for attempted deliberate homicide in Great Falls for attempting to shoot Detective Bruce McDermott. Because of security concerns Herrick was shackled at the ankles during the trial. There was no evidence that the jury saw the shackles, and according to Chief Justice Gray every effort was made to ensure the jury did not see the shackles. The state had asked for several additional security precautions, which were not permitted. Herrick raised the issue that making him appear in shackles violated his right to dignity under Article II, Section 4. This is the entire analysis by the Court of the issue:

> We again observe that nothing of record indicates that jurors or potential jurors saw Herrick's leg restraints at any time. In any event, a conclusory statement of the type advanced by Herrick, without more, falls far short of establishing a constitution violation. *Herrick*, 2004 MT 323, ¶35, 324 Mont. 76, 85, 101 P.3d 755, 761

Wilson v. State, 2010 MT 278, 358 Mont. 438, 249 P.3d 28, was a challenge brought in the 20th Judicial District before Judge Kim Christopher. Wilson pled guilty to assault with a weapon and received a six-year deferred sentence. Wilson was 18 at the time of the offense. Wilson had a troubled history and a variety of psychiatric diagnoses. Prior to sentencing he was evaluated by Dr. Will Stratford who diagnosed Wilson with severe ADHD and rapid cycling bipolar disorder. Dr. Stratford prescribed Abilify, Vyvanse, and Lamictal, and opined that Wilson would fail any attempt at rehabilitation without those medications.[3] Wilson was sent to "boot camp" but was not provided his medication while he was there. Unsurprisingly he became a problem and was terminated from the camp and sent back to the District Court. The court ordered Wilson to be stabilized on medication and then sent back to try boot camp again. Wilson was first sent to Missoula Assessment and Sanction Center for pre-boot camp. Wilson failed at MASC and so could not attend boot camp. He went back to the District Court for a second violation. At the revocation hearing Dr. Stratford again testified that Wilson could not succeed without all three medications. Wilson asked that he not be sent to the Montana State Prison as the prison would not allow him to take Vyvanse (a stimulant). Judge Christopher was unpersuaded and sentenced Wilson to 20 years, with 15 years suspended.

When Wilson arrived at the prison he was not given Vyvanse, both because it is a stimulant and because the prison psychiatrist, Dr. David Schaefer, disagreed with Dr. Stratford that Vyvanse was appropriate for Wilson.

Dr. Schaefer had different diagnoses for Wilson and therefore prescribed different medication for him. Wilson challenged his incarceration under the decision in *Walker*, claiming the failure to provide him with Vyvanse violated his right to dignity under Article II, Section 4. The District Court did not find Dr. Stratford's opinions sufficient to compel a decision that Wilson should not be sentenced to prison, in light of Dr. Schaefer's testimony. Wilson appealed. Justice Brian Morris delivered the opinion of the Court.

Justice Morris first looked to *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), and the Supreme Court's test in Eighth Amendment cases of this type.

> The inmate must demonstrate that he suffered (1) a serious deprivation that results in the denial of the "minimal civilized measure of life's necessities," and (2) that a prison official acted with deliberate indifference to the inmate's health and safety. *Wilson*, 2010 MT 278, ¶30, 358 Mont. 438,444-445, 249 P.3d 28, 33.

Justice Morris also looked to the court's prior decision in *Walker* and the impact that Article II, Section 4 right to dignity had on the issue, recognizing that the Montana Constitution provides greater protection than the federal constitution in deciding issues of cruel and unusual punishment. The court held that the prison had continued to provide Wilson with adequate psychiatric care and medication, even though it was for a different psychiatric diagnosis and therefore different medication that Dr. Stratford had provided. The court found no constitutional violation.

Justice Morris found that the care provided met the standard under both the Eighth Amendment and Article II, Section 4 since Wilson had not demonstrated his care at the prison had exacerbated his mental illness or deprived him of his sanity, and that substantial evidence supported the decision of the district court.

Justice Nelson, the author of the court's opinion in *Walker,* wrote the lone dissenting opinion in *Wilson*. Justice Nelson found the facts in *Wilson* to be similar to those in Walker.

> Without proper medication, Wilson acts out. He receives warnings and write-ups jeopardizing his opportunity for parole or other department programs. Wilson's treatment is akin to denying a diabetic his insulin, and then punishing him for going into shock. *Wilson*, 2010 MT 278, ¶43, 358 Mont. 438,447, 249 P.3d 28, 34.

Justice Nelson concluded with a footnote that Dr. Schaefer, the prison psychiatrist the District Court relied on to justify Wilson's care, had been responsible for the psychiatric care of the petitioner in *Walker*.

In *State v. Spell*, 2017 MT 266, 389 Mont. 172, 404 P.3d 725 the defendant *Spell* was charged with aggravated kidnapping and deliberate homicide for participating in the murder and kidnapping of Sidney resident Sherry Arnold. Before trial, counsel for Spell filed a motion to determine his competency. He was found to be competent and pled guilty to deliberate homicide. A charge of aggravated kidnapping was dismissed as part of the plea bargain. Spell was sentenced to 100 years in the Montana State Prison, and he appealed. Spell alleged that the District Court should not have found him competent to proceed, that he should have been sentenced to the Montana State Hospital rather than to the prison pursuant to MCA §46-14-312, and that his sentence violated Article II, Section 22 and Article II, Section 4 of the Montana Constitution.

The opinion in *Spell* was written by Chief Justice Mike McGrath. Although there was conflicting testimony about Spell's competency, the court found sufficient evidence supporting the District Court's finding of competence. A few facts, however, were undisputed. Spell had an IQ of about 70, read at a third-grade level, and had a mental age of 11 despite a chronological age of 25 (in 2014), and was easily manipulated by those around him.

On the issue of sentencing to either the State Hospital or to the prison, the court found that Spell had not carried the burden of proving that he lacked the capacity to conform his behavior to the requirements of the law.

Finally, on the issue of cruel and unusual punishment, the court found *Wilson* and *Walker* inapposite since they dealt with conditions of confinement and not whether the defendant should be detained at the Montana State Hospital or the Montana State Prison.[4] The court further found that *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 2252, 153 L.Ed.2d 335 (2002) was no help to Spell. In *Atkins* the U.S. Supreme Court ruled that it violated the Eighth Amendment to sentence an intellectually disabled individual to death. The court in *Spell* held that *Atkins* had no application outside the realm of the death penalty.

A more recent application of *Wilson* and *Walker* took place in *Smith v. State*, No. OP 20-0185, 2020 WL 1660013 (Mont. Mar. 31, 2020). Smith filed an application for writ of habeas corpus, challenging the legality of his incarceration at the WATCH program given the pendency of the COVID-19 pandemic. In a brief order signed by five justices the court found that Smith had appropriately raised an issue under the Eighth Amendment and under Article II, Sections 4 and 22. The court reiterated that *Wilson* and *Walker* elevate the protections in Montana against cruel and unusual punishment beyond those offered by the Eighth Amendment. The court found that Smith:

> … has made a sufficient threshold showing that the COVID-19 virus pandemic generally poses a substantial risk of serious harm to the health and safety of incarcerated inmates in a prison facility. However, aside from cursory assertion and citation to the Chief Justice's recent memorandum to lower courts regarding local detention center prisoner population management in response to the virus threat, Smith has made no evidentiary showing that the Department of Corrections is not taking reasonable measures under the circumstances to protect him and other inmates from the COVID-19 risk. *Smith v. State*, No. OP 20-0185, 2020 WL 1660013, at *2 (Mont. Mar. 31,

2020)

The court ruled that Smith failed to prove his claim that the Department of Corrections did not provide adequate protections from the pandemic. The application for writ of habeas corpus was denied.[5]

Mapping a Way Forward: Hybrid Protections of Dignity and Against Excessive Sanctions

Courts have struggled with the rationale for how to apply legal analysis of more than one individual right at a time. In some instances it has resulted in a strained interpretation for courts that are seeking to do justice. For example, some commentators have criticized the U.S. Supreme Court's analysis creating "penumbral rights" like the right to privacy.[6] Professor Dan T. Coenen suggests a clearer methodology for approaching these issues in his recent article "Reconceptualizing Hybrid Rights," 61 B.C. L. Rev. 2355, 2355 (2020). Coenen looks at hybrid rights as rights arising from two or more constitutional protections.

> Developing a proper understanding of where hybrid rights come from begins with recognizing that these rights, at bottom, are no different from other rights. More specifically, as with other rights, each of these so-called "hybrid rights" is the product of one, and only one, identifiable textual source. To be sure, that textual source is indeterminate, and thus must be given meaning through judicial interpretation. Moreover, although courts in hybrid-rights cases do consult, among other things, related constitutional provisions in the process of defining the reach of the contested clause, this approach is neither surprising nor misguided. Indeed, courts routinely interpret ambiguous texts located within more expansive written instruments-- whether those instruments are contracts, wills, statutes, treaties, or constitutions--with an attentiveness to other terms embodied in that same document. Taking this approach does not remove the need for courts to make difficult decisions as to when and to what extent they should look to Constitutional Clause B as a source of guidance in interpreting Constitutional Clause A. But difficult choices are commonplace in constitutional interpretation. And in all fields of both public and private law, difficult choices of this very sort routinely arise as courts interpret contested terms within a larger writing by taking account of companion texts.
>
> The bottom line is that hybrid rights are simply rights. Thus, cases such as *Smith* and *Obergefell* should not be seen as unorthodox, far less bizarre. Rather, these cases exemplify the common practice by which courts consider matter extrinsic to the text of a particular constitutional provision to resolve ambiguities that inhere in that text. And here, the extrinsic matter takes the form of information supplied by one or more other passages located within the Constitution itself. Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. Rev. 2355, 2363–64 (2020)

Coenen argues that when there is ambiguity in one constitutional provision it is entirely acceptable to look to other constitutional provisions to help provide context and meaning.

One well-accepted form of rights-related hybridism involves nothing more than resolving an ambiguity in a particular constitutional clause by considering, among other things, relevant language located elsewhere in the same document. And that is as it should be because this approach honors, rather than dishonors, the text of the constitution.

Indeed, it honors that text in three ways. First, this methodology directs attention to the dictates of a particular textual command set forth in the Constitution. Second, this methodology honestly acknowledges the ambiguity that inheres in that textual passage. Finally, this methodology does not call on courts to look hither and yon for interpretive guidance, but instead directs them to seek guidance in the text of the Constitution itself. This last step comports with longstanding rules of statutory, contract, and trust and will interpretation, as well as other forms of interpretation, because it directs judges to consider "the instrument as a whole" as they labor to resolve clause-specific ambiguities. And courts, including the Supreme Court, have not hesitated to apply this interpretive principle in a wide variety of contexts over many years. Dan T. Coenen, *Reconceptualizing Hybrid Rights,* 61 B.C. L. Rev. 2355, 2373 (2020)

Justice Nelson used much this same analysis in *Walker*. In order to determine what constitutes cruel and unusual punishment under Article II, Section 22 of the Montana Constitution (an admittedly ambiguous provision) the court also looked to the right to dignity under Article II, Section 4. Justice Nelson concluded that Section 4 required additional protections against cruel and unusual punishment not found in Section 22. Analyzing an ambiguity in one provision by looking to another provision exemplifies the concept of interpreting the Constitution as a whole instrument.

A framework for future analysis of cruel and unusual punishment in Montana

We know from *Roper* that the concept of cruel and unusual punishment includes "evolving standards of decency." In determining what those evolving standards are, the U.S. Supreme Court has *so far* looked to:

- Decisions in the aggregate of states legislating on an issue – although the court has kept for itself the exclusive determination of what constitutes cruel and unusual punishment, regardless of what states do or do not allow
- International standards, including the United Nations Convention on the Rights of the Child
- New discoveries in

neuropsychology about human development

We know from *Walker* that the right to dignity under Article II, Section 4 in Montana elevates the prohibition against cruel and unusual punishment, although the particulars about how that right is enhanced remain under development. We know that Article II, Section 4 was designed to enhance the equal protection rights of all Montanans, and that there are special protections against discrimination against cultural groups such as Montana's indigenous population. Because Montana's dignity provision has roots in the Puerto Rico constitution, which itself is based at least in part on the law of other nations, a strong argument can be made to look to the law of other nations in determining the meaning of the right to dignity in any particular context. There are many sources in both international and domestic law to look to in crafting a challenge based on the right to dignity and the prohibition against cruel and unusual punishment.[7]

Finally, we know from *Keefe* that Chief Justice McGrath and Justice Dirk Sandefur both believe that Article II, Section 15 of the Montana Constitution provides additional protections for juveniles.

Where does this all lead? First, the protection against cruel and unusual punishment is stronger for juveniles than adults both under the U.S. and Montana Constitutions. Of the two, Montana may provide more protection. At a minimum Chief Justice McGrath and Justice Sandefur would be open to such an argument. The protection against cruel and unusual punishment is also stronger involving discrimination targeting Montana's indigenous population.

In crafting a hybrid challenge using Article II, Sec. 4, and Article II, Sec. 22, the most likely objectives might include:

- Punishments that affect the mentally ill in a particularly difficult way (for example, solitary confinement)
- Punishments that affect juveniles in a particularly difficult way (for example, solitary confinement, or the practice of shackling)[8]
- Punishments based on retribution against individuals who are not fully matured. For now, the court has limited this to juveniles, however, the science of brain development shows that our brains and our psyche may not fully develop until significantly after the age of 18. An argument can be made, based on the best and most recent science, that it is improper to mete out excess punishment to someone who is not fully developed, regardless of whether they are 17 or 18. Such an argument will require the development of a sufficient record of reliable data based on expert testimony.[9]
- Punishments of life without parole. In cases in which life without parole is a possible sentence, Chief Justice McGrath is not at all convinced that it is possible to determine whether someone who commits a homicide as a juvenile is "permanently incorrigible" or "irreparably corrupt."[10]
- Punishments disproportionately imposed on identifiable groups. In cases that have a particular impact on the indigenous population (for example, disparate sentencing based on race). Although equitable arguments are addressed to the Sentence Review Division (outside of the realm of the death penalty) legal arguments based on discrimination are a matter for *de novo* review by the Montana Supreme Court.[11]
- Punishments resulting in a death sentence. Although it is unlikely for now that the Montana Supreme Court would rule the death penalty unconstitutional, if Montana maintains the death penalty those challenges should still be raised. Evolving standards of decency will one day evolve beyond the death penalty. There are presently 22 states that have abolished the death penalty. Another 12 states (including Montana) have gone 10 or more years without carrying out an execution. 34 of the 50 states have actually or effectively stopped imposing the death penalty. Montana's death penalty has been subject to a state court injunction since 2010.[12] The trends in the United States are towards abolition of the death penalty. On the international level, the trend is even more pronounced. 106 countries have abolished the death penalty. The death penalty is prohibited by several international agreements including the Second Optional Protocol to the International Covenant on Civil and Political Rights, Protocol No. 6 to the European Convention on Human Rights, Protocol No. 13 to the European Convention on Human Rights, and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.[13] These are the kinds of factors that were compelling to the U.S. Supreme Court in *Roper*.
- Outside the area of punishments, a challenge might be brought based on combining the right to dignity and the right not to have excessive bail imposed. Most likely candidates for this challenge would be individuals that are young, or that suffer from mental illness, or that are members of a disproportionately affected minority group.[14] These challenges must be based on the best available science, and on statistical information about the impact on the affected group.

Challenges based on extensions of *Roper, Miller, Montgomery, Walker*, and *Keefe* are not likely to succeed on the first try, or the second, or even the third. These cases are based on the concept of evolving standards of decency, and evolution is not a straight path. Evolution takes time, makes missteps, but ultimately leads to improvement. As Dr. Martin Luther King Jr. said, "the arc of the moral universe is long, but bends towards justice." Change will come about with developments in science; it will come about with slow but steady policy changes in other states and internationally; it will come about with persistent litigation raising and refining the issues again and again and again. In Montana a hybrid rights analysis can help move us forward. Few of us who graduated from the University of Montana School of Law in 1980 would have expected the U.S. Supreme Court to strike the death

penalty for juveniles, and few would have envisioned that the court would strike down state constitutional bans on same sex marriage.[15] Change is a process that requires imagination for how things should be and determination to get there. Our sense of right and wrong will continue to evolve. One day the Legislature, the Courts, or the people through the initiative process, may do away life without parole and do away with the death penalty for everyone, not just for juveniles. We are not there yet but as Justice Kennedy said we have "evolving standards of decency." We will see how they evolve. The path for change is before us. Like our colleagues in Myanmar, we only need to be brave enough to walk it.

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Endnotes

1 The current BMP's available on the Department of Corrections website can be found here: http://corrections.mt.gov/Portals/104/Resources/Policy/Chapter3/3-5-5.pdf

2 The ***Walker*** decision has been significant in other contexts as well. See ***Snetsinger v. Montana University System***, 2004 MT 390, 325 Mont. 148, 104 P.3d 445, concurring opinion of Justice Nelson (action for a declaratory judgment that the policy against dependent health insurance coverage for same sex non-married partners violated equal protection and right to dignity protections); ***Baxter v. State***, 2009 MT 449, 354 Mont. 234, 224 P.3d 1211, concurring opinion of Justice Nelson (action challenging constitutionality of homicide statutes to physicians that provide aid in dying to mentally competent terminally ill patients)

3 Abilify is an anti-psychotic used to treat, among other things, bipolar disorder, Vyvanse is a stimulant used to treat ADHD, and Lamictal is used to treat seizures.

4 The decision in ***Smith*** glosses over the fundamental differences of how the mentally ill are treated at the Montana State Prison versus how they are treated at the Montana State Hospital. Conditions for the mentally ill have been an ongoing subject of litigation in both the State and Federal Courts.

5 See also ***Disability Rights Montana v. Montana Judicial Districts 1-22***, et al, 2020 WL 1867123, OP 20-0189

6 ***Griswold v. Connecticut***, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965), in which the Court found a right to privacy arising from the Third, Fourth, Fifth, and Ninth Amendments. For some critiques of penumbral theory see Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221 (1973); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920 (1973); Louis J. Sirico, Jr., *Failed Constitutional Metaphors: The Wall of Separation and the Penumbra,* 45 U. Rich. L. Rev. 459 (2011)

7 See e.g. Matthew O. Clifford and Thomas P. Huff, *Some Thoughts on the Meaning and Scope of the Montana Constitution's "Dignity" Clause, with Possible Applications* (Summer 2000), 61 Mont. L. Rev. 301, 307; Gonzales, *Human Dignity and Proportionate Punishment: The Jurisprudence of Germany and South Africa, and its Implications for Puerto Rico*, 87 Rev. J.P.R. 4, at 1179 (2020); Lauren M. De Lilly, *Antithetical to Human Dignity: Secondary Trauma, Evolving Standards of Decency and the Unconstitutional Consequences of State-Sanctioned Executions*, 23 S. Cal. Interdisc. L. J. 107 (Winter 2014); John D. Bessler, *Torture and Trauma: Why the Death Penalty is Wrong and Should be Strictly Prohibited by American and International Law*, 58 Washburn L. J. 1 (Winter 2019); Michelle Freeman, *The Right to Dignity in the United States*, 68 Hastings L.J. 1135 (June 2017); *Curious In-Laws: The Legal Connections between Montana and Puerto Rico*, 79 Mont. L. Rev 187 (Summer 2018); Rex D. Glensy, *The Right to Dignity*, 43 Colum. Hum. Rts. L. Rev. 65 (Fall 2011); Amanda Eklund, *The Death Penalty in Montana: A Violation of the Constitutional Right to Individual Dignity*, 65 Mont. L. Rev. 135 (Winter 2004)

8 A great resource for juvenile issues is the Juvenile Sentencing Project, https://juvenilesentencingproject.org/. See also Daniella Johner, "One Is the Loneliest Number": A Comparison of Solitary Confinement Practices in the United States and the United Kingdom, 7 Penn St. J.L. & Int'l Aff. 229, 261 (2019); Anna Conley, Torture in US Jails and Prisons: An Analysis of Solitary Confinement under International Law, 7 Vienna J. on Int'l Const. L. 415, 436 (2013); Locked in the Past Montana's Jails in Crisis, Report of the ACLU of Montana, https://www.aclumontana.org/sites/default/files/field_documents/2015-aclu-jail-report.pdf

9 Challenges are now being brought to extend the rulings in ***Roper***, ***Miller*** and ***Montgomery*** to young persons over the age of 18. See ***State v. O'Dell***, 183 Wash. 2d 680, 696, 358 P.3d 359, 366 (2015), "For these reasons, a trial court must be allowed to consider youth as a mitigating factor when imposing a sentence on an offender like O'Dell, who committed his offense just a few days after he turned 18," citing to ***Graham, Roper***, and ***Miller***;

Commonwealth v. Bredhold, 599 S.W.3d 409, 414 (Ky. 2020), *cert. denied sub nom.* ***Diaz v. Kentucky***, No. 19-8873, 2021 WL 161019 (U.S. Jan. 19, 2021); ***Hairston v. State***, 167 Idaho 462, 472 P.3d 44, 48 (2020); ***State v. Barnett***, 598 S.W.3d 127, 128 (Mo. 2020). For a discussion of the importance of fully developing the record when bringing a case to expand the reach of a ***Roper***, ***Miller***, or ***Montgomery*** claim in an as applied challenge, see ***People v. Holman***, 2017 IL 120655, ¶ 30, 91 N.E.3d 849, 858, "The defendant's claim in ***Thompson*** illustrated that point. The defendant there maintained that the evolving science on juvenile maturity and brain development highlighted in ***Miller*** applied not only to juveniles but also to young adults like himself between the ages of 18 and 21. *Id.* ¶ 38. We rejected that claim because the record contained "nothing about how that science applies to the circumstances of defendant's case, the key showing for an as-applied constitutional challenge." *Id.* We stated the trial court was the most appropriate tribunal for such factual development. *Id."*

10 In Pennsylvania, a case has been filed by the Center for Constitutional Rights challenging life without parole sentences for adults convicted of felony murder. The case is ***Scott v. PA Board of Probation and Parole***. https://ccrjustice.org/home/what-we-do/our-cases/Scott-v-PBPP

11 The Montana Department of Corrections currently has a project to study the disproportionate impact of the criminal justice system on Montana's indigenous population. See Montana Department of Corrections Biennial Report, 2021, at page 31, https://cor.mt.gov/Portals/104/Legislative%20Agency%20Materials/All%20Agency%20Materials/Biennial%20Report%202021.pdf?ver=2020-12-16-142148-960. The ACLU of Montana is also working on this issue through its Smart Justice project. https://www.aclumontana.org/en/issues/criminal-legal-reform

12 Judge Jeffrey Sherlock entered a preliminary injunction against Montana's

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Why lawyers should put a priority on housekeeping

Mark Bassingthwaighte

ALPS

Over the years I have visited more firms than I can remember; but no visit stands out more than the one that made me feel as if I had walked onto the set of "Close Encounters of the Third Kind." I kid you not. One of my favorite scenes in that film was when Richard Dreyfuss' character built a rather large replica of Devils Tower in his living room out of just about anything he could find — bricks, dirt, shrubbery, you name it. If you missed that film, trust me, it was a heck of a mess. This particular lawyer didn't build a replica of Devils Tower out of anything he could find, he built it out of his client files! Seriously. As I entered his file room, I found myself standing next to a pile of files that towered far above my head. Access to the top could only be accomplished by ladder. To my relief, I did learn I was one of a select few ever allowed access to that room; and thankfully, no clients ever learned what was hidden behind a very mundane door they walked past every time they met with that lawyer.

I've long since come to realize that lawyers have widely divergent levels of tolerance for messy spaces. For example, as I was about to enter one lawyer's office during a firm visit, I was informed that I would need to hop over file boxes to get to a chair that was in the process of being relieved of its burden. In another situation, a conversation occurred at the desk of a lawyer that had so many papers, unopened mail, and files spread about on it that no part of the desk was visible. Making matters worse, that desk was also littered with empty soda cans and a large overflowing ashtray full of cigarette butts. Suffice it to say, the aroma of the space was less than welcoming. And finally, I have visited more than a few firms that had more clutter in the offices and halls than what was in my garage when we had four teenage sons still living at home, met with lawyers in conference rooms full of broken furniture, and waited in reception areas that were in dire need of a thorough cleaning.

I have also visited many firms that are at the opposite end of the spectrum. One of the more memorable firms in this group was both a law firm and an art gallery. That space did more to bring about a sense of calm and relaxation than that of any other firm I have ever visited.

Of course, I have just shared the extremes. Most firm spaces fall somewhere in the middle. These professional spaces are appropriately furnished and generally well maintained in accordance with the financial realities and personal tastes of those who work there, which is the way it should be. That said, it's important to appreciate that people naturally have emotional responses to whatever space they are in, which is why I would have you pause for a moment to consider how a potential or current client might respond to being in your office space. Like it or not, the physical space in which you interact with your clients will say something about you. And that unspoken message can positively or negatively influence the beliefs they will ultimately form about your sense of professionalism, the degree to which you value protecting client confidences, the level of respect you have toward your staff and clientele, and with some, even how competent they think you are.

If you feel that your space reflects highly on you after thinking through all that has been shared thus far, great! Do all that you can to keep it that way. On the other hand, if you are now beginning to think your office space could benefit from a little sprucing up, here are a few ideas that might prove useful:

1. If it is your nature to work in a disheveled workspace and this truly works for you, fine. Just don't visit with anyone in that space, even remotely via video conference. Designate a conference room or a separate office as a public space and commit to always keeping that space clean and free of file materials. Then when using that space, only bring in whatever materials are necessary for any given meeting.
2. Never leave confidential information in view of others. Anything that could identify any client must be kept in a non-client area. Such materials might include wall calendars, file boxes with client names on the outside, corporate books stored on open shelves, and even mail sitting on the counter in reception. If client names would be visible to anyone visiting your office, move the offending materials or store them in a different manner such as placing them inside a file cabinet.
3. Take file materials off your desk, cover the materials up, or at least turn them over before bringing a client into your office. Client confidences, to include identities, need to be maintained. But consider this: it is just too easy for the wrong client to remember always having to look at all the stacked files on your desk and eventually conclude that the reason their matter didn't work out the way they thought it should was because you had too many things to worry about and their matter didn't receive the attention it deserved. You see, a cluttered desk doesn't convey the message that you're in demand, it's often interpreted as saying you're not very organized.
4. Before you decide to leave a client alone in an office, recognize

Risk, next page

Risk, from previous page

that some clients may look through materials left on a desk or peek at a computer screen once they are left alone. This is one more reason why any area the public can access should be free of confidential information of others.

5. If any furniture in any public space is heavily worn, in disrepair, or hasn't been cleaned in years, address the situation. Clean, repair, or replace as called for. Similarly, repair or replace worn or torn rugs and carpets because they can be a trip hazard.

6. Recognize and accept that no public area should ever be used as a permanent storage space for anything, especially closed files!

7. You might not think this needs to be said, but for some it does. Keep up with the basics. Pick up the trash, run a vacuum now and again, empty full trashcans prior to any meeting, don't leave dirty dishes lying around, and regularly clean the restroom.

8. Have someone you trust to be open and honest with you walk through your office space as if they were a potential new client. Ask this person to look for opportunities to "discover" something that should not be visible to any guest, and also have them share how they respond to being in the space by asking them about the unspoken messages they feel you are sending. Then, take whatever remedial actions seem appropriate.

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2018 MT 312, ¶¶19, 22.

Without regard to the reliability of polygraph evidence, or Rule 403 considerations the bottom line for Walker was the same as for the litigants in all the prior cases cited by the Court:

> ¶ 24 Accordingly, consistent with our well-established precedent, **we reiterate the "simple rule of law" previously stated in Staat: "Polygraph evidence shall not be allowed in any proceeding in a court of law in Montana."** *Staat*, 248 Mont. at 293, 811 P.2d at 1262. We affirm the District Court's order excluding Walker's proffered polygraph evidence. [Emphasis added]

2018 MT 312, ¶24. (The Court later recognized a single, very limited, valid use for polygraphs as conditions in sentencing.[10]) As the *Walker* trial judge recognized, Montana's common law requires exclusion of polygraph evidence in every case and in every circumstance, to preserve the role of the fact-finder in the trial process. Montana's rule is about as clear as they come and sidesteps totally any application of Rule 403 or either Rule 702 (if polygraphs are considered non-novel) or *Daubert* (if novel).

Conclusion: Polygraphs are Basically Inadmissible in both State and Federal Court; Montana's Simpler Ban is Better

The significance of *Walker* lies in the fact that the Montana Supreme Court outright refuses to engage in the arduous analyses required by Rule 702 and 403, in favor of an unambiguous ban of polygraph evidence. Montana's common law per se exclusion is similar to that in the Military Rules of Evidence, found valid and constitutional by the U.S. Supreme Court in *Scheffer*, *supra*. In contrast, federal judges in the 9th Circuit faced with the proffer of, and objection to, polygraph evidence, might avoid the *Daubert* swamp by ruling on 403 grounds but even that requires weighing and comparing the probative value against the danger of unfair prejudice. The 9th Circuit caselaw demonstrates a continued antipathy to polygraph evidence, but requires a lot of work to get there. As Isaac Walton said, "Truth is ever to be found in simplicity, and not in the multiplicity and confusion of things." If the end result is the same, isn't Montana's simpler approach to polygraph evidence better?

10 "[A] court may impose 'any other reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim and society[.]' Section 46-18-201(4)(p), MCA. Thus, annual polygraph testing is allowed. Smart, ¶ 12." Wood v. Guyer, No. OP 19-0136, 2019 WL 1276509, at *1 (Mont. Mar. 19, 2019).

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version of the death penalty on November 1, 2010, in ***Smith v. Batista,*** Cause No. BDV-2008-303, in the First Judicial District. In that same case Judge Sherlock made the injunction permanent in a written Order issued October 15, 2015.

13 Amnesty International webpage on the death penalty, https://www.amnesty.org/en/what-we-do/death-penalty/. For crafting challenges to the death penalty two of the best sources of information are the Death Penalty Information Center, https://deathpenaltyinfo.org/ , and the Berkeley Death Penalty Clinic, https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/

14 See Dr. Ciara Dawn Hansen, *Risk and Resiliency Factors in Predicting Recidivism Among Native Americans on a Montana Reservation* (2018), https://scholarworks.umt.edu/etd/11246/ ; https://www.sentencingproject.org/news/race-justice-news-native-americans-in-the-justice-system/; https://www.mintpressnews.com/report-native-americans-account-disproportionate-amount-prison-population/214617/

15 ***Obergefell v. Hodges,*** 576 U.S. 644, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). For a discussion of social movements that lead to legal change see Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 Hastings Const. L.Q. 243 (2016); Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. Rev. 1662 (2017); Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 Berkeley J. Crim. L. 32 (2018)

Fellows, from page 10

Association of Counsel for Children, a position that enables her to advocate for continuous improvement in the quality of representation of children in Montana's foster care system. Contact Chase here - https://www.alawcarte.lawyer/

■ ■ ■

Danielle Shyne is the owner of Shyne Law Group, PLLC. Shyne is a magna cum laude graduate of the Gonzaga University School of Law. Prior to opening her law firm she worked for Montana Elder Law and clerked for Chief Justice Mike McGrath and Justice Michael Wheat of the Montana Supreme Court.

Shyne has dedicated her professional life to helping others through her work at the Montana Governor's Office, the Montana Governor's Office of Community Service, and the nonprofit Thrive. During law school, Shyne supported the Gonzaga Public Interest Law Project and the Women's Law Caucus. Additionally, she fought for her clients at the Unemployment Law Project and interned for Chief Justice Mary Fairhurst of the Washington Supreme Court. She has two children and a miniature schnauzer with her husband of 10 years, whom she met while earning her undergraduate degree at the University of Montana. She enjoys hiking and swimming, spending time with her large extended family in Bozeman, and exploring the small towns of Montana.

■ ■ ■

Anna Rose Sullivan was born in Butte and resides in Nashua, where she serves as city attorney for Glasgow, Wolf Point and the Town of Fort Peck. Sullivan has worked in municipal law for four years. Prior to that she worked as the supervising public defender for the Fort Peck Tribes and deputy county attorney for Roosevelt County. She has also worked as a litigator and thrives in a court setting. She owns her own Glasgow-based firm and was recently awarded a fellowship with the Montana Legal Services Foundation Rural Incubator Project for Lawyers. In her spare time, she enjoys collecting artwork by female Montana artists, visiting the Fort Peck Reservoir, and enjoying a fire at home with her two dogs.

■ ■ ■

Gregory M. Worcester grew up in Norris. He attended kindergarten through 12th grade in the same building and had a graduating high school class of 10 people. He attended Gonzaga University, where his transcripts say he was supposed to have been studying Political Science and Criminal Justice. He left after 4 years with no degree, and the following spring enlisted in the United States Army Military Police. Worcester has had six years of active-duty service, including deployments to Afghanistan and Kosovo, and 10 years in the U.S. Army Reserve as a drill sergeant. In 2013 he completed a Bachelor of Arts in political science and a Bachelor of Science in military leadership at Western Kentucky University. In 2017 he completed a Juris Doctor degree at the University of Montana School of Law. He worked for the Montana Office of the State Public Defender in 2018, and then spent some time as a stay-at-home father. In 2020 he opened Aspen Law P.L.L.C. in Helena, MT and has handled cases in family law, consumer protection, First Amendment law, contract law, and just about any other kind of case that comes through the door. Worcester is committed to being an attorney who cares more about whether a person needs a lawyer than whether they can afford one, and his selection as a fellow in Montana Legal Services Association's Rural Incubator Project for Lawyers has been invaluable in advancing his access-to-justice mission. He and his wife of 17 years, Cynthia, have three children — Summer (13), Liam (5) and Vivian (3).

RURAL INCUBATOR FELLOWS

Current Fellows

- Jessie Wiles
- Chris Fisher
- Kathy Coleman
- Chase Rosario
- Morgan Handy
- Anna Rose Sullivan
- Danielle Shyne
- Greg Worcester

Graduated

- Walter Clapp
- Jennifer Williams

Referrals

To refer clients to RIPL, contact MLSA. mtlsa.org or 1-800-666-6899

RIPL Mentor

Driscoll Hathaway Law Group

RIPL, from page 10

The RIPL program provided me with the training, mentoring, and support system I needed to provide legal advice calls and take cases, mostly on a limited scope basis, in areas such as estates and probate, landlord/tenant, and family law. I know that my practice, no matter what direction it takes in the future, will always include space for pro bono and modest means work. The RIPL program is an excellent example of how to boost the skills and knowledge of attorneys already working here in Montana to increase affordable access to Justice for Montanans."

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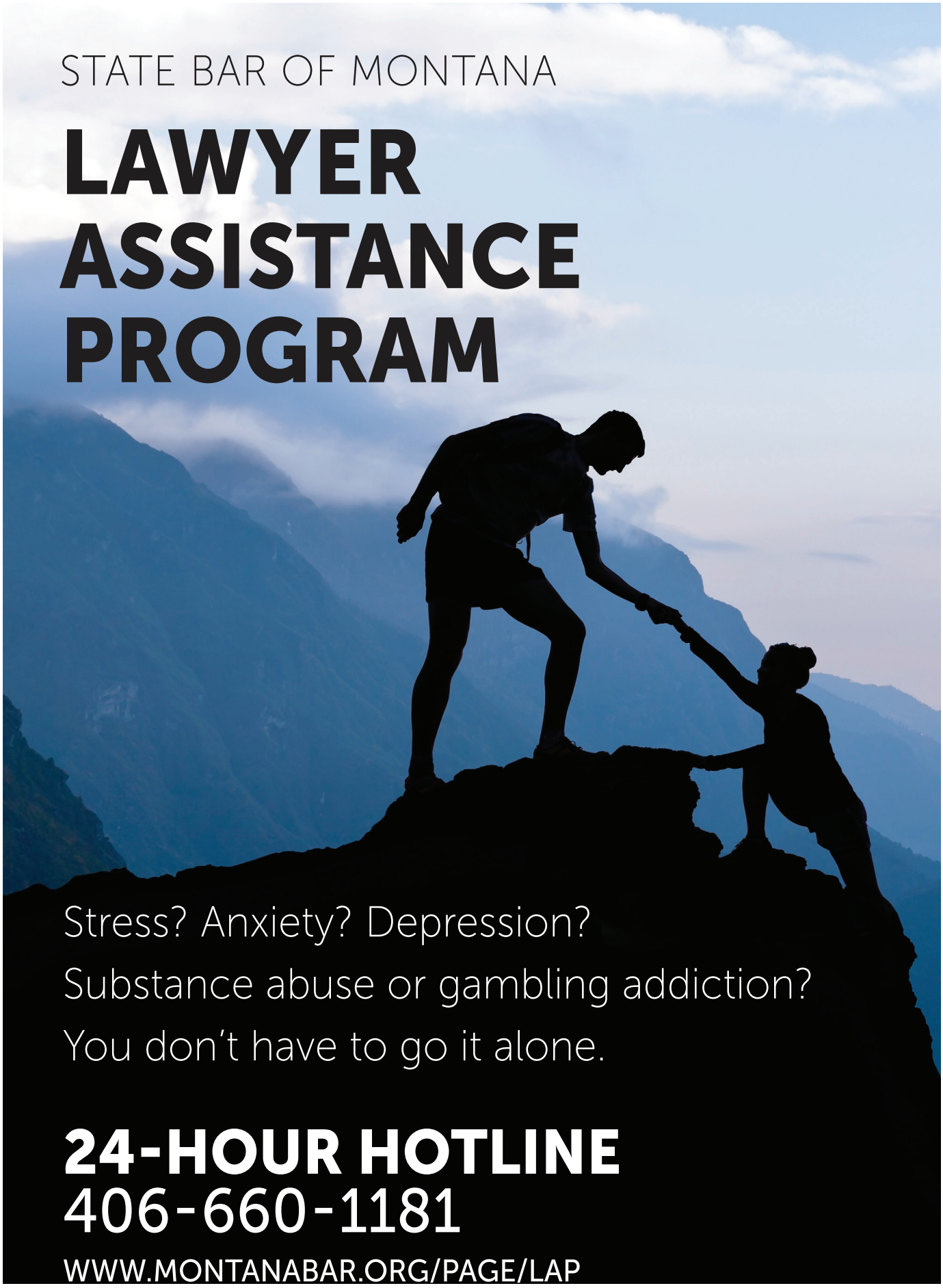
If you are unable to commit to the RIPL fellowship but are interested in assisting with one or more modest means cases, please contact Ann Goldes-Sheahan at the State Bar of Montana at agoldes@montanabar.org or 406-447-2201.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