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AUGUST 2020

VIRTUAL ANNUAL MEETING

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MONTANA LAWYER

AUGUST

2020

VOL. 45 ISS. 4

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ON THE COVER

For the first time, the State Bar of Montana is holding a Virtual Annual Meeting in 2020. Read President Juli Pierce's President's Message on the meeting on Page 4, and more information on the meeting on page 5.

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Join us (virtually) for the Annual Meeting in September

Friends and Colleagues,

I am very pleased to announce the lineup for the State Bar of Montanan's first-ever Virtual Annual Meeting, September 10-11, 2020.

In a year of firsts, not all of them pleasant, we are excited to bring you this outstanding lineup of speakers who will tackle the topics of the day, as well as some of the events you've come to expect from the State Bar of Montana Annual Meeting, including recognizing this year's State Bar award winners and our 50-year pin recipients.

During our CLE, we will address issues that are pertinent in the legal world right now including Zoom, HIPAA, discovery, ethics, diversity in a day of "ripped from the headlines," and running your practice. Handling meet-and-confer requirements from the perspective of the bench. What are we learning about legal ethics in this changed environment, and how do you run your practice as so many of these changes continue? Finally, we will tackle the diverse landscape of Montana's legal profession as we talk about the challenges of the day. We will conclude Friday morning with oral argument from the Montana Supreme Court.

And here is another first – during these uncertain times we are bringing this to all of you at nearly 70% off our regular CLE pricing – 6.5 credits (planned) including 1.0 ethics for just $100. And, of course, the additional 1.5 credits on Friday come at no cost to all members.

Our awards will take place during a "bring your own lunch" virtual awards presentation from noon to 1:30 p.m. on Thursday, September 10, and we will honor our 50-year pin recipients during our virtual President's Reception at 4:45 p.m. that evening.

Be sure to join us at 8:00 a.m. on Friday, September 11, before the Montana Supreme Court argument, for our annual business meeting and an update from Dean Kirgis at the Blewett School of Law at UM.

While I am sad we will not see each other in person, I am excited to join you for our Virtual Annual Meeting. I hope to "see" there!

JULI PIERCE

We are excited to bring you an outstanding lineup of speakers who will tackle the topics of the day, as well as many of the events you've come to expect from the State Bar of Montana Annual Meeting

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JOIN THE STATE BAR OF MONTANA
FOR THE FIRST EVER

VIRTUAL ANNUAL MEETING

SEPTEMBER 10-11, 2020

SCHEDULE OF EVENTS

THURSDAY, SEPTEMBER 10
MORNING CLE SESSION
8:30 AM TO NOON

Zoom in the Courtroom: It's Here. Here's How to Use It. (Panel information forthcoming)

HIPAA: What You Thought You Knew, Before & After COVID-19
Erin F. MacLean, Jackie Boyle
Jones, Peterson and MacLean P.C.

The Meet and Confer Discovery Conference
Hon. Elizabeth Best, 8th Judicial District; Hon. Amy Eddy, 11th Judicial District of Montana

NOON — State Bar Awards Ceremony and Gavel Passing · Bring Your Own Lunch

THURSDAY, SEPTEMBER 10
AFTERNOON CLE SESSION
1:30 TO 4:30 PM

Ethics and Technology in the Time of COVID
Pam Bucy, Chief Disciplinary Counsel; Todd Seaton, Investigator

Practicing in 2020: Navigating the Challenges & Opportunities
Panel 1: COVID19 and the Business of Law

Meet & Confer Discovery Conference
Hon. Elizabeth Best, 8th Judicial District; Hon. Amy Eddy, 11th Judicial District of Montana

4:30 PM — Virtual President's Reception & 50-Year Pin Ceremony

FRIDAY, SEPTEMBER 11
MORNING CLE SESSION
9 TO 11:30 AM
(FREE TO ALL MEMBERS)

Introduction of the Montana Supreme Court Oral Argument Split-Appeal over Information forthcoming

Montana Supreme Court Oral Arguments
Keefe v. Kirkegard
Appeal of Juvenile Life Without Parole Sentence

11: AM — Annual Meeting Concludes

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CAREER MOVES

Tremper opens mediation and arbitration practice

After more than 30 years in a complex civil litigation practice, Glenn E. Tremper has opened Tremper Dispute Resolution, offering independent and neutral mediation, arbitration and conflict resolution services - both in person and by video conferencing - throughout Montana and the region.

Tremper is a 1987 graduate of the University of Montana School of Law, a former law clerk to Chief Judge James R. Browning of the U.S. Court of Appeals for the Ninth Circuit, a former member of Church, Harris, Johnson & Williams, P.C., and, since 2007, a solo practitioner focusing on construction negligence and other complex civil matters based out of Great Falls.

Tremper

Tremper has particular experience and skill in the areas of complex commercial litigation, construction defects and disputes, estate and probate disputes, business tort disputes, professional malpractice claims, closely held business disputes, insurance coverage and claims handling, family farm and ranch disputes, corporate and partnership separations, family business succession planning, personal injury and other complex litigated matters. He also has represented clients in commercial real estate development, leasing, employment and other business management issues.

Tremper has served as a mediator over 30 litigated cases and has represented one or more parties in over 70 separate mediations over the past 12 years. He has received over 100 hours of training in dispute resolution, including attendance at courses offered by the Strauss Institute for Dispute Resolution at Pepperdine University and the ABA Section on Dispute Resolution. He holds an AV Preeminent Lawyer rating from Martindale-Hubbell, is a Certified Mediator and Certified Online Mediator at Mediate.com, and is listed on the American Arbitration Association's directory at Mediation.org. More information may be found at www.tremperlaw.com.

Havre firm welcomes Kuhr as new associate attorney

Bosch, Kuhr, Dugdale & Brown, PLLP, is proud to welcome Katie Kuhr to the firm as an associate.

Kuhr will focus on agricultural law, corporate law and business organizations, general and commercial litigation, estate planning/probate and real estate law. In 2007, she graduated from Montana State University-Billings with a B.S. in Psychology. Upon graduation Kuhr worked as a licensed addiction counselor and later for the Montana Department of Corrections. While continuing her education at the University of Montana School of Law, she served as counsel for the law school's trial team. After graduating law school in 2019, Kuhr clerked for Judge Yvonne Laird of the 17th Judicial District Court, State of Montana.

Kuhr

Kuhr was born and raised on a farm and ranch in Havre, Montana. She currently serves on the board of Havre's Helping Haven and the Hill County Parks Rules & Regulations Committee. When able she helps on the family farm and enjoys running, hiking and exploring Montana's wide-open spaces with her husband.

HONORS

Parker wins Eddye McClure Award from Indian Law Section

Victoria Parker (Western Shoshone, Reno-Sparks Indian Colony) is named the 2019-2020 recipient of the Eddye McClure Memorial Graduate Award. The Indian Law Section awarded Parker $1,000 for her commitment to Tribal Law and Indian people.

The Eddye McClure Award is given by the Indian Law Section to a recipient committed to Indian people. Parker embodies this principle. Parker was raised on the Hungry Valley Reservation in Sparks, Nev., surrounded by her family, tribe, and cultural values. She joined the Army shortly after graduating high school to honor the veterans of her community and to serve her country. She served for 15 years and in that time gained important skills including how to be a leader, how to advocate for underrepresented people, the value of selfless service, and the importance of a strong work ethic. Each of these values Parker exemplified throughout her time at the law school.

Parker earned a bachelor's degree in criminal justice, sociology and psychology in May 2013 while serving in the Reserves. Eventually, her path guided her to law school where she graduated this past May. During her time in law school, Parker traveled throughout Montana to teach Tribal Historic Preservation Officers about their rights in cultural

Do you have news to share?

The Montana Lawyer welcomes news about Montana legal professionals including new jobs, honors, publications, and other accomplishments. Please send member news and photo submissions to editor@montanabar.org. Email or call 406-447-2200 with questions.

property law, wrote an article accepted by the University of Pennsylvania, spoke at their Cultural Heritage Conference, and showcased integrated representations of Tribes in Montana; Black, Indigenous, and People of Color (BIPOC); and women during an unveiling event in January 2020.

Like Eddye McClure, Parker fought for equality throughout her life and her battles will have a lasting, positive impact on many people. She will continue Eddye's goal of achieving equality by eliminating discrimination. Although Eddye worked tirelessly to achieve this goal without any expectation of recognition for her efforts, the Indian Law Section has recognized her contributions. The Eddye McClure Memorial Graduate Award should serve to remind everyone that selfless, tireless effort on behalf of others can achieve great results that ripple forward. The Indian Law Section congratulates Parker on being chosen to represent Eddye McClure's legacy.

Pabst appointed to National District Attorneys Association Board, will chair task force

The National District Attorneys Association unanimously selected Missoula County Attorney Kirsten Pabst to its Board of Directors as a vice president and as a member of its Executive Committee.

Kuhr

Pabst will also chair NDAA's new Prosecutor Wellbeing Task Force designed to develop and disseminate resources, training and peer to peer exchanges for prosecutors around the country to promote their health and wellbeing.

Pabst said it is an honor to be chosen to work with the dedicated leaders on the board.

"Criminal justice is at a crossroads on so many levels – racial inequality, gender inequality, mass incarceration – and it is exciting to be in a position to effect positive policy changes, not just at the local and state level, but nationally," she said.

Pabst started her career as a prosecutor 25 years ago and has worked with the NDAA for the past 20 years as a trial instructor.

"Pabst was chosen because of her leadership and longstanding commitment to criminal justice reforms and prosecutor wellbeing initiatives," NDAA President Nancy Parr said. "We welcome her expertise and look forward to working with her."

NDAA is the oldest and largest national organization representing state and local prosecutors in the country, with more than 5,000 members representing over two-thirds of state and local prosecutors' offices.

Revised temporary admission rules adopted

The Montana Supreme Court has adopted a proposed revision of Temporary Rules for Admission to the Bar.

The court had instituted temporary rules in June, considering the extraordinary circumstances created by the COVID-19 pandemic, to allow certain recent law school graduates provisional admission to practice while under supervision of a licensed Montana lawyer.

The revised rules eliminate language requiring the supervising attorney to be personally present in throughout proceedings in criminal matters in which the defendant has the right to counsel.

The court adopted the revised Temporary Rules on Aug. 4 after a 14-day comment period on the revision. The court received five comments on the revisions, all in favor.

The amended Section F of the Temporary Rules for Admission now reads:

F. Authorized Scope of Practice

Subject to the limitations described infra, a person provisionally admitted to the Montana Bar may appear in courts of record, administrative tribunals, arbitration hearings, and other judicial and quasi-judicial proceedings in all civil and criminal matters.

1. In civil cases in any court or tribunal, the person on whose behalf an appearance is being made must consent to the supervising attorney's absence.

2. In any criminal matter, the provisionally admitted lawyer must comply with the disclosure requirements of Section E(3) and must orally advise the court at each appearance that he or she is certified to appear pursuant to this rule.

APPOINTMENTS

Faure reappointed to Commission on Practice

Jean Faure, of Faure Holden in Billings, was appointed to the Supreme Court's Commission on Practice.

Faure was one of the top three vote getters in a June election voted on by lawyers in Area D. The names of the three were forwarded to the Supreme Court, which appointed Faure.

Area H consists of Cascade, Glacier, Pondera, Teton and Toole Counties.

5 reappointed to Courts of Limited Jurisdiction Commission

The Supreme Court reappointed the Honorable Perry Miller, the Honorable Kelly Mantooth, the Honorable Steve Fagenstrom, the Honorable Steve Bolstad, and Peggy Tonon to the Commission on Courts of Limited Jurisdiction.

All five members' terms will expire on June 30, 2024.

DISCIPLINE

Morin disbarred for multiple violations, pattern of conduct

The Montana Supreme Court on March 31 ordered attorney Tina L. Morin to be disbarred in Montana effective immediately.

The court agreed with the Commission on Practice's conclusion that Morin violated multiple sections of the Montana Rules of Professional Conduct by soliciting false testimony from a trial witness, failing to promptly inform her clients about their incurred costs, and unreasonably charging certain costs to her clients.

In agreeing with the commission's recommendation of disbarment, the court cited concerns with Morin's conduct, both in this matter and as an overall pattern of conduct, her lack

MORE NEWS, PAGE 10

Judge Reynolds, Judge Pinski announce retirements

The Judicial Nomination Commission is seeking applicants for two Montana District Court judge positions that are opening in October.

The positions are in the First Judicial District, which covers Broadwater and Lewis & Clark Counties; and the Eighth Judicial District, which covers Cascade County.

The Honorable James P. Reynolds of the First Judicial District and the Honorable Gregory G. Pinski of the Eighth Judicial District both recently notified the Montana Supreme Court that they will be retiring effective Oct. 2.

The commission is now accepting applications for both positions from any lawyer in good standing who has the qualifications set forth by law for holding the position of district court judge. The application form is available electronically at courts.mt.gov/courts/supreme/boards/jud_nom. Applications must be submitted electronically as well as in hard copy.

The deadline for submitting applications for the Eighth Judicial District opening is 5 p.m. on Friday, Aug. 21. The deadline for submitting applications for the First Judicial District opening is 5 p.m. on Thursday, Aug. 28.

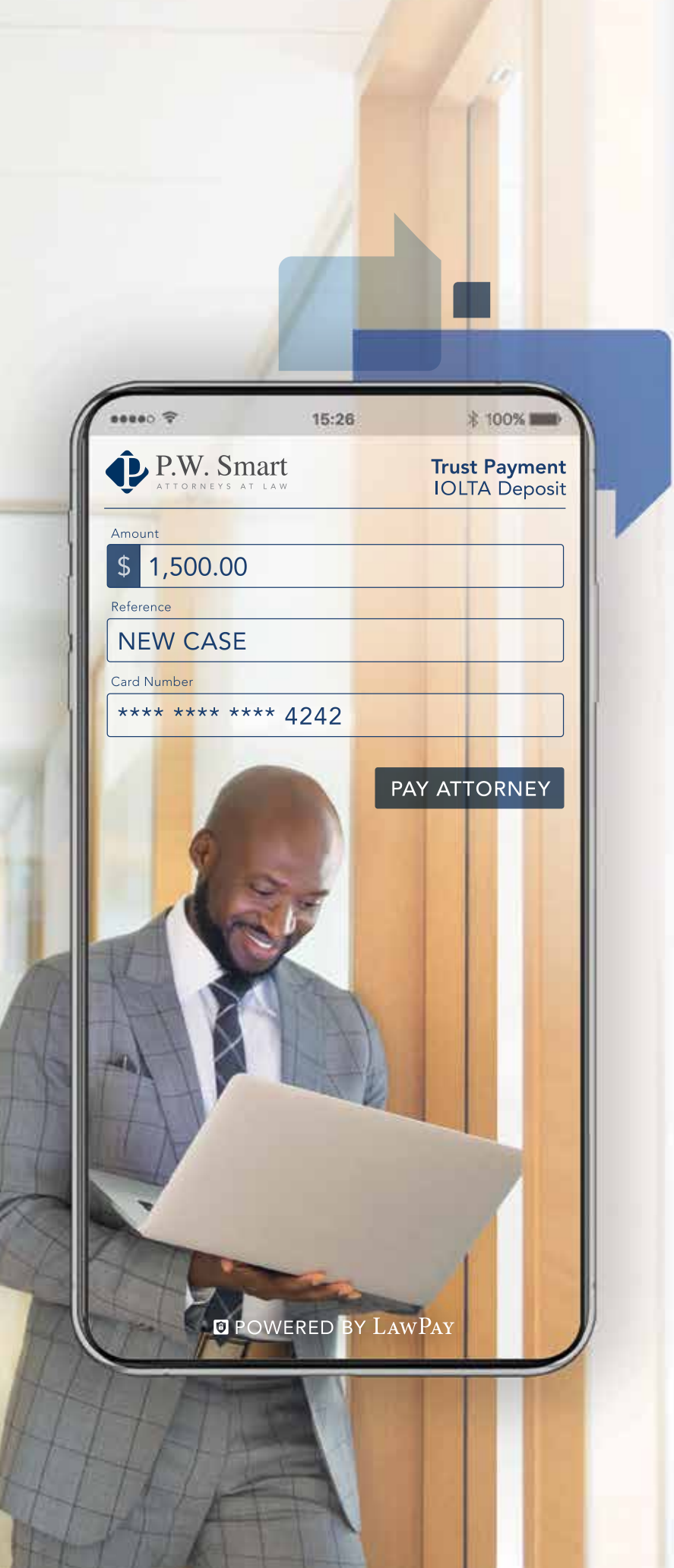
There will be a 30-day public comment period on the applicants for each of the positions after the application deadlines.

After reviewing the applications, receiving public comment, and interviewing the applicants if necessary The commission will forward the names of three to five nominees for each position to Gov. Steve Bullock for appointment.

The judges appointed by the governor will both be subject to Senate confirmation during the 2021 legislative session.

If confirmed, the new First Judicial District judge will serve the remainder of Judge Reynolds' term, which expires in January 2023.

The Eighth Judicial District position is subject to election in 2022, and the successful candidate will serve for the remainder of Judge Pinski's term, which expires in January 2025.



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Supreme Court to hear juvenile life without parole appeal

Oral argument slated for Bar's virtual convention

The Montana Supreme Court will hear a Montana prisoner's appeal of his three life without parole sentences for a triple homicide he committed as a teenager.

The oral argument will be held on Friday, Sept. 11, during the State Bar of Montana's first Virtual Annual Meeting.

Steven Wayne Keefe was 17 when he shot and killed three people during a burglary, for which he received a life without parole sentence. After the U.S. Supreme Court held in *Miller v. Alabama* in 2012 that mandated life without parole is unconstitutional for juvenile offenders, his case was remanded to District Court for resentencing. Keefe was resentenced to three consecutive life without parole sentences at a hearing in April 2019.

Keefe's appeal raises four issues on appeal:

- Whether the District Court unconstitutionally deprived Keefe of expert assistance. The state argues that the court was not obligated to appoint a psychologist to aid in Keefe's defense.
- Whether the District Court complied with *Miller v. Alabama*.
- Whether it was error for the District Court to admit and rely upon expert testimony where the expert refused to disclose the basis for his opinion.
- Whether the state knowingly presented false evidence and whether the District Court acted partially and bias violated due process.

NEWS
FROM PAGE 8

of contrition, and her unwillingness to accept responsibility for her actions.

The court also noted that Morin's conduct toward other counsel was an aggravating factor – although it wasn't a violation as charged by the Office of Disciplinary Counsel – and that she continued this conduct in objections she filed in the disciplinary case. The court also took into consideration Morin's previous disciplinary cases, her patt

Morin was also ordered to pay the costs of the disciplinary proceedings.

OTHER ORDERS

Judges training to be held by videoconference

The Montana Supreme Court ordered that the statutorily mandated biannual training conference for limited jurisdiction judges can be held by videoconference.

The court determined that no statute expressly mandates that the conferences be held in person, granting the Commission on Courts of Limited Jurisdiction's request to conduct the training remotely due to the COVID-19 pandemic.

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By Stuart Segrest and Matthew Cochenour

Appellate Brief Writing: A Primer

I. Introduction

Our purpose in this article, and a follow-up article on appellate argument, is to take the mystery out of appellate advocacy and simplify the goals and strategies we think make for effective arguments. Specifically, in this article on appellate brief writing, we hope to provide practical guidance to make your brief more persuasive and less distracting (often two sides of the same coin). Appellate advocacy differs from trial. There is a different audience — a panel of judges instead of a jury or trial judge — which requires a different presentation style. And there are different goals: namely preserving a win or explaining an error. While we wade into the particulars below, remembering these two points — focusing on your audience and the specific relief you seek on appeal — goes a long way to crafting a winning appellate brief.

I. Sections of the Brief

As you organize your brief, remember your audience. Supreme Court justices, court of appeals judges, and their respective clerks, read A LOT of briefs. There are certain things they expect to see. Below we break down the brief's parts and suggest some best practices.

A. Introduction

This is often the first thing the judge reads, and it should say why you win in a cohesive and memorable way. Always include an introduction in federal appeals. In the Montana Supreme Court, many briefs do not include introductions (partly because they are not expressly included in the rules); however, an introduction may be beneficial where the case is complicated, includes significant policy interests you want to highlight up front, or involves multiple issues.

The introduction should be one to three punchy paragraphs. It should say, in simple but powerful terms, what the case is about, who the parties are, the main issues, and why you should win. This is your first chance to present your theme, as discussed in more detail below.

For some judges, the introduction is the most important section, so spend some time honing it. You may want to write the introduction before drafting the rest of the brief, then return to it when done to see if you encapsulate the argument made in the brief. This will not only help you perfect the introduction but will also highlight whether your arguments in the body of the brief are on target.

B. Issues

Try to present three or fewer issues if possible. The Montana Supreme Court's rules suggest a maximum of four, but why push it? And really, the district court did not make 14 errors that require reversal. Moreover, a shotgun issue statement risks hiding the most important issues, at best. At worst, it signals you don't know which issues, if any, are important enough to focus on.

There are two main types of issue statements. The most common is short and to the point: "Did the district court err when it [short summary of scenario presented in a way that suggests you win]." This type of issue statement is appropriate for most cases.

The other type of issue statement is often referred to as a "deep issue" statement. It explains the relevant background — the factual or legal context — before presenting the issue. Done correctly, this encapsulates your case and helps to convince the Court why you should win. Though longer than a typical statement, it should not be more than 75 words. A deep issues statement is appropriate for issues needing, or at least benefiting from, some background discussion.[1]

C. Statement of the Case

This section is where you tell the Court how the case got there. Include

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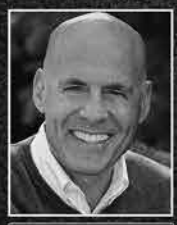

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procedural steps that add context, and those that show the district court's rulings at critical stages. You may want to include a parenthetical explaining the court's reasoning for procedural orders that benefit your position or highlight an error.

But don't get into the weeds. If you find yourself providing too much detail about an order or filing, move the details to the fact or argument section. Also, don't include every small event or filing; only those necessary to tell the story and put the case in context. You don't need to say that the plaintiff filed the complaint on a particular date, for example, unless that is important to the appeal (say because there is a statute of limitations issue).

D. Statement of Facts

Depending on the issue, this is the most important section for some judges. To ensure you highlight the facts that matter to your appeal and position, only include relevant, necessary facts. This should include unfavorable facts, though you may want to set those facts out in a qualifying statement. Also include all facts that you mention in the argument (it's a good idea as you edit your argument to check each fact you mention to ensure it is discussed in the fact section). But do not include facts that don't affect the analysis of any issue.

The goal with the fact section is to tell a memorable story that shows why you should win, or at least why your position is sympathetic. While your story should be interesting if possible, it should not be argumentative. If the Court perceives advocacy in the fact section, your credibility will suffer, and the Court will look to the opposing party's brief for the "true" version of the facts. A good way to outline your story and provide a roadmap is to use headings in the fact section (an underutilized tool). Used correctly, fact headings, like argument headings, can preview why you win.

Generally, fact sections should be chronological, though that may vary depending on the case. Even though chronological, the facts should not read as a recitation of dates (on Jan. 1 this happened ... on Jan. 5 this happened). Instead use temporal relationships to explain the chronology, such as "Only two weeks later . . ." The exception, as with the statement of the case, is where a specific date matters to your argument. Also avoid reciting the minutes of the hearing or trial (Witness 1 testified ... Witness 2 testified), again unless the witness's testimony or the chronology is relevant to an issue.

The goal with the fact section is to tell a memorable story that shows why you should win, or at least why your position is sympathetic. While your story should be interesting if possible, it should not be argumentative. If the Court perceives advocacy in the fact section, your credibility will suffer.

E. Summary of the Argument

This is a summary, not the argument itself. On the other hand, this section should not merely recap the headings. And it generally should not include case citations or citations to the record.

Instead, approach the summary like a conversation with someone familiar with the law but unfamiliar with this case. Told well, the summary of the argument, like the introduction, can encapsulate why you should win. To that end, be assertive and direct: you win because of a, b, and c. This is the most important section for some judges and may be the first they read, particularly if your brief does not have an introduction. Make it count.

F. Argument

Finally, the argument! Here is where you dig in and explain why you win. As with the other sections, you must thoughtfully structure the Argument section to accurately convey your main points and maintain the reader's attention.

For each issue, we suggest a separate section using the CRAC method: Conclusion, Rule, Application, Conclusion. Wait, two conclusions? That's because your heading should be written like a conclusion, identifying the ruling or decision you want coupled with key facts, often offset with "because."

It is often beneficial to follow the heading with a short umbrella section that fleshes out the legal standard (for example, a three-part test) and adds a few specific facts relevant to the standard. Think of it as a miniature argument summary just for this section of the argument.

You then explain the rule. That is, what the law is, whether constitutional, statutory, or case law (or all combined). This section may include a standard of review, though sometimes it is best to describe the standard of review in its own section, especially if it applies to all issues or is controversial. We suggest a legal overview using conclusive statements coupled with case cites and parentheticals as necessary, rather than "In *Smith*, the court held x, y, and z." More on this later.

Then apply the rule, highlighting why you win based on the rule you explained as applied to the particular facts of the case. The conclusion should then flow from your application. Done well it reads like a wrap-up from the heading and umbrella. "We told you we would win and now you see why."

G. Conclusion

The conclusion should generally be direct and to the point.[2] Conclude with one sentence stating the relief you seek: "The district court should be affirmed." A longer, more substantive conclusion should only be used where necessary to draw disparate arguments together (e.g. in a long brief with many complex issues), or to ask for specific relief requiring explanation. As noted above, though, each section of the argument should have its own substantive conclusion.

II. Techniques for Different Briefs

For an opening brief, you should include affirmative reasons why you win, i.e. what the court below did incorrectly. Also use the brief to address obvious weaknesses up front so they don't seem as damaging when addressed in the response. But don't say "the other side may argue ... ." Just address the issue and show why the contrary position is wrong

or doesn't matter. And remember the standard of review. Set it out and then analyze the issue through that standard. Advocates often overlook the benefit of addressing an issue through a helpful standard of review.

For the response, remember this is *your* main brief, not the other side's. Don't get bogged down addressing every point the opening brief makes. That allows the opposing party to dictate what you address and how. Instead, explain why you win first in an affirmative argument, then explain why their position is bunk. Be sure to include any good reason the Court should not reach an issue: standing, not preserved below, etc.

The reply is a little more fluid. One option, as with the response, is to reiterate your affirmative points, and then show that their responses are inadequate. Alternatively, you can take on their hardest argument first, explaining why they still don't win even under that theory. A good way to set up either option is to highlight what is no longer in dispute: "They agree with us on x and y, so the only issue is z."

III. Develop a theme or central idea as an organizing principle

It sounds obvious, but if you want to write a persuasive brief, you ought to know why the Court should rule in your favor. Yet some briefs just cobble snippets of law together with unrelated facts, ramble for 20-30 pages, and then abruptly end with a declaration that "for the above-stated reasons," we win. Worse, some briefs insist on rehashing unrelated discovery disputes or focus on castigating opposing counsel or the trial court judge. However cathartic it may be to call your opponent a disingenuous, dirty dog, it will not help you win your case.

Instead, your brief should focus on an organizing principle that states in plain terms why you win. This is the theme. Some lawyers strive to find an existing theme from allegorical stories. If that fits your case, that's great, but don't get hung up trying to fit your case into a saying from Poor Richard's Almanac. Rather, simply figure out what points you want to make. A useful exercise is to think about what you would tell the Court if you had its undivided attention for two minutes — would you spend those that time analogize your case to a symbolic parable? Would you recount a tangential discovery dispute? Of course not. You would tell the Court a few key reasons why you should win the case. Once you figure out those reasons, you have found the essence of your case, and your theme.

Use your theme to organize your brief. It begins in the Introduction. Consider this example from Supreme Court advocate Lisa Blatt in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), a case involving whether the Indian Child Welfare Act (ICWA) required adoptive parents to surrender custody of a child to the biological father. The primary arguments were that lower courts were divided on whether ICWA's parental termination provision applied to certain voluntary adoptions and on the meaning of "parent" under ICWA. Here's how Blatt began the brief:

Use your theme to organize your brief. It begins in the Introduction. You can further develop the theme by setting out the top reasons why the Court should rule in your favor, beginning with the strongest argument.

With a "heavy heart," a bare majority of the South Carolina Supreme Court ordered petitioners to surrender custody of the two-year-old daughter they had raised since birth, even though petitioners were "ideal parents who have exhibited the ability to provide a loving family environment." App. 40a. The court granted custody to the child's biological father who had voluntarily relinquished his parental rights via text message while the mother was pregnant. Id. at 4a. Such a tragic result, the South Carolina court reasoned, was mandated by "the dictates of federal Indian law," id. at 40a — namely, the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901-63. ICWA thus preempted state law under which petitioners' adoption of the child would have been approved.

ICWA would not have "dictated" this outcome, however, in at least eleven other states with a collective population of two million Native Americans... . State courts across the country have wrestled openly for decades over the meaning and operation of ICWA, and the result is two acknowledged splits on issues central to the decision below. These issues are at the heart of the administration of ICWA. And these issues potentially impact thousands of child custody cases annually involving Indian children with unwed, mixed-race parents.

These two paragraphs explain who the parties are, what the dispute is, what the brief will focus on, why the Court should care about the case, and the impact that the case will have on not only the litigants but on thousands of other cases.

Following the introduction, you can further develop the theme by setting out the top reasons why the Court should rule in your favor, beginning with the strongest argument. Developing the theme through your introduction and a list of reasons provides a roadmap of the arguments you intend to make and a framework for your argument.

You can also use your theme as a decision-making tool to decide what arguments should be left behind. If a section does not fit within or advance your theme, consider cutting it.

IV. Edit to focus your brief and make it more persuasive

It can be difficult to edit a piece of writing. For some, the writing process itself is exhausting, and it can be challenging to critically approach a "finished" draft with an eye toward cutting all those beautiful words that you've labored over. But editing can be the most rewarding process of brief writing. While a well-edited brief can't change the law or the facts of your case, it can spell the difference between presenting the Court with a mess to clean up and presenting it with a clear and logical path to a decision in your favor. If you want to get your point across, you need to edit your brief.

So, what is editing – getting rid of sentence fragments and extra commas?

That is a part of it, but the process can and should be so much more. This is the time to hone your arguments, clarify or cut confusing or unnecessary arguments, condense sections, cut excess clauses and distracting tangents, and yes, correct grammar mistakes and typos. In short, editing makes your brief more readable, and a readable brief is a persuasive brief.

A. The Big Picture – structural organization

Edit from big to small, meaning that on your first pass, look at the big picture to ensure that you make all the arguments you want to in the order you want them. Do the arguments make sense? Do they flow linearly, leading to the conclusion you want the Court to reach, or do they jump around? Spend the time to rearrange paragraphs to see if a different placement makes your argument stronger. Don't be surprised if your strongest argument in a section is the last paragraph; try making that the first paragraph to see whether your brief is stronger.

If you've spent the time to develop a theme or overarching idea, this is the time to question whether your points, arguments, and sub-arguments advance the theme or main idea. If not, why not? Is it because they are tangential? As you read each section and the paragraphs within, ask yourself why that paragraph is in the brief — what purpose is it serving? As an example, some briefs contain exquisite detail about discovery disputes that are no longer an issue. Leaving hard-fought victories or losses on the cutting floor can be difficult, but unless they help the Court decide the issues, cut them.

B. The Weeds – paragraphs and sentences

When you are satisfied with the overall organization of the brief, it's time to move on to individual paragraphs and sentences. Use varying lengths to keep your readers attention. A paragraph that spans a page or more buries important points and risks boring your reader; conversely, a series of one sentence paragraphs highlights a lack of coherence and risks distracting your reader.

In general, a section's opening paragraph should begin with a thesis sentence telling what the section is about and how it supports a decision in your favor. The paragraphs that follow should generally begin with topic sentences explaining how each paragraph supports the thesis and

Edit from big to small, meaning that on your first pass, look at the big picture to ensure that you make all the arguments you want to in the order you want them. When you are satisfied with the overall organization of the brief, move on to individual paragraphs and sentences.

fits within the framework. Use transition words such as "Instead," "Moreover," "What's more," etc. to connect paragraphs and maintain flow.

For each paragraph and sentence, strive to avoid a "so what" response. For example, a paragraph that begins, "The opinions provided by Dr. Smith all involve the braking system of automobiles" tells the reader something about Dr. Smith's opinion, but it doesn't explain why the reader should care. By contrast, a paragraph that begins "Dr. Smith's opinions regarding braking systems are relevant because the plaintiffs contend that their car's brakes failed due to a flaw unique to this model" tells the reader the *what* and the *why* of the paragraph.

One common mistake is the habit of launching into a discussion of court cases without first explaining the point you are trying to make and how the decisions support your argument. More than one appellate judge has singled out this practice as one of the more frustrating characteristics of a poorly written brief. Often the Court finds out why these cases are listed only at the end of the section, if at all, in a summary paragraph. Worse yet, some lawyers forgo any explanation, apparently relying on the judges and their clerks to connect the dots. While your legal reader can no doubt accomplish this task, you have missed an opportunity to persuade.

Instead tell the Court upfront (not at the end) what point you are trying to make. If you want the Court to adopt a legal rule that other courts have adopted, say so: "Every court to have considered this issue has ruled X. This Court should follow suit for three reasons." Note that simply citing the rule to the Court is not enough; you should explain the reason for the rule and why the Court should adopt it.

At the sentence level, the goal of editing is to make your writing easy to read and understand. Cut excess filler words (hereinbefore, hereinafter, etc.) and stilted formal language. Scour for verbs that have been converted into nouns; restoring these nominalizations to their proper place can go a long way toward keeping your reader's attention.

The following examples illustrate how sentence-level edits can tighten up your writing.

Unnecessary words:

1. On April 23, 2009, Defendant Smith was charged by Information with a violation of driving under influence of alcohol or drugs, in violation of Montana Code Annotated 61-8-401.

2. Plaintiff ABC Corp. filed a complaint in the district court against Defendant XYZ Corp., alleging that XYZ Corp. had breached a contract for goods. XYZ Corp. timely filed an Answer denying that it had breached the contract.

Revised:

1. "The State charged Defendant Smith with driving under the influence."

2. "ABC Corp. sued XYZ Corp. for breach of contract."

Extra words:

In order to prevail on a motion for summary judgment, the defendant must make a clear showing in terms of the lack of disputed issues of fact.

Revised:

To prevail on summary judgment, the defendant must show the lack of disputed issues of fact.

You could also change "disputed issues of fact" to "disputed fact issues"

Nominalizations:

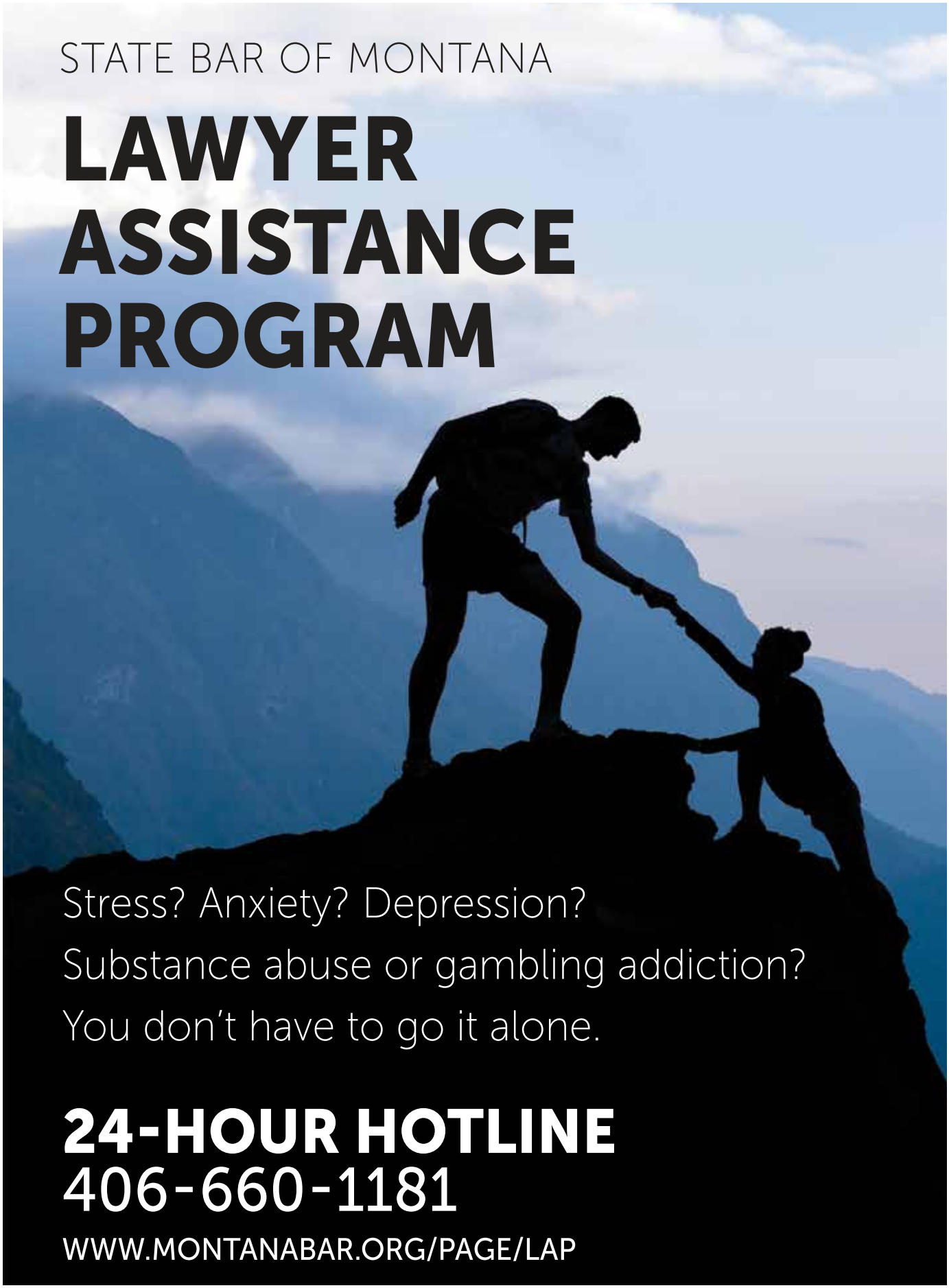
Look for nominalizations or buried verbs in your writing and rewrite them for clarity. Emails are a great place to practice spotting nominalizations. Consider the following:

"We are in agreement with your position, but if it is your intention to cause delay, we will stand in opposition to you."

It sounds unnatural because it is, but no doubt you have read (maybe even written) something like this. Isn't it easier to say — "we agree, but if you intend to cause delay, we'll oppose" — or something similar?

Sentence Structure – active vs. passive voice

MORE EVIDENCE, PAGE 28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Expert reports are like cake: You can't have it and eat it too

By Professor Cynthia Ford

Who wouldn't like to have the jury hear the direct of your witness AND admit into evidence a written version of that testimony for the jury to take into its deliberations? Have your cake and eat it too? Two bites at an apple rather than one…I could go on and on in cliché land. And yet the sad fact of evidence law is that your EXPERT'S REPORT IS NOT ADMISSIBLE INTO EVIDENCE, no matter how much you might want to get it in and no matter how many times you have seen an expert report admitted without any apparent fuss.

I am writing about this topic thanks to a CLE I recently did at the Montana Water Court, where this question came up. Parties in Water Court frequently call experts in engineering, history, hydrology, and other specialized areas of knowledge helpful to the judge. The question asked was whether the Court should admit, in addition to an expert's live testimony, their[1] written report. To a person, the attendees indicated that expert reports are regularly offered, and regularly admitted, mostly without objection. Although I hesitate to disrupt custom, the Montana (and federal) Rules of Evidence contradict this practice.

MRE ON EXPERT TESTIMONY

Article VII: Expert **Testimony** Requires Live Appearance at Trial; Reports are not an acceptable substitute

Article VII of the Montana Rules of Evidence deals with "Opinions and Expert Testimony." That article's rules address the requirements of live expert testimony; none of the rules refers to expert reports in any way. Rule 702 sets out the requirements for admission of expert evidence, using only the word "testimony." Rule 703 discusses the permissible bases for expert opinions. Rule 704 again is limited to "testimony." Rule 705, the last in Article VII, addresses testimony and cross-examination, providing that on direct the expert may testify to their opinion and reasons therefor, without prior disclosure of the underlying facts or data. The word "report" does not appear in any of these rules.

Under Article VII, then, the expectation is that the expert appears in person at trial, takes the oath or affirmation, and then addresses the jury from the witness stand. The proponent's counsel conducts the direct examination, with the ultimate goal of having the expert give an opinion to a fact in the case (another Evidence Corner column will discuss the distinction between ultimate opinions of fact — allowed by Rule 705 – and legal conclusions, which are not allowed). The opposing lawyer then has an opportunity to cross-examine the expert and to put on an opposing expert.[2] Although an expert, unlike a lay witness, need not have personal knowledge of the facts, requiring live expert testimony conforms with the policy behind the hearsay prohibition of Rule 802.

Consistent with the language of Article VII, the Montana Supreme Court has expressly held that experts must appear and be subject to cross-examination in order for their opinions to be admissible; the proponent may not merely present a written statement from an expert.

If a party seeks to introduce expert testimony regarding the party's medical condition and prognosis, the expert must be available for cross-examination regarding his knowledge, training, and any assumptions or facts on which he or she has based his or her opinions. *Lynch v. Reed* (1997), 284 Mont. 321, 332, 944 P.2d 218, 225; *Goodnough v. State* (1982), 199 Mont. 9, 18, 647 P.2d 364, 369.

Pannoni v. Bd. of Trustees, 2004 MT 130, ¶ 46, 321 Mont. 311, 324, 90 P.3d 438, 448. The Court held that the report of the expert, even though authenticated, was an inadmissible substitute for her live testimony and affirmed its exclusion:

¶ 48 Additionally, the medical expert (the psychiatric social worker) who authored the reports was not called as a witness, did not give sworn testimony, and was not available for the requisite cross-examination regarding the information and opinions contained in the reports. Section 2–4–612(5), MCA; Lynch, 284 Mont. at 332, 944 P.2d at 225; Goodnough, 199 Mont. at 18, 647 P.2d at 369; Pickett, 151 Mont. at 98, 439 P.2d at 63; Klaus, 157 Mont. at 286, 485 P.2d at 59. The unsworn medical reports are not subject to any hearsay exception. Rule 802, M.R.Evid. Based on the foregoing, the reports are hearsay and inadmissible in evidence. Pickett, 151 Mont. at 98, 439 P.2d at 63; Klaus, 157 Mont. at 286, 485 P.2d at 59.

2004 MT 130, ¶ 48, 321 Mont. at 324, 90 P.3d at 448. Thus, it is clear that a party must call any expert to testify live at trial. If the party fails to do so, the expert's report is inadmissible in lieu of the testimony.

The question that this article addresses is if the expert does testify, and has prepared a written report, whether that report is admissible in addition to the oral testimony. The fact that Article VII's rules don't refer to any report by an expert witness does not automatically mean they don't exist, nor that if a report exists, it is either admissible or inadmissible. Article VIII, Hearsay, does.

Article VIII: Expert Reports offered by the Proponent are Hearsay, Even when the Expert Testifies

Expert witnesses who write reports do so out of court, it goes without saying. After they review the facts and data they have been provided[3] and come to a conclusion, the expert sits at their computer in an office and writes a report stating the expert's opinions and the reasons for them. The report itself is a written assertion of those facts and conclusions, and thus is a "statement" per MRE 801(a). The expert is the person making that statement, and thus is the "declarant" per 801(b). The report/statement is drafted, finalized, saved, printed, and provided to counsel, all before and thus "other than while testifying at" the trial (MRE 801(c)). Thus, the expert report is a classic out-of-court statement.

The logical reason for the proponent of the expert to offer that report into evidence through the authenticating testimony of the expert is to prove the truth of the matters asserted in the report (presumably similar to the live substantive testimony of the expert). Thus, an expert report offered by the party

who called the expert witness fits squarely within the definition of hearsay under 801(c): "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." None of 801(d)'s exemptions to the definition of hearsay fit the proponent's offer of the expert report, so the report is hearsay, and presumptively banned by MRE 802: "Hearsay is not admissible except as otherwise provided…". The opponent should object on hearsay grounds.[4]

Expert Reports are not 'Business Records'

Now the ball passes to the proponent to get over the hearsay objection. The two primary sources for any response to a hearsay objection are Rules 803 and 804. In this scenario, 804 is off the table for the very reason that the declarant expert is present and testifying at trial, so the 804(a) prerequisite of unavailability cannot be met.[5] That leaves 803's 23 substantive exceptions (and the final amorphous residual exception) to the hearsay rule, available "even though the declarant is available as a witness…". This is a lot of ways to get around a hearsay objection. However, none of them actually work for an expert report offered by the expert's proponent under ordinary circumstances.

The closest of the exceptions to an expert's report is 803(6), entitled "Records of regularly conducted activity" but better known as the "business records exception." A retained expert could testify as a basis for this exception that they maintain a business dedicated to providing expert review and testimony for litigation, and in the course of that business, they regularly make such reports. However, the argument falters at the subsection's caveat: "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." As the Montana Evidence Commission Comment to 803(6), referring to the corollary federal Advisory Committee Note, observes:

The guarantee of trustworthiness is provided by the nature of the record and the circumstances of preparation, enhanced by "systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Advisory Committee's Note, supra 56 F.R.D. at 308.

The basic idea is that if a business keeps a record for its own business, non-litigation, purpose, it is trustworthy enough to get into evidence, too. The cases since the rule was adopted have phrased this purpose requirement as "made for railroading, not litigating." This iconic phrase stems from the U.S. Supreme Court's decision in *Palmer v. Hoffman* (1943), involving a railroad crossing accident. The Court affirmed the exclusion of a statement made two days after the accident to a railroad superintendent and a representative of the state Public Utilities Commission. The defendant argued that this statement was admissible as a business record. Both the trial court and the Supreme Court disagreed:

We agree with the majority view below that it was properly excluded.

We may assume that if the statement was made 'in the regular course' of business, it would satisfy the other provisions of the Act. But we do not think that it was made 'in the regular course' of business within the meaning of the Act. The business of the petitioners is the railroad business. That business like other enterprises entails the keeping of numerous books and records essential to its conduct or useful in its efficient operation. …

…

In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.

Palmer v. Hoffman, 318 U.S. 109, 111–12, 114, 63 S. Ct. 477, 479, 481, 87 L. Ed. 645 (1943).

Although Palmer was decided well before the adoption of the Federal Rules of Evidence, its rationale was carried into FRE 803(6). Most significantly for this article, the Federal Advisory Committee Note to 803(6), includes a lengthy discussion of Palmer v Hoffman and then specifically addresses the admissibility of reports prepared by experts for litigation:

The [*Palmer*] report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivations to misrepresent." *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942)….

A physician's evaluation report of a personal injury litigant would appear to be in the routine of his business. If the report is offered by the party at whose instance it was made, however, it has been held inadmissible, *Yates v. Bair Transport, Inc.*, 249 F.Supp. 681 (S.D.N.Y. 1965), otherwise if offered by the opposite party, *Korte v. New York, N.H. & H.R. Co.,* 191 F.2d 86 (2d Cir. 1951), cert. denied 342 U.S. 868, 72 S.Ct. 108, 96 L.Ed. 652….

The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness." (Emphasis added).

Advisory Committee Note to FRE 803(6), 1975.

The Montana Supreme Court has stated that our state version of 803(6) incorporates the *Palmer v. Hoffman* limitation on admission of records/reports prepared for litigation. In 1998, the Court held that an "Incident Report" prepared by the employer was inadmissible hearsay in an unemployment compensation case, despite the employer's argument that the Incident Report was prepared in the ordinary course of its business. The Court reviewed Montana's rule against hearsay, as well as the state version of 803(6):

Business records are presumed reliable for two general reasons: 1) employees generating these records are motivated to accurately prepare these records because their employer's business depends on the records to conduct its business affairs; and 2) the routine and habit of creating these records also lends reliability. These reasons are lacking when a document is prepared for use outside normal business operations, especially for use in litigation. *United States v. Blackburn* (7th Cir.1993), 992 F.2d 666, 670, cert. denied, 510 U.S. 949, 114 S.Ct. 393, 126 L.Ed.2d 341 (1993) ("adher[ing] to the

well-established rule that documents made in anticipation of litigation are inadmissible under the business records exception").

Bean v. Montana Bd. of Labor Appeals, 1998 MT 222, ¶ 20, 290 Mont. 496, 965 P.2d 256, 262. The Court went on to discuss and endorse the rationale of *Palmer v. Hoffman*, supra, and concluded:

¶ 22 The language of Rule 803(6), M.R.Evid., supports the rationale of Palmer. That is, Rule 803(6), M.R.Evid., not only requires that the reported activity be a regularly conducted business activity, but the rule precludes admission of regularly prepared business records when "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." In this instance, the Incident Report lacks trustworthiness for a number of reasons, and, consequently, does not qualify as a business record.

1998 MT 222, ¶ 22. More generally, the Court stated:

Any documents created in anticipation of litigation do not qualify as business records because they lack sufficient guarantees of trustworthiness. See *Hunter v. City of Bozeman* (1985), 216 Mont. 251, 700 P.2d 184. See also Palmer, 318 U.S. at 113–14, 63 S.Ct. at 480–81, 87 L.Ed. 645, and Blackburn, 992 F.2d at 670.

1998 MT 222, ¶ 23, 290 Mont. 496, 965 P.2d 256, 262.

The Court's analysis in its earlier case of *Hunter v. City of Bozeman*, 216 Mont. 251, 700 P.2d 184 (1985), was less developed but entirely consistent with *Bean*. There, the plaintiff's proof of damages included some oral testimony but also relied on "unverified letters" to prove the bulk of the claim. The Court reversed the award because of this admission of hearsay, and specifically noted:

These letters are not business records as they were not kept in the ordinary course of business, but were compiled for litigation purposes. Sufficient guarantees of trustworthiness do not exist when documents are compiled for litigation purposes.

216 Mont. at 256, 700 P.2d at 187–88 (1985).

The Supreme Court did provide some wiggle room for admission of records prepared for litigation in a water law case in 2014, although the case did not specifically address expert reports. There, the documents about use of the water were originally compiled in the early 1900s in anticipation of litigation about the water rights on Dupuyer Creek. Prior to the hearing (presumably in 2013), the claimants moved to exclude those documents on the grounds that they were "prepared in anticipation of litigation and contained self-serving declarations." The Water Master and Water Judge both admitted them anyway, not as business records per se but under the separate ancient documents exception to the hearsay rule (803(16)). The Supreme Court affirmed this evidentiary ruling, noting that:

The generally accepted view of *Palmer* is that "documents prepared for litigation are excluded, not on a per se basis, but rather upon an inquiry into whether such documents bear circumstantial indicia of lack of trustworthiness." *Jefferson Garden Assocs. v. Greene*, 202 Conn. 128, 520 A.2d 173, 181 (1987) (noting that courts may exclude documents prepared in anticipation of litigation under the Palmer test, but that the decision whether to exclude such documents requires "the exercise of appropriate discretion"). While we have previously addressed documents containing self-serving declarations, see *King v. Schultz*, 141 Mont. 94, 99, 375 P.2d 108, 111 (1962) and Osnes Livestock Co. v. Warren, 103 Mont. 284, 296, 62 P.2d 206, 211 (1936), **we have not created a per se rule that all documents created in anticipation of litigation must be excluded**. (Emphasis added).

Skelton Ranch, Inc. v. Pondera Cty. Canal & Reservoir Co., 2014 MT 167, ¶ 35, 375 Mont. 327, 337, 328 P.3d 644, 652. Importantly, the Court also noted that the parties agreed that the documents were more than 20 years old and "once the Master made his ruling regarding admissibility, both parties moved to admit Pondera documents and relied on data in the documents at the hearing." 2014 MT 167, ¶ 36, 375 Mont. at 337–38, 328 P.3d at 652. Further, the actual basis of admission of these documents was their age, justifying the use of the ancient documents exception rather than the business records exception. Presumably, this exception would not apply to the subject of this article--the admission of a testifying expert's written report—because that report would not be more than 20 years old.

Most recently, in 2019, the Montana Supreme Court stated:

Many other hearsay exceptions are premised upon the logic that the hearsay statements are admissible because they were prepared for a reason other than in anticipation of litigation and are, therefore, trustworthy. See, e.g., M. R. Evid. 803(4) (statements for purposes of medical diagnosis or treatment); M. R. Evid. 803(6) (records of regularly conducted activities);…

State v. Laird, 397 Mont. 29, 58, 447 P.3d 416, 436 (Mont., 2019). In *Laird*, the State convinced the district judge to admit an out-of-court statement that the victim's "bruises were troubling" as evidence of the reason there was a second autopsy, and not for the truth of the assertion. On appeal, the Montana Supreme Court split, the dissent arguing that even if the statement was offered for its truth, it fit within the present sense impression exception of 803(1). The majority was skeptical about this, but based its decision on the Confrontation Clause[6] rather than on the hearsay rule per se:

A hearsay statement is not unquestionably admissible just because it fits into a hearsay exception—the defendant's Sixth Amendment confrontation right remains a fundamental consideration that may not be infringed upon, state evidentiary rules aside. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324, 129 S. Ct. 2527, 2539-40, 174 L.Ed.2d 314 (2009).

397 Mont. 29, 58, 447 P.3d 416, 436. As it discussed whether the out-of-court statement was "testimonial" for purposes of the Confrontation Clause, the Court shed further light on its view of the business record exception to the hearsay rule:

While records kept in the regular course of business are typically admissible under a hearsay exception, see M. R. Evid. **803(6), documents are not admissible under that hearsay exception if the "regularly conducted business activity is the production of evidence for use at trial."** *Melendez-Diaz*, 557 U.S. at 321, 129 S. Ct. at 2538. "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because--having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial--they are not testimonial." *Melendez-Diaz*, 557 U.S. at 324, 129 S. Ct. at 2539-40. (Emphasis added).

397 Mont. 29, 59, 447 P.3d 416, 437.

Because a retained testifying expert clearly prepares their report "for the purpose of establishing some fact at trial," that report does not qualify as a business record per 803(6) and thus should be refused on the basis of the hearsay rule even if the expert is present and available for cross-examination.[7] The opponent should ALWAYS object to the offer of the report on direct. Failure to make this objection is akin to

MORE EVIDENCE, PAGE 25

7 Tips for lawyers who need help for anxiety, depression or substance abuse

By Stan Popovich

It is no secret in the legal community that lawyers have been dealing with a mental health crisis in recent years. Many lawyers face various mental health issues on a regular basis and many of them are afraid and do not know where to turn.

To make things worse, some are afraid to ask for help because of fear it could damage their reputation and create stigmatize them among peers and clients.

As a result, here are seven suggestions on how lawyers can seek help for their mental health issues without these issues interfering with their career and reputation.

1. Accept that you have a problem

The first step any lawyer needs to do is to accept they have a mental health problem. Making excuses or ignoring your mental health issues is a mistake that will not only ruin your career but can ruin your entire life. Make the smart choice and admit that you need help.

2. Use the services of a professional

Talk to a mental health professional who can help you manage your depression and mental health issues. A mental health counselor will be able to provide you with additional advice and insights on how to deal with your current problem. Most importantly, listen to what the professionals have to say and follow their advice so you can get your life back on track.

3. You are not alone — join a support group

There are countless number of mental health support groups all over the country. Many business professionals (just like you) go to these groups to get help. Go to a support group in your area and meet people who are also struggling with the same issues you are currently dealing with. By going to these groups, you will realize that you are not alone and that there are people who can relate to your situation and are willing to help you out.

4. Communicate your situation to your peers

You have a choice on who you want to talk to about your mental health issues. Your best bet is to keep things confidential while you focus on getting your life back on track. In terms of your job, explain your situation to your supervisors. Be willing to answer their questions so they understand where you are coming from.

5. Do not seek everyone's approval

Most employers will be understanding with your situation, however there maybe some people who will cause some friction. The fact of the matter is that you can't please everybody in life regardless how much you try. The key is to do what is best for you and for your family.

6. It is about your life

Many lawyers have a lot of time and hard work invested in their current company. As a result, many lawyers will sacrifice their mental health issues for the sake of protecting their investments and their reputation with their employer and peers. Your mental health issues will not go away by themselves. Your life is more important than your career. Jobs come and go, but your physical and mental health is a constant. Make the smart choices and do what is best for you in the long run.

7. Learn the mistakes from others

If you still feel that your career is more important than your mental health, then follow the lessons from other lawyers who neglected their health. There are countless number of people who ignored their mental health issues for various reasons and either committed suicide or they ended up losing everything. Do not make the same mistake.

If you are unsure on how to deal with your mental health issues and your career, talk to a professional mental health counselor or your primary care physician for advice. These experts will be able to help you make the right decisions and steer you in the right direction.

Stan Popovich is the author of "A Layman's Guide To Managing Fear." For more information, visit www.managingfear.com

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The Montana Lawyer Assistance Program provides confidential services and support to judges, lawyers and law students facing substance use or mental health issues. If you or someone you know needs help, call the 24-hour hotline, 406-660-1181.

ATTORNEYS TO THE RESCUE

Lawyers can lend their expertise to disaster victims in need thanks to new MLSA program

Montana Legal Services Association

The image of a disaster responder is often one that includes debris piles, dark skies, and a lot of personal protective equipment. While those images do reflect a critical part of disaster response, legal aid has long been linked to the recovery process of individuals and communities after catastrophic events. During big hurricanes and often-overlooked flooding events, legal aid organizations step in to help people seeking their new normal. Pro bono volunteers help disaster survivors secure safe shelter, access public benefits, and fight scammers. And in contrast to most response and recovery programs that require a minimum damage threshold and lengthy approval process, the Disaster Legal Services Program under Montana Legal Services Association (MLSA) is available to low-income individuals no matter the size, type, or location of a disaster.

In September 2019, MLSA started the Disaster Legal Services Program with the goal of helping people during their darkest days. Through outreach and partnership building, MLSA learned that Montana is a "high-frequency, low-attention-seeking" disaster state. This label is best explained by looking at how Montanans respond to wildfire evacuations: in community after community, emergency management professionals open shelters and feeding operations, but find that most Montanans chose to stay with friends and family or in their travel trailer by a river. Very few even think to look for help. This does not mean that disaster survivors in Montana do not need help; it means that help looks a little different here. To serve our low-attention-seeking clients, MLSA's Disaster Legal Services Program focuses on collaborative community outreach, education, and recruitment of well-trained volunteers. The program informs low-income Montanans about common legal needs that arise after a disaster, how they can help themselves, and how they can access critical legal support.

This Disaster Legal Services Program is fully operational during a global pandemic, and we have seen first-hand the importance of a strong community-driven safety net. Over 50,000 Montanans are projected to lose their jobs due to COVID-19, throwing many Montanans who have never before applied for public benefits into a complex and overburdened unemployment benefits system. MLSA intake specialists have performed over 395 COVID-related client intakes since the beginning of March 2020, demonstrating that we are in the midst of a slow-moving, monolithic disaster. In response, MLSA Disaster Legal Services volunteers have stepped up to help fellow Montanans who are months behind on paying their rent, mortgage, medical bills, or other crucial expenses and have no employment opportunity in sight. MLSA is now a part of Montana's social service first responders, as the Disaster Legal Services Program throws a lifeline to people who fear they have no options.

The far-reaching impact of COVID-19 demonstrates how unanticipated events can have massive implications in our communities. Under calm, blue skies, MLSA has just one civil legal aid lawyer for every 9,800 people in poverty, whereas there is one attorney for every 274 Montanans living above 125% of the federal poverty level. However, a disaster event exacerbates existing legal issues and creates new ones for individuals and families. It can cause a family that never thought they would be low income to suddenly be living in poverty. By providing free access to information and legal advice, MLSA Disaster Legal Services volunteers increase access to justice and mitigate the lingering effects of disasters to increase individual and community-wide resiliency to future events.

MLSA's Disaster Legal Service's program is a frontline resource for survivors of a single-house fire, a county-wide wildfire, or a global pandemic. Over the next couple of years, MLSA will continue to recruit and train pro bono attorneys who can then provide critical legal advice to low-income Montanans when they need it most. This cadre of volunteers will make all of Montana more resilient, strengthen the safety net for the most vulnerable, and ensure the rule of law for everyone. You can be the new face of disaster response by signing up to volunteer at mtlsa.org. For more information, contact Megan Helton at mhelton@mtlsa.org or Angie Wagenhals at awagenha@mtlsa.org.

BE A FIRST RESPONDER

Do you want to be the new face of disaster response? You can get started by signing up to volunteer at mtlsa.org. For more information, contact Megan Helton at mhelton@mtlsa.org or Angie Wagenhals at awagenha@mtlsa.org.

The far-reaching impact of COVID-19 demonstrates how unanticipated events can have massive implications in our communities. MLSA Disaster Legal Services volunteers increase access to justice and mitigate the lingering effects of disasters.

Mark Bassingthwaighte

How will economic fallout from COVID-19 affect malpractice?

The challenge here is to not let emotions, such as fear and panic, cloud one's personal and professional judgment, because that's when poor decisions are made.

During a recession, and for the three years following, there has historically been a huge spike in paid claims that typically does not return to a more normalized level until five years post-recession. In addition, and looking back at the events of 2008 specifically, legal malpractice insurers experienced a spike in paid claims above $10,000 that ranged from 35% to 41%. I share this to explain why recessions always capture the attention of the insurance industry, because given how the markets look of late, another recession appears to be imminent thanks to the COVID-19 pandemic. I wish it were otherwise, but it sure looks like history is going to repeat itself.

As a risk manager for a legal malpractice insurer, one interesting question for me is how will COVID-19 impact our insureds? While only time will tell, I have a few thoughts. Lawyers have had to deal with telecommuting and all the associated risks, not the least of which is a significant increase in the risk of someone at a firm becoming a victim of a cybercrime. Some lawyers and more than a few clients will be forced to deal with significant and potentially long-term reductions in household income. Some lawyers may simply say enough is enough and decide to retire while others may be forced into postponing retirement because of steep declines in their retirement accounts. While I could continue, I'll admit this is starting to make me feel a bit depressed, so I'll stop.

The point is that everyone, including lawyers, is trying to find a way to maintain some level of control and normalcy during very uncertain times. The challenge here is to not let emotions, such as fear and panic, cloud one's personal and professional judgment because that's when poor decisions are made. For example, investments get sold at the market's bottom, an attachment to an email that claims to have the answer to preventing the spread of coronavirus is opened too quickly, or an important deadline never gets entered into a calendar all because worry and fear rule the day.

Now, based upon what has happened in past recessions coupled with the realities of the response to COVID-19 by people and governments, here are a couple issues legal malpractice insurers are currently concerned about:

First, claim frequency and/or claims severity will change for any number of reasons. We just can't accurately predict how. At a minimum, clients will look to blame their lawyers when their business dealings go south because of the near-certain coming recession. Lawyers and staff will make mistakes that otherwise would not have been made due to the rapid transition to working from home and/or being under excessive stress. And clients, who are also experiencing excessive stress, will question decisions they made in light of the advice their lawyer gave them if their legal matter doesn't work out the way they expected it to. Regardless, there will be a new normal in terms of claims, at least for a few years.

Second, policy retention may be an issue; but again, we cannot accurately predict how this might evolve. Lawyers facing difficult financial times may choose to leave the practice of law entirely or may decide to allow their policy to lapse and simply go bare to save some money. Of course, on the flip side, some who have previously been bare may decide now's the time to purchase coverage because the value of their assets have dropped, and their level of risk has risen. Only time will tell.

I do understand that it can be difficult to turn off the noise and stay focused on the tasks at hand; to stop worrying about finances and family and take care of the business side of the practice; and to keep emotions in check as you try to find the time to document your files, keep your clients informed, and struggle to deal with courthouse closures and emergency orders. It is a given that mistakes will be made; but times like these truly underscore one of the values of having a malpractice policy. It's the comfort that comes with knowing that if some mistake does eventually turn into a malpractice claim, you've got coverage in place.

That said, I can't help but add one final comment. Those who have until now made a choice to forgo coverage, I can't imagine a better time to rethink that decision. As I stated above, the value of assets has dropped, and the level of risk has increased. If you ask me, the peace of mind that comes with malpractice insurance is worth every penny.

ALPS Risk Manager Mark Bassingthwaighte, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Many of his recent seminars are available at montana.inreachce.com. Contact him at: mbass@alpsnet.com.

baking the cake for your opponent and adding frosting. The jury will in effect get a double dose of the expert's opinion: once orally and again in the admitted report.

If the report does somehow get into evidence, there is a substantial danger that it will be allowed to go to the jury room. There, the jury will be able to refer to it during deliberations, and is likely to give the written report more emphasis than its collective memory of the expert's oral testimony. That is adding a cherry to the frosted cake. Montana law gives the judge considerable discretion, although not unfettered[8], in deciding what to send back with the jury.

In *State v. Stout*, a 2010 criminal case, the defendant argued on appeal that it was error to send several written reports with the jury into the deliberation room. The key to this case, in my view, is that all them had been admitted into evidence without any objection from the defense: "She does not contend that the reports were erroneously admitted into evidence during the trial." *State v. Stout*, 356 Mont. 468, 475, 237 P.3d 37, 43 (2010). The parties had conferred at the close of the evidence about which documents should accompany the jury; the defense had objected to only one line of one of the documents, the portion of the autopsy report which stated "Manner of Death: Homicide." The trial judge overruled the objection and allowed the complete report, with many others, to be provided to the jury, on the basis that "the conclusion was consistent with the author's testimony and was 'no surprise.'" 356 Mont. at 477, 237 P.3d at 44.

The Supreme Court affirmed the trial court's decision to provide the written reports to the jury, including the entire autopsy report, citing both the Montana statute and Montana common law on the issue of what the jury can take into its deliberations:

When jurors retire for deliberation, they may take with them "all exhibits that have been received as evidence in the cause that in the opinion of the court will be necessary." Section 46–16–504, MCA. At the same time, this Court has recognized the common law rule against submission of "testimonial materials" to the jury for "unsupervised and unrestricted review." *State v. Herman*, 2009 MT 101, ¶ 38, 350 Mont. 109, 204 P.3d 1254. That rule applies both as to materials sent with the jury at the start of deliberations, and to requests from the jury to re-hear testimony during deliberations as provided in § 46–16–503(2), MCA. Bales, ¶ 23. A district court's decision under § 46–16–504, MCA, on evidence that may be taken by the jury during deliberations is reviewed for abuse of discretion. Bales, ¶ 24.

356 Mont. at 475, 237 P.3d at 43. The Supreme Court concluded that the various reports did not constitute testimonial materials subject to the common law exclusion, so that, once admitted into evidence, they fell squarely within the discretion accorded to the trial judge by Section 46-16-504.

¶ 35 The author of each of the reports testified and was cross-examined at trial. The defense either stipulated to or did not contest the expert qualifications of each of the witnesses. The jury was instructed on its power and duty to evaluate the testimony of each witness and to determine the weight it should be given. The jury was instructed specifically that expert testimony should be given the weight it deserves, and may be entirely rejected if the reasons given to support it are unsound. Trial court judges are given broad discretion to determine which exhibits would be necessary to help the jury in deciding the case. The District Court did not err by allowing these reports to accompany the jury during deliberation.

356 Mont. at 477, 237 P.3d at 44.

The teaching of *Stout*, then, is that it is key to prevent the admission of written reports into evidence in the first place, restricting them instead to their pretrial discovery use. The oral testimony of the expert, who appears live and thus is subject to oath, observation by the jury, and cross-examination, is all that should be admitted on the expert's direct. The opponent must object at trial to preserve any error for appeal, and that basis for that objection is the hearsay rule. Once the report is admitted without objection, or by the judge after objection, *Stout* seems to allow wide discretion in allowing the report to go into the jury room.

CONCLUSION

So, in the courtroom as in life, you can't have your cake and eat it too. You can have your expert come to trial and testify, subject to cross-examination by opposing counsel. However, if your opponent objects, you can't add to the oral testimony the written version contained in the report. This conclusion derives not from the usual "expert witness" rules, but from the far broader ban on hearsay.

Endnotes

1 I am a grammarian, so this mixture of singular and seemingly plural possessive is difficult for me. However, I am convinced that usage should change to the non-gendered singular possessive "their" whenever the subject has not specified which pronoun is appropriate. Older dogs *can* learn new things. Change is hard, but not impossible.

2 Cross-examination and testimony by an opposing expert are two of the safeguards cited by both the U.S. Supreme Court (in Daubert) and the Montana Supreme Court (which doesn't usually follow Daubert per se, as described in prior columns and will be more fully discussed in the next Evidence Corner) as bases for liberal admission of expert testimony. See: Ford, "Daubert, Or Not Daubert? That Is The Question On Expert Testimony In Montana State Courts," Mont. Law., August 2018 at 16; Ford, "When Daubert Is the Way: The Road Less Traveled by," Mont. Law., November 2018, at 14.

3 See MRE 703: "The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." This is the key difference between expert testimony and lay testimony, which requires actual perception by the witness per Rules 602 and 701.

4 As usual, the objection is easier than the response. Rule 103 requires only that the objection be timely (here, when the proponent offers the report and the judge asks for a response) and state the specific grounds of the objection: "Hearsay." Done and done. Now the proponent has to come up with some exception to justify admission despite the hearsay ban.

5 804(b) lists 5 possible exceptions to the hearsay prohibition (actually 4 are substantive, while the 5th is that old devil the residual exception) but for each, the proponent must first prove that the declarant is unavailable to testify live: "b) Hearsay exceptions. The following are not excluded by the hearsay rule **if the declarant is unavailable as a witness:"** (emphasis added). Rule 804(a) lists the possible reasons a witness might be unavailable.

6 The Confrontation Clause is an independent ground, in addition to hearsay, for a criminal defendant to object to the introduction of an expert report into evidence. However, again supposing that the expert has in fact testified live and their report is offered as a supplement, not in lieu of that live testimony, the Confrontation Clause would be satisfied by the ability of the defendant to cross-examine at trial.

7 The Confrontation Clause would not be a basis for exclusion in this situation, even in a criminal case, because the witness is present at trial and is available for cross-examination, which constitutes the confrontation to which the criminal defendant is entitled.

8 See *State v. Nordholm*, 396 Mont. 384, 386, 445 P.3d 799, 802 (2019). I hope to publish another article dedicated solely to the general issue of what is appropriate for the jury to take into deliberations.

Mark your calendars!

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Pardon me, don't lock me up! *US v. Stone* case reveals sentencing guidelines hypocrisy

By Daniel Donovan and John Rhodes

The *United States v. Roger J. Stone, Jr.* case reveals the United States Sentencing Guidelines for what they really are - legal authority to send minorities and poor people away to prison for very long periods of time. Designed by Congress to create "certainty and fairness," when the Guidelines call for a multi-year prison sentence for one of their own (who kept his silence to protect the President), the rich and powerful have decided that the Guidelines should not apply.

Enacted as part of the Sentencing Reform Act of 1984 when the "war on drugs" and "tough on crime" hysteria was at its height, the Guidelines were ushered in along with mandatory minimum sentences and the elimination of parole. The Guidelines and mandatory minimum sentences were designed to take discretion away from sentencing judges to create national uniformity. As the Supreme Court put it:

"The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and to reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system."

As somewhat of a tradeoff, judges are able to "determine" the length of the sentence actually served because there is no parole. In practice, however, the Guidelines and mandatory minimum sentences gave control of sentences to the Department of Justice and "local" U.S. Attorneys (appointed by the President). Is it any surprise that our prisons are overcrowded when prosecutors control sentencing?

The Supreme Court's 2005 decision in *Booker v. United States* converted the Sentencing Guidelines from mandatory to "advisory" and supposedly restored sentencing discretion to the judges. But that never happened. Instead, a "correctly calculated" Guidelines range, determined by the nature of the crime and the defendant's criminal history, must be referenced as the "starting point" and "lodestar" for all sentences. Factors deliberately excluded from the Guidelines calculation include the defendant's age, education, mental condition, physical condition, drug or alcohol dependence, employment record, family ties and responsibilities, and military, civic, charitable or public service. In short, the defendant's personal history and characteristics are kept out of the Guidelines equation.

In the federal courts in Montana, 15 years after *Booker*, the typical plea agreement provides that, in return for a guilty plea (note that although some charges may be dismissed, virtually all criminal conduct, including that in dismissed counts, is used to calculate the "advisory" Guidelines range), the U.S. Attorney's Office reserves the right to make whatever sentencing recommendation it deems appropriate. If the prosecution decides that the defendant has accepted responsibility and expressed remorse, the Guidelines range will be reduced only by a few months. After the probation office has calculated a Guidelines range which is usually punitive and excessive, the U.S. Attorney's Office, as a matter of national policy, will recommend a sentence within that range.

Because the U.S. Attorney's Office, again as a matter of national policy, must obtain a conviction for the most serious offense, which means the most punishment, it forces the defendant in its plea agreements to waive the right to a jury trial and then the prosecutor will argue for a Guidelines sentence, if not a mandatory minimum sentence from which the judge by law cannot depart. And the defendant is also routinely forced to waive the right to appeal if the sentence imposed is within the Guidelines. Thus, the Justice Department controls the sentencing process including the actual sentence imposed, which is rarely reviewed, and even more rarely reversed, on appeal.

Back to the *Stone* case, with the politics and personalities removed, many observers would agree that a Guidelines sentence of 7 to 9 years in prison with no parole may very well be excessive for a 67-year-old first-time, non-violent offender. Indeed, backtracking from years of adherence to a firm nationwide policy for recommending sentences within the Guidelines ranges and completely contrary to its original sentencing memorandum, the Department of Justice took the position in its amended sentencing memorandum that the Guidelines are overly punitive for Roger Stone.

The Justice Department stood against the Guidelines by quoting the Supreme Court in *Gall v. United States*: a sentencing court "may not presume that the Guidelines range is reasonable but must make an individualized assessment based on the facts presented." Incredibly, the Department of Justice, in its amended memorandum, highlighted "several facts and circumstances supporting the imposition of a sentence below 87 to 108 months' imprisonment [the advisory Guidelines range for Stone]." However, in the typical case, the Justice Department, in advocating for a Guidelines sentence, routinely requests judges to ignore all mitigating factors including, as stated above, the defendant's personal history and characteristics as well as community and social considerations.

According to the Department of Justice, Stone should not have been

MORE STONE, PAGE 28

OP-ED POLICY

The Montana Lawyer will make every effort to print letters to the editor submitted by members of the State Bar of Montana. Letters longer than 250 words and longer op-ed pieces require prior approval of the editor. Submit letters and op-eds to editor@montanabar.org.

APPELLATE
FROM PAGE 16

In general, you can make your brief more readable by placing the subject or actor first, followed by the verb, then followed by the object. Similarly, you should generally employ active voice, rather than passive voice (unless intentional, such as to shield the actor or "hide the villain"). Active voiced sentences focus on the actor, rather than the object. For example, the passive "Plaintiff's motion for summary judgment should be denied" becomes active when you focus on the actor: "the Court should deny Plaintiff's motion."

Once you are satisfied with your brief, have another lawyer edit it if possible. To ensure a thorough edit, you need to actively invite it. In other words, give the reviewing attorney permission to take a red pen to your brief. One way to encourage this is to ask for at least two suggestions on every page. This practice will engage your readers and encourage them to make suggestions, which is what you want.

V. Additional Tips and Suggestions – do's and don'ts

- Citation manual – follow the appropriate citation manual and be consistent throughout your brief. The judges and law clerks will notice.
- String citations - one good cite is often better than a string cite, but if you cite a bunch of cases, then include parentheticals to briefly explain the significance.
- Civility — attack your opponent's arguments, not your opponent. If their argument is weak or wrong, explain why, but don't call them liars or disingenuous even if you think that's the case. The Court doesn't want to hear it, and it may impact your credibility.
- Similarly, don't attack the district court judge — instead, show how the court abused its discretion or incorrectly interpreted the law.
- Use common language. For example:
  - "because" instead of "in light of the fact that" or "for the reason that"
  - "although" instead of "despite the fact that"
  - "use" instead of "utilize"
  - "to" instead of "in order to"
- Show don't tell. If it's "clearly the case," then explain why.
- Use ***EMPHASIS*** sparingly. Otherwise it looks like you are shouting. Pick one method for body of brief and stick to it: *italics*, e.g. Also, avoid all caps in headings because it is harder to read.

VI. Recommended Reading and Sources

"Plain English for Lawyers" by Richard Wydick

Bryan Garner books

"Point Made" books by Ross Guberman

www.legalwritingpro.com/ (Ross Guberman)

"Elements of Style" by Strunk and White

Stuart Segrest is Chief of the Civil Bureau and Matt Cochenhour is Acting Solicitor General for the Montana Attorney General's Office within the Montana Department of Justice. Segrest is also a Trustee for the State Bar of Montana. This article does not represent the views of the Montana Department of Justice or the State Bar.

Endnotes

1 See Bryan Garner's "Advanced Legal Writing" for more detail on the "deep issue" statement.

2 Some disagree and think all conclusions should be substantive and summarize all the arguments made in the brief. In our view, this is more effectively accomplished in an introduction or a summary of the argument.

STONE
FROM PAGE 27

subject to a Guidelines sentence so "that justice shall be done." This about-face did not get past United States District Judge Amy Berman Jackson who stated:

"For those who woke up last week and became persuaded that the guidelines are harsh and perhaps sentences shouldn't be driven by strict application of a mathematical formula...I can assure you that defense attorneys and judges have been making that argument for a long time, But we don't usually succeed in getting the government to agree."

Judge Jackson pressed the prosecution for answers including why the Justice Department ultimately chose to recommend bucking the Guidelines in the case – when Department policies do not permit prosecutors to argue for a sentence below the Guidelines without supervisory approval. Ultimately, she imposed a prison sentence of 40 months – less than half of the low end recommended by the Guidelines.

By highlighting Stone's personal history and characteristics, the Department of Justice argued for a below-Guidelines sentence based on principles of reasonableness and fairness and on all the facts relevant to the sentence. Conversely, by deliberately ignoring mitigating factors in the tens of thousands of low-profile, apolitical cases it annually prosecutes in the Federal courts, the Government continues to promote and demand excessive Guidelines range sentences. Now is the time for the Department of Justice to free itself and the courts from the prison-oriented stranglehold of the Guidelines.

In the meantime, the rich and powerful protect their corrupt own. Just ask Rod Blagojevich who was effectively paroled by the President after serving seven years of a 14-year sentence. Or Michael Milken or Eddie DeBartolo. And to prevent Roger Stone, who did not even accept responsibility or express remorse for his criminal conduct, from serving even one day in jail, the president commuted his sentence rather than grant a pardon. If he had been pardoned, Stone would no longer be able to invoke the Fifth Amendment as a justification for refusing to testify in court. With the commutation, Stone can continue to invoke the Fifth Amendment to refuse to testify against President Trump. Corruption of justice? You be the judge.

More recently, President Trump said he also had been "strongly considering" pardoning another fellow liar, Michael Flynn. The Department of Justice, however, dropped all charges against Flynn before the president could pardon him – even though Flynn had voluntarily pleaded guilty not once but twice.

And so it goes, poor people and people of color, whose sentences are excessive by application of the Guidelines, still suffer in prison while justice is thwarted by a powerful few. As far back as 1891, the Supreme Court unanimously declared that no government "can deprive particular persons or classes of equal and impartial justice under the law." This principle, engraved on the front of the Supreme Court building in Washington, D.C., is now largely ignored and, at some point, may be forgotten.

Daniel Donovan is a criminal defense lawyer in Great Falls and serves on the Criminal Justice Act (CJA) Panel of the District of Montana. John Rhodes serves as an Assistant Federal Defender for the District of Montana in Missoula.

Maria Elena Beltran-Jensen

Maria Elena Beltran-Jensen, 87, the daughter of migrant farm workers who became one of Montana's leading attorneys and advocates for farm workers after raising her nine children, died Aug. 1, 2020 of brachiostasis.

Maria was born May 2, 1933, in El Paso, Texas, to Clemente Bonilla and Bertha Perez Bonilla. She moved to Montana with her family in 1938. She lived in the Huntley Project area for most of her life, raising her nine children in Worden.

Beltran-Jensen

She was named one of the Exceptional Women of 2017 by the Billings Gazette, which cited her tenacity, dedication and work with farmers. An article accompanying the award noted that she dropped out of school in the seventh grade. She went back to school after receiving encouragement from a supervisor at her job with Montana Legal Services Association. At nearly 50 years old, she completed her GED and earned a college degree before receiving her JD from the University of Montana School of Law.

She spent her legal career representing farm workers and other marginalized people.

She is survived by her husband, Theodore; 12 children; 29 grandchildren, 50 great-grandchildren and four great-great-grandchildren.

Memorials may be designated to Sts. Cyril and Methodius Church, in Ballantine, or Mary Queen of Peace Church, in Billings. Memories may be shared at www.dahlfuneralchapel.com

John Timothy Jones

John Timothy Jones passed away from complications of an autoimmune disease on May 7, 2020.

Born Dec. 2, 1956, to James and Mary Ann Jones, his earliest years were spent in Billings. As a young man, he worked alongside his brothers in the family construction business. Together they built the Jones cabin near Yellowstone National Park, which remains a cherished gathering place. John carried the principles of a well-run jobsite to his future endeavors as a student, professional, and patriarch.

He received his B.A. degree from Willamette University (1979), his J.D. from the University of Puget Sound (1983), and an LL.M. in taxation from Boston University (1985). He was Articles Editor of Boston University Journal of Tax Law.

John clerked for the Montana Supreme Court in Helena during 1984 -1985, before beginning a long and successful career at Moulton Bellingham PC in Billings, where his aptitudes were appreciated and his leadership encouraged. He was proud to be a shareholder and, for many years, firm president. John treated everyone with respect and dignity – he recognized the importance of everyone's efforts to a successful outcome – he always made a point to say thank you to fellow attorneys and staff.

Jones

John was an exceptional friend, partner, attorney and adviser. He was recognized by his peers and was listed in Martindale-Hubbell - Peer Rating "AV Preeminent" (Highest Rating), The Best Lawyers in America, The Chambers USA Guide - Highest Rating, and in the Mountain States Super Lawyer for Real Estate, Health Care, and Tax. John had the ability to address and resolve complex legal issues with common sense and integrity. John was truly a leader and a mentor, not only in the local community but also on a state and national level.

John's community contributions were many and he served for many years on many boards, including Board of Trustees for Rocky Mountain College, Billings; as Trustee of the Yellowstone Art Museum Finance Committee; and Wells Fargo Bank of Billings Community Board of Directors. He was dedicated to the philanthropic work of the Charles M. Bair Family Trust, serving on its Board of Directors and as Board Chair.

John had great success in life, but he deeply appreciated the little rewarding moments. Over his life, he coached several athletic teams and he was overjoyed when former athletes passed him in town with a, "Hey Coach Jones." One memorable summer, John provided a Little League team in a small Montana town with their very first set of matching jerseys – and he was so pleased when they enjoyed a winning season that year. There wasn't much in the world that gave John more joy than helping those around him succeed.

The outpouring of support after John's passing serves as a testament to the quality of his character. Everyone who knew John was amazed by his ability to bring out excellence in the people around him. He is missed.

Kerry Newcomer

Kerry Newcomer died July 6, 2020, after a yearlong battle with pancreatic cancer.

He was a longtime resident of Missoula. Kerry was a member of the State Bar of Montana for almost 40 years, graduating from the University of Montana School of Law in 1980.

Newcomer

Kerry had a deep passion for practicing law and mediation. He was a fierce opponent as a litigator, but also worked hard to help reform and improve the law. He retired from the law to start BF Custom Shotgun Cases. Kerry enjoyed blues music, BBQ, softball (Kerry was a founding member of the Coneheads for Justice co-rec softball team), working in his home shop and field trips with the Society for Industrial Archeology. As a longtime member of the Montana Trap & Skeet Club, he had a passion for competitive shooting and was grateful for the support offered by club members during his fight with cancer.

In the last year of his life Kerry had the chance to learn how much he mattered to those who knew him. Kerry had a wicked sense of humor and he will be sorely missed by his friends and family."

Memorial submissions

The Montana Lawyer will publish memorials of State Bar of Montana members at no charge. Please email to editor@montanabar.org using the subject line "Memorial." Submissions subject to editing.

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ATTORNEYS

ASSOCIATE ATTORNEY: Bitterroot Law is looking for an attorney to join the fastest growing law firm in the Bitterroot Valley. Bitterroot Law is a general practice firm with a focus on aviation law, criminal defense, civil litigation, business transactions, family and real estate law. Experience is preferred but not required. The applicant must be licensed in Montana. Apply by email to tom@bitterrootlaw.com

ASSOCIATE ATTORNEY: Hendrickson Law Firm, P.C. seeks an attorney with litigation experience to do primarily commercial litigation, including contract, property, construction and estate cases, with the opportunity to be a major part of a small, well established, highly rated, general practice firm in Billings. This is an opportunity for immediate revenue sharing and virtually unlimited future financial success, primarily based on productivity, while keeping a strong emphasis on professionalism. Five years' experience preferred. Immediate client involvement and experienced mentoring. Several members are at or nearing retirement and want to keep their good clients in capable hands. Please send letter of application, references, resume, transcript, and writing sample to katie@hendricksonlawmt.com.

ASSOCIATE ATTORNEY: Parker, Heitz & Cosgrove, PLLC, a Billings litigation firm, seeks an associate attorney for a litigation position. Applicants must demonstrate excellent research, writing and communication skills. Competitive salary and benefits. Please submit your cover letter and resume in confidence to Parker, Heitz & Cosgrove, PLLC, P.O. Box 7212, Billings, MT 59103-7212, or via email to markdavidparker@gmail.com; caseyheitz@parker-law.com; or shawn@parker-law.com.

ASSOCIATE ATTORNEY: Dodd Law Firm, a trial-focused firm in Bozeman is looking for an Associate to join our busy practice. Experience preferred but not required. Applicant must be licensed in Montana or planning to sit for the July 2020 Bar, with continued employment contingent upon obtaining a license to practice within 6 months. Please email cover letter, resume, references, and writing sample to info@doddlawfirmpc.com.

BANKRUPTCY ATTORNEY: An immediate opportunity for an experienced bankruptcy attorney to join a rapidly growing law firm in Montana with multiple offices statewide. We seek someone with 2+ years' experience working in the bankruptcy courts. Successful candidate should have strong oral and written advocacy skills, someone who is highly organized with the ability to multi-task. Attorney may work in physical office or remotely. Apply by email to tracie@mtelderlaw.com

DEPUTY CITY PROSECUTING ATTORNEY: Professional legal duties with primary responsibility for prosecution of criminal misdemeanor and municipal code violations in the City of Missoula Municipal Court. Apply online: www.ci.missoula.mt.us/jobs

deputy county attorney: The Lewis and Clark County Attorney's Office seeks a deputy county attorney to prosecute criminal and civil offenses, represents county government in legal proceedings, and advise county officials on civil matters. For more information and to apply online, visit www.lccountymt.gov/hr/jobs.html

DEPUTY COUNTY ATTORNEY - CRIMINAL: Cascade County Attorney's Office seeks a deputy county attorney in the criminal department. Full listing and applications available at www.cascadecountymt.gov, the Cascade County Human Resources Dept., or Job Service.

ATTORNEY: Montana Department of Transportation seeks an Attorney to represent MDT in areas of transportation law including eminent domain, real estate, contracts, construction claims, civil rights, motor fuels tax, labor and employment law, environmental law, property and liability, and outdoor advertising control. This position represents MDT at trials and hearings in state and federal district and appellate courts and before administrative forums. MDT Attorneys provide legal advice and guidance to the Director and agency managers on MDT transactions and related issues. This position reports to the Chief Counsel in the Legal Services Unit. This position is covered under a Career Ladder Advancement Policy. Education and experience will determine salary. apply at statecareers.mt.gov/

PARALEGAL: Datsopoulos MacDonald Lind in Missoula is looking for a skilled litigation paralegal to be the backbone of our personal injury practice. You will be responsible for the coordination of all the details before, during and after trial or mediation. The successful candidate will be able to provide assistance during all phases of the litigation process including, legal research, document filing and attending trials. apply by email to sjacobson@dmllaw.com

OFFICE SPACE

PREMIUM PROFESSIONAL OFFICE SPACE FOR RENT: Single office (approximately 170 sq. ft.) with large window, available in small law firm suite on walking mall in downtown Helena. $800 per month, which includes utilities, janitorial services, and use of copy room, common areas, kitchen, and scheduled access to conference rooms. Existing office

furniture available for use or can be removed. Tenant to pay for own phone, parking, and internet. Please call David at 406-442-8560 ext. 4.

PREMIUM PROFESSIONAL OFFICE SPACE FOR RENT: Missoula office share for one or two attorneys: Located in the historic Higgins Building on the corner of Main St. and Higgins Ave. Nice woodwork and high ceilings. Includes conference room, large waiting room, storage, and paralegal/secretary space. Contact Andrew George at 406-531-6653 or andrew@georgelaw.us.

ATTORNEY SUPPORT/ RESEARCH/WRITING

CONTRACT ATTORNEY available for hire to assist your firm with brief writing, legal research, document review, and court appearances. Strong research/writing skills, former UM Law graduate on National Moot Court and Montana Law Review, and professional experience at a Missoula law firm. Contact me at pannabeckerr@yahoo.com, (406) 590-5167

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

ENHANCE YOUR PRACTICE with help from an AV-rated attorney with more than 37 years of broad-based experience. I can research, write and/or edit your trial or appellate briefs, analyze legal issues or otherwise assist with litigation. Please visit my website at www.denevilegal.com to learn more. mdenevi81@gmail.com, 406-210-1133.

TRANSCRIPTIONIST: Expert Quality Transcriptionist available for all your transcription needs. I am the chief transcriptionist and owner of Transcription Solutions USA. I've been transcribing for medical practices, attorneys, court reporters, law enforcement, investigators, courts, etc. for 15+ years. I am highly experienced in legalese and document formatting. I have an outstanding turnaround time and fair pricing. Exceptional references are available upon request. Please contact Krystin Spolar at 406-539-1985 or transsolusa@gmail.com.

CONSULTANTS & EXPERTS

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

EXPERIENCED BANKING EXPERT/ CONSULTANT – 40+ years of banking experience 30 years of which were in executive management positions in banks ranging in size from community banks to multi-billion-dollar, multi-state banking organizations. Executive responsibility for all phases of lending, lending disciplines and credit assessment. Special expertise in determining borrower creditworthiness and the appropriateness of lender behavior. Outstanding legal references upon request. Please contact Leon Royer by telephone at 406-932-4255 or backcastranch@gmail.com.

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

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

EVICTIONS

EVICTIONS LAWYER: We do hundreds of evictions statewide. Send your landlord clients to us. We'll respect your "ownership" of their other business. Call for prices. HH Evictions, Inc., 406-549-9611, trevor@montanaevictions.com. See website at www.montanaevictions.com

BETTR SECTION MENTOR PROGRAM

New to transactional practice and don't know where to find answers? Providing limited-scope input within the mentor's discretion, a mentor from the BETTR section may be able to help. To learn more, or to find a mentor, email Kathleen Magone, chair of Education and Outreach Committee of the BETTR section, at kmagone@bresnan.net.

MONTANA
LAWYER

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