

# MONTANA LAWYER

State Bar  
— of —  
Montana

June/July 2017 | Vol. 42, No. 8



## Federal Health Care Legislation

Special report from Health Care Law Section looks at where legislation stands now and the battle that looms ahead

### Also in this edition:

- > 2016 Pro Bono Report: Montana attorneys give 120,000 hours, nearly \$18M in services
- > Pro Bono Connect makes limited scope easy

- > Rancher, lawyer, senator and 2006 Jameson winner Jim Moore dies at age 89
- > Shaun Thompson, longtime chief disciplinary counsel at ODC, retiring this month

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

## Our members have spoken, and the Bar is listening

I don't know about you but I am a sucker for surveys. I am constantly driving my wife nuts with surveys on whether our marriage, love life, and kids are normal. I fill out the customer service surveys from hotels and airlines. I even answer political polls (it's fun to see how slanted the questions are and then deliberately give the opposite answer).

Recently the State Bar conducted a survey of its own and I thought I would share some of the results. Once it's cleaned up, the survey results will be posted on the State Bar website.

No surprise to me we are aging. Twenty-five percent of State Bar members have been members for less than six years down from 35 percent in 2014; 31 percent (down from 41 percent in 2014) are under 40 and 51 percent (up from 42 percent in 2014) are over 50. That's me, so mind your elders!

Fifty six percent of respondents are in private practice with 41 percent of those indicating solo practice. We solos command the world ! Mah Haaaaa. Sorry, airplane air has gotten to me. The figures do, however, refute those who say the State Bar is dominated by "big firms." Both Matt Thiel, immediate past president and myself are solos. On the national level Bob Carlson the ABA president-elect is focusing on solo and small firms. (Have you taken advantage of the screaming deal on ABA dues through the State Bar?)

The top State Bar activities were:

- Providing a positive reputation for the profession.
- Provide information on areas of practice
- Provide support for access to justice

activities

- Develop positive relationships between bench and bar.
- Provide networking opportunities.

Not all is rosy, some areas where the State Bar needs improvement are website design, its Lawyers Referral Service, and Section communication options.

The State Bar Trustees met earlier this spring and conducted a strategic planning session. The Trustees felt the top roles of the State Bar are:

- Advocacy for the profession
- Provide benefits to members
- Encourage networking, professionalism, and collegiality.

Surprising how this dovetails with the survey result when the Trustees had not yet seen the survey.

The State Bar is always seeking to improve for its members. A newly redesigned website will be coming this fall. In conjunction with the ABA exciting new options for retirement plans. New affinity agreements offering discounts on products are arriving soon, as well as opportunities for non- health-related benefit programs. A public lawyer task force will be issuing a report soon on how to make the State Bar more relevant to public lawyers. We hope to incorporate those ideas in the fall. New communications options for sections and a new approach to lawyer referral and modest means representation are being considered as well.

I just want you, the members, to realize, the State Bar is trying to work for you and provide value for your membership. Please let us know how we are doing.



*The State Bar is trying to work for you and provide value for your membership. Please let us know how we are doing.*



### Crowley Fleck's Missoula office introduces Schultz as senior counsel in Missoula office

Crowley Fleck, PLLP, has announced that Gregory Schultz has joined the firm's Missoula office as senior counsel.

Schultz graduated from Yale University, summa cum laude, in 1980, and received his law degree from Northwestern University School of Law in 1984. He has practiced law for 33 years and is licensed in the Arizona, Kansas, Missouri, and Montana. He has administered his own law practice in Montana since 1998, concentrating on commercial and real estate transactions and litigation.

He is affiliated with, and an instructor to, the Montana Association of Registered Land Surveyors and the Montana Land Title Association. He holds a Martindale AV rating. Schultz will continue his commercial and real estate practice, with a particular emphasis on land titles and title insurance.

### P. Mars Scott Law Offices welcomes Jason Scott

P. Mars Scott, P.C. Law Offices, located in Missoula, welcomes Jason M. Scott as an associate attorney.

Scott's practice emphasizes family law issues including complex marital dissolution and business organizations.

Scott is a 2016 graduate of the Santa Clara University School of Law, receiving his Juris Doctorate degree. In 2011, Scott graduated from the University of Montana and received Bachelor of Science degrees in management information systems and marketing. While attending law school, he served as an editor on the Santa Clara Law Review, and as an editor for the Santa Clara Sports Law Symposium publication.

He also interned with P. Mars Scott Law Offices, Terrazas Law Offices, and the Santa Cruz Public Defender.

You can contact him at P. Mars Scott, P.C. Law Offices, 2920 S. Garfield St., Missoula, MT 59801; 406-327-0600; or Jason.scott@pmarsscott.com.

### Twidwell joins Hammer, Quinn & Shaw



Twidwell

Hammer, Quinn & Shaw, PLLC, has announced that Kevin Twidwell has joined the firm.

Twidwell earned his B.A., with honors, from the University of Montana in 1987 and his Juris Doctorate, with honors, from the University of Montana School of Law in 1994.

Twidwell has spent more than 19 years representing individuals and businesses in

civil litigation in Montana and Washington state and federal courts. His extensive litigation background includes personal injury litigation, insurance defense, professional negligence claims, and commercial disputes. He is admitted to the State Bars of both Montana and Washington, as well as the District Courts of both states.

### Farve & Brown Law opens firm with offices in Bozeman and Helena

Jennifer L. Farve and Abigail R. Brown, both formerly of Moore, O'Connell & Refling, PC, have announced they opened Farve & Brown Law, PLLC, in January 2017 with offices in Bozeman and Helena. The firm serves clients throughout Montana, and is a boutique firm specializing in land and water law related matters.



Farve

Farve received her BA with academic honors from Montana State University in Bozeman, and went on to receive her JD with honors from the University of Montana School of Law. She completed a judicial clerkship with the Honorable Jim Rice of the Montana Supreme Court before entering private practice in 2004. She practices extensively in real estate, with an emphasis on farm and ranch sales that extends statewide. She is licensed in both Montana and Michigan. Jennifer manages the firm's Bozeman office, which is located at 1276 N. 15th Ave, Ste 104, Bozeman, MT 59715. You can reach her in Bozeman by phone at 406-219-0073 or email at jennifer@farvebrownlaw.com.



Brown

Brown received her BS from Northwestern University in Evanston, Illinois. After completing her service in the United States Peace Corps in Malawi, Africa, she moved to Missoula where she received her MA from the University of Montana and her JD with honors from the University of Montana School of Law. Brown completed a judicial clerkship with the Honorable Patricia O. Cotter of the Montana Supreme Court before entering private practice in 2011. Her statewide practice is primarily in water law, both in adjudication cases before the Montana Water Court and enforcement cases before state district courts. Abby manages the firm's Helena office, which is located at 7 W. 6th Ave, Suite 4B, Helena, MT 59601. You can reach her by phone at 406-457-5494 or email at abby@farvebrownlaw.com.

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



### Elshoff wins Alpha Chi honor society's 'Favorite Professor' award at Texas State



Elshoff

Attorney Jim Elshoff was named "Favorite Professor" by the Alpha Chi National College Honor Society's Texas State University Chapter.

Elshoff, who moved to Texas in 2007, has achieved that award for five of the last seven years, as a professor in the School of Criminal Justice at Texas State University San Marcos. Elshoff is also in his third year as Teen Court judge for the city of San Marcos.

### Zotti joins Rocky Mountain Law Partners



Zotti

Nicholas "Nick" O. Zotti has joined Rocky Mountain Law Partners, P.C. as its newest associate attorney. Zotti is a 2013 graduate of Loyola University New Orleans College of Law. He completed his undergraduate studies at the University of Kent, Brussels School of International Studies, Brussels, Belgium, and Millsaps College in Jackson, Mississippi. He most recently practiced law in Seattle. His practice in Louisiana and Washington focused on civil

litigation and criminal defense.

Zotti's association with Rocky Mountain Law Partners adds criminal defense as a new practice area for the firm. Zotti will focus his practice on criminal defense, with an emphasis on white-collar crime while also continuing the firm's commitment to its commercial, business and real estate clients.

### Achten joins Holland & Hart's Billings office

Holland & Hart has announced that Becky Achten has joined the Billings office as an employee benefits specialist in the Benefits Law Group. Achten comes to Holland & Hart with 25 years of experience in the financial services industry focused on retirement and benefit plan administration.



Achten

A certified retirement services professional and an active member of the Institute of Certified Bankers, Achten's experience ranges from benefit plan administration, employee communications, to plan document reviews and amendments. Achten will leverage her expertise to help clients ensure their plan documents are in compliance with the Benefits Law Group's recently launched Qualified Plan Documents, Opinions, and Compliance service, which offers a legally approved plan document through a customizable service.

On-demand recorded CLE content: [montana.inreachce.com](http://montana.inreachce.com)

## Get CLE credits. On your time.

### New – Domestic Violence Webinar Series. Get 4 for the price of 3

- Domestic Violence Risk Assessments
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- The Impact of Domestic Violence on Children
- Domestic Violence in Indian Country

### New – Recent Montana Criminal Law Changes



## 2 February bar exam participants file grievances

Two people who took the February bar exam in Montana and did not pass have filed petitions over the exam with the Montana Supreme Court.

The court ordered the Board of Bar Examiners to file responses to the petitions.

Caitlin T. Pabst filed a complaint with the court, alleging that her essay answers

on the written portion of the exam “were given unfair, inadequate, and inconsistent reviews which resulted in grading errors.” Pabst said she failed the exam by one point. She petitioned the court to have the written portion of her exam reviewed and regraded.

Lyndon Scheveck petitioned the court regarding a “disturbance” during the

February exam. Scheveck says he was distracted by the disturbance and requests that the court credit him with the 4.3 points he needed to pass the exam.

The court gave the Board of Bar Examiners 20 days to respond to each petition; the orders were issued on May 12 and May 25, respectively.

### DISCIPLINE

#### Johnson disbarred after failing to respond to complaints

The Montana Supreme Court disbarred Billings attorney Roy W. Johnson on May 16.

Johnson, who was already on suspension from a previous disciplinary proceeding, failed to respond to new informal complaints filed with the Office of Disciplinary Counsel (ODC) by two of his former clients.

The Commission on Practice (COP) recommended Johnson’s disbarment, noting his significant disciplinary history. Johnson has received five public admonitions, two public censures, and three suspensions.

Johnson testified at a hearing before the COP that he didn’t respond to the complaints against him because he had not decided whether he would seek reinstatement of his law license. In his objection to the COP’s recommendation,

Johnson asked the court to spare him the “public shaming” and perceived elimination of employment opportunities the disbarment would cause.

In response, ODC said disbarment was justified in light of Johnson’s previous discipline and because ODC had given him many opportunities to respond to the complaints.

#### Braukman placed on interim suspension over convictions

The Montana Supreme Court on May 23 ordered Billings attorney Michele Lynn Braukman to be placed on interim suspension over her recent convictions on two criminal offenses.

The suspension is effective immediately and pending final disposition of a disciplinary proceeding.

The court ordered Braukman to answer the complaint within 20 days. A hearing will be held to determine the full extent of the final discipline Braukman will receive.

In December 2016, Braukman pleaded guilty in Yellowstone County District Court to felony criminal child endangerment and aggravated driving while under the influence. On March 6, the court imposed a three-year deferred sentence on the child endangerment charge and a one-year sentence with all but three days suspended on the DUI charge.

#### Small given public reprimand for unauthorized practice of law

The Montana Supreme Court on May 12 ordered a public reprimand for attorney Andrew Small as reciprocal discipline for practicing law without a license in Minnesota.

The Minnesota Supreme Court reprimanded Small, of Winona, Minnesota, in December 2016. According to an order from that court, Small unconditionally admitted to engaging in the unauthorized practice of law in Minnesota.

Small is an Inactive Attorney member of the State Bar of Montana.

# 406-683-6525

## Montana’s Lawyers Assistance Program Hotline

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

## 4 apply for 7th Judicial District judge position

Four attorneys have applied with the Judicial Nomination Commission for an open 7th Judicial District judge seat. They are:

- Sally K. Hickok, Circle
- Olivia Rieger, Glendive
- Matthew S. Robertson, Great Falls
- Cynthia K. Thornton, Glendive

The commission is soliciting public comment on the applicants until Wednesday, June 28, at 5 p.m. The commission will forward the names of three or four nominees to Gov. Steve Bullock, who will appoint one.

Comment can be submitted by email to [mtsupremecourt@mt.gov](mailto:mtsupremecourt@mt.gov); by phone at 406-841-2950; or in writing to:

Judicial Nomination Commission,  
c/o Lois Menzies, Office of Court  
Administrator, P.O. Box 203005, Helena,  
MT 59620-3005.

The position is subject to election in 2018. The successful candidate will serve

a six-year term.

The position became open when the Honorable Richard Simonton in April announced that he is retiring effective July 14.

### Tenant who was charged deposit for service animal gets \$37K verdict in federal trial

A federal jury in Butte returned a \$37,343 verdict against a Bozeman landlord for charging a tenant with physical and psychiatric disabilities \$1,000 to have a service animal, the U.S. Justice Department announced.

The lawsuit, filed in U.S. District Court in Butte, alleged that Jaclyn Katz, the owner and manager of rental properties in Bozeman, discriminated against a tenant with physical and psychiatric disabilities by charging her a \$1,000 deposit as a condition for allowing her to keep

her service dog.

At trial, tenant Kristen Newman, her treating therapist and an independent expert testified that the service dog assisted Newman in living with the symptoms of her disabilities. This includes providing emotional support, helping to predict migraines, and reducing suicidal thoughts. Newman also testified that she repeatedly informed Katz that charging a deposit for a service animal was illegal and that Newman understood that she would have to pay for any actual damage caused by her service dog. Nevertheless, Katz continued to levy this charge and, at one point, even threatened to terminate Newman's tenancy. The case arose out of a complaint filed by Newman with the U.S. Department of Housing and Urban Development.

The May 17 verdict includes \$11,043

**COURT**, next page

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# Wilson to intern at UN court in The Hague

Hannah Wilson, a student at the Alexander Blewett III School of Law at the University of Montana, will be spending her summer at a United Nations court in The Hague, the legal capital of the world.

Wilson will be interning with the International Criminal Tribunal for the former Yugoslavia, helping to prosecute war criminals from the Yugoslav Wars. The Office of the Prosecutor, where Wilson will be working, prosecutes



Wilson

persons suspected of planning, implementation, and execution of the most serious violations of international humanitarian law that have occurred in the territory of the former Yugoslavia since 1991. The Office is wrapping up its final cases and transitioning toward

closure, making this a once-in-a-lifetime opportunity.

Wilson is a Blewett Scholar and a member of the Montana Law Review. She has focused her studies on international law, taking law courses in China, Singapore, and Mexico and completing her Advanced Writing Requirement on international law topics. Her career goals include working abroad, ideally in the field of international law, and eventually becoming a Foreign Service Officer.

## Zellmer to be Distinguished Visiting Professor at UM

Professor Sandra Zellmer will join the Alexander Blewett III School of Law for the 2017-18 academic year as a Distinguished Visiting Professor.

Zellmer, the Robert E. Daughtery Professor of Law at the University of Nebraska, is a nationally recognized teacher and scholar in the fields of natural resources,



Zellmer

water, public lands, wildlife, and environmental law. She is a co-author of a leading casebook on natural resources law, as well as a hornbook on natural resources law.

Zellmer began teaching at the University of Nebraska College of Law in 2003. She has also published dozens of book chapters and articles, and was awarded "Best Paper" by the American Bar Association for her work on "Missouri River Mud: Clean Water and Endangered Species," which she presented at the ABA's Annual Water Law Conference in 2011.

Zellmer has given presentations about water law and other related topics around the globe. She has also participated in annual training sessions on wilderness management at the Arthur Carhart National Wilderness Training Center in Missoula.

Prior to teaching, she was a trial attorney in the Environment and Natural Resources Division of the U.S. Department of Justice,

litigating public lands and wildlife issues for various federal agencies, including the National Forest Service, National Park Service, and Fish and Wildlife Service.

Zellmer will supervise the Land Use & Natural Resources Clinic and will teach Public Lands in the fall semester and Water Law in the spring semester.

## Negotiation team invited to international competition

The Blewett School of Law's ABA Negotiation Competition Team will travel to Oslo, Norway in late June to attend the 2017 International Negotiation Competition hosted by the University of Oslo and the Norwegian Association of Lawyers. The School of Law's team of Frans Andersson '17 and Kirsi Luther '19 placed second among more than ninety teams in the national competition earlier this year, earning the invitation to Oslo.

Teams from more than 30 countries will travel to Norway for the International Competition this year. The competition, conducted in English, involves four rounds of competition, with one four-party negotiation. Andersson and Luther will see their skills tested, as they face teams with a wide variety of cultures and backgrounds.

This year's entry into the International Negotiation Competition is the second appearance by a University of Montana team, continuing a tradition of success. In the past decade alone, the team has appeared in the national competition six times, following nine appearances at regional final rounds. 2017 marks the fourth consecutive year of

the team's appearance at nationals.

The team is coached by adjunct faculty member Klaus Sitte who has been coaching the team since 1990. Sitte teaches the Negotiation and Alternative Dispute Resolution courses at the School of Law.

## Law school ranked 15th in federal clerkship placement

The University of Montana's Alexander Blewett III School of Law is ranked 15th in the nation for placing new graduates in federal clerkships based on the percentage of graduates hired as federal judicial clerks over the course of the past three years.

The law school placed 7.5 percent of its graduates for the classes of 2014, 2015 and 2016 in federal clerkships within 10 months of graduation according to the most recent ABA employment data. That percentage exceeds federal clerkship placement for prominent national law schools such as the University of Notre Dame (16th), Cornell University (19th) and New York University (23rd), and is fourth among all law schools in the West, behind Stanford, California-Berkeley, and California-Irvine.

According to the law school, the 2017 class will have an even higher placement percentage than the three-year average, as 9.6 percent of 2017 graduates have reported federal clerkship positions.

Overall clerkship placement of Blewett School of Law graduates is also extraordinary. For the past two graduating classes, 25.6 percent of each graduating class secured state or federal clerkships positions within 10 months of graduation.



## Bar continues search for new executive director

The State Bar of Montana continues its search for a new executive director.

Applications will be accepted until July 1, 2017, with a state date of Jan 2, 2018.

Current Executive Director Chris Manos announced in December that he is retiring after 16 plus years in the position.

The executive director supervises an organization with over 6,000 members and a 15-member staff located in Helena,

Montana, with a budget of \$1.8 million. The position is responsible for leading, managing and executing the affairs of the organization. This includes implementing policies, strategies and programs and priorities approved by the Board of Trustees and overseen by an Executive Committee and the establishment and review of staffing and organizational structure in consultation with the Executive Committee and the Board.

The executive director job is a salaried position with a salary range of \$90,000 to \$105,000. A Juris Doctorate preferred but candidates with a Bachelor's or Master's of Administration will be considered.

Direct letters of interest, inquiries and resumes to [cmanos@montanabar.org](mailto:cmanos@montanabar.org), or call 406-447-2203 for details.

You can see a full job listing online at [jobs.montanabar.org](http://jobs.montanabar.org).

### Court, from previous page

in compensatory damages for Newman, \$20,000 in punitive damages for Newman, and \$6,300 for Montana Fair Housing, Inc., which assisted Newman with her fair housing complaint.

"Persons with disabilities have the right to live in and enjoy their communities, just as all families do throughout our nation," Acting Assistant Attorney General Tom Wheeler of the Justice Department's Civil Rights Division said. "We commend the jury for recognizing that the Fair Housing Act prohibits landlords from discriminating against persons with disabilities, and we will continue to work to eliminate discriminatory barriers in housing for persons with disabilities."

### Utility responsible for property taxes until taking occurs, court finds in Mountain Water case

The Montana Supreme Court has ruled that the city of Missoula does not owe property taxes accruing on a water utility's property during a pending condemnation of the utility.

The ruling reverses Helena District Court Judge Kathy Seeley's ruling that she erred in her interpretation of state statute

on proration of taxes in a condemnation when she ordered a refund to Mountain Water and assessment of property taxes against the city.

Justice Jim Rice, writing for the 7-0 majority, said the parties in the case had read more into the statute than was actually there. The statute simply established a tax proration date that is more favorable to condemnees than under general law, and provided no additional or alternate process to accompany this adjustment.

Rice wrote that it is common sense that Mountain Water would retain responsibility for taxes until a taking occurs.

"If a condemnation action is ultimately unsuccessful and the owner does not lose possession of the property, then the property tax obligation, along with the use and enjoyment of the property, would have rightly remained with the owner during the litigation," Rice wrote.

### Judge: Revenue Department was wrong to exclude religious schools from scholarship

Montana's School Choice program can grant scholarships to students who attend faith-based schools, a Flathead County District Court judge ruled in

May.

The Honorable Heidi Ulbricht ruled on May 25 that the Montana Department of Revenue was wrong to exclude such students from the program.

Kendra Espinoza, Jeri Ellen Anderson and Jaime Schaefer, whose children attend Stillwater Christian School in Kalispell, challenged the rule with the help of the Institute for Justice, a libertarian public interest law firm.

"What a wonderful victory this is for all the families in Montana who have chosen private education for their children," Espinoza said in a press release from the Institute for Justice. "We are thrilled and encouraged. This is going to make such a difference for all the parents who will now have the opportunity to send, or continue to send, their children to the school of their choice."

The Revenue Department determined in writing the rules that an institution controlled by any church or religious sect could not be considered a "qualified education provider" for purposes of the scholarship. The agency argued that the state constitution does not allow appropriations to faith-based schools.

Ulbricht, however, found that the program is funded through tax credits, not appropriations, and the constitution does not address the use of tax credits.

## Attorneys: Do you have good news you want to share?

Have you recently been recognized for contributions you make to the communities you serve? Is your firm raising money or collecting food for charity? Are you a leader who is being recognized for advancing the legal profession? If so,

we want to hear about it! Email [editor@montanabar.org](mailto:editor@montanabar.org) to be considered for inclusion in a future issue the Montana Lawyer.

## Fox, 31 other AGs sign letter opposing elimination of LSC's federal funding

Montana Attorney General Tim Fox is among 32 attorneys general who have signed a letter urging Congress to oppose the proposed elimination of funding for Legal Services Corporation (LSC).

Colorado Attorney General Cynthia H. Coffman and Massachusetts Attorney



Fox

General Maura Healey led the bipartisan group in highlighting the need for legal services in rural and low-income communities across the country are led by.

In the letter sent to the U.S. Senate and the U.S. House of Representatives

Appropriations Committees, the attorneys general noted that for more than 40 years, under both Republican and Democratic administrations, the LSC has helped veterans and military families secure important benefits, supported survivors of domestic

violence seeking safety, and assisted families facing foreclosure and victims of natural disasters.

"The legal services provided by LSC are critical for low-income and vulnerable citizens in Colorado and for millions of people across the country," said Attorney General Coffman. "As a bipartisan group of attorneys general we have joined together to speak up for those people who need access to these services in order to protect their rights."

The letter was signed by the Attorneys General of Massachusetts, Alaska, American Samoa, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Northern Mariana Islands, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Virginia and Washington.

## Winners named in MT federal courts' high school civics contest

Great Falls Central Catholic High School freshman Trinity Holden is the first place winner in the U.S. District Courts for Montana's 2017 Essay Contest.

The district held the contest in conjunction with its 2017 Law Day activities, with entries addressing the legal lessons of the Japanese Internment during World War II. The district also held a video contest, with Alexis Giles of Fort Benton High School taking first place. (See ad on facing page for more on the contest.)

The top three entries in both the essay contest and the video contest received cash prizes. The top three essays also were

Trinity Holden is the daughter of Jason Holden, the State Bar of Montana's Secretary Treasurer.

A short excerpt from Trinity's essay is printed below. The full essay is posted on the State Bar of Montana website, [www.montanabar.org](http://www.montanabar.org), and at the District of Montana website at [mtd.uscourts.gov](http://mtd.uscourts.gov).

During World War II not a single Japanese American was proven to be disloyal. The voluntariness and cooperation shown by those discriminated against was ultimately their greatest act of loyalty. They gave up their businesses, their homes, their possessions, and ultimately their liberty to prove their love for the ideals that the rest of America forgot.

The legacy of Hirabayashi, Korematsu, and Endo is their life-long fight to right the injustice of internment, and the truth it uncovered. Without their commitment we would never have known that the internment was based on false information. I learned from their fight that meaningful judicial review, in times of uncertainty, is the only act of courage capable of defeating tyranny. Anything less will not allow any of us to say, I am an American.



## Legal Research brought to you by the State Bar

All Active Attorney and Paralegal Section members of the State Bar of Montana and members of the Montana Magistrates Association have free access to the Fastcase legal research system. This exclusive member benefit provides access to one of the largest law libraries in the world and a variety of Montana legal materials, including case law, statutes, regulations, court rules and attorney general opinions, as well as a 50-state and federal legal database.

Fastcase offers three options for webinar training hosted by a Fastcase attorney: Introduction to Fastcase, Boolean (Keyword) Searching and Advanced Tips for Enhanced Legal Research.

If you have any technical questions about Fastcase, visit [www.montanabar.org/?page=AboutFastcase](http://www.montanabar.org/?page=AboutFastcase), email [support@fastcase.com](mailto:support@fastcase.com) or call toll free at 866-773-2782.

## June-July Webinars

(All webinars 11 a.m. to 1 p.m. MT. See the calendar at [www.montanabar.org](http://www.montanabar.org) for links to registration.)

**Thursday, June 1** – Introduction to Legal Research on Fastcase

**Thursday, June 8** – Advanced Legal Research on Fastcase

**Thursday, June 15** – Introduction to Boolean (Keyword) Searches

**Thursday, July 6** – Introduction to Legal Research on Fastcase

**Thursday, July 13** – Advanced Legal Research on Fastcase

**Thursday, July 20** – Introduction to Boolean (Keyword) Searches



## 2017 NINTH CIRCUIT CIVICS CONTEST



The United States Courts for the District of Montana are proud to announce the winners of the 2017 District of Montana civics contest. High school students from around Montana submitted video and essay entries addressing the contest's theme of "*Not to Be Forgotten: Legal Lessons of the Japanese Internment.*" The winners were selected by a panel of judges consisting of practicing attorneys and federal court personnel. The top three entries in each category will receive cash scholarships and go on to compete in the Ninth Circuit-wide competition, where they will have the opportunity to earn additional scholarship awards. A short excerpt from the first place essay, written by Great Falls Central Catholic High School freshman Trinity Holden, is printed on the opposite page. Each of the winning essay and video entries will be posted on the District of Montana website at [mtd.uscourts.gov](http://mtd.uscourts.gov).

### 2017 ESSAY CONTEST WINNERS

<i>First Place</i>	<i>Second Place</i>	<i>Third Place</i>
<b>Trinity Holden</b>	<b>John Davies</b>	<b>Heidi Froelich</b>
<b>Great Falls Central Catholic High School</b>	<b>Billings West High School</b>	<b>Park City High School</b>
<b>\$2,000</b>	<b>\$1,000</b>	<b>\$500</b>

### 2017 VIDEO CONTEST WINNERS

<i>First Place</i>	<i>Second Place</i>	<i>Third Place</i>
<b>Alexis Giles</b>	<b>Coya Nack</b>	<b>Kaitlyn Bird</b>
<b>Fort Benton High School</b>	<b>Fort Benton High School</b>	<b>Fort Benton High School</b>
<b>\$2,000</b>	<b>\$1,000</b>	<b>\$500</b>



The scholarship awards for the Montana winners were made possible by generous donations from each of the following Montana law firms and legal organizations:

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# Montana attorneys report 120,000 hours of pro bono service in 2016

## Montana Lawyer Staff

The Montana Supreme Court and the State Bar of Montana are pleased to announce almost 1,600 Montana attorneys provided more than 120,000 hours of pro bono service to low-income Montanans across the state in 2016. The value of pro bono legal services approaches \$18 million.

“Accessing our civil justice system by those without the financial means to pay for legal services is a guiding ethical principle of Montana’s legal profession,” said Chief Justice Mike McGrath. “Through these exceptional contributions, hundreds of low-income Montanans received critical legal assistance at no cost. We are grateful to Montana’s attorneys for their deep commitment to working toward justice for all.”

Pro bono services help fill the gap in unmet legal needs to low-income clients most often in family law matters, including adoptions, guardianships, divorces, parenting plans and child support issues, including victims of domestic violence. Attorneys provide pro bono services to many other qualifying clients, including the elderly, military veterans and organizations serving low-income individuals.

The information was gathered in conjunction with the State Bar’s annual Interest on Lawyers Trust Account certification. In this year’s survey, 1,561 attorneys reported pro bono hours.

“The Montana Rules of Professional Conduct state that ‘[a] lawyer should render at least 50 hours of pro bono public legal services per year,’” Bruce Spencer, State Bar of Montana President said. “Montana lawyers have stepped up to the plate and assisted those of limited means. This report demonstrates that while meeting their ethical obligations, Montana lawyers provide significant benefits to the public and Montana’s judicial system.”

- Among the highlights of this year’s report:
- 1,301 attorneys reported 70,706 hours of free services to people of limited means or organizations designed to help them.
- 582 attorneys reported 15,284 hours of free services to charitable, religious, civic, educational and other organizations.
- 461 attorneys reported 22,144 hours of pro bono service at a substantially reduced fee to people/families of limited means.
- 81 attorneys reported 15,284 hours of free services to charitable, religious, civic, educational and other organizations.

686 in-state attorneys reported 17,260 hours participating in volunteer activities for improving the law, legal system or legal profession.

The report also included the following recommendations for the access to justice community to concentrate their efforts in providing support for attorneys:

- continue expansion of limited scope representation opportunities without diluting full representation attorney resources;
- expand attorney training opportunities in the areas of greatest legal need;
- develop supportive non-attorney legal professional and law student modules for existing pro bono programs
- create or expand mentor-mentee protocols and opportunities in pro bono programs;
- create programs to remove impediments to participation in pro bono programs for government and public interest lawyers;
- update government agency pro bono policies to facilitate pro bono participation.



*Montana lawyers have stepped up to the plate and assisted those of limited means. This report demonstrates that while meeting their ethical obligations, Montana lawyers provide significant benefits to the public and Montana’s judicial system.*





# Pro Bono in Montana

## 2016 — By the numbers

70,706	Hours of services free of charge to individuals of limited means or organizations that serve them
22,144	Hours of services at substantially reduced fee to individuals of limited means or organizations that serve them
15,284	Hours of services free of charge to charitable, religious, civic, community, governmental or educational organizations
11,902	Hours of reduced fee services to charitable, religious, civic, community, governmental or educational organizations



1,561 attorneys provided a total of 120,000 hours of pro bono services in 2016 at a total value of \$18 million

## The Montana Pro Bono Attorney

- 30% – Share of responding attorneys who are solo practitioners.
- 89% – Share of responding attorneys who reported pro bono hours.
- 20.1 – Average years in practice among reporting attorneys



## Pro Bono Service by Category



**Family Law**  
45%



**Nonprofit Law**  
23%



**Criminal Law**  
23%



**Landlord-Tenant Law**  
23%



**Estate Planning**  
23%

## No Pro Bono Service

Among attorneys who reported no pro bono, the most common reasons

Not enough time to do pro bono	30%
Employer prohibits it	12%
Cannot afford to do it	11%
Not practicing law	11%
Recently admitted	9%
No opportunity	9%

## Improving Pro Bono

The most common responses for how to improve pro bono

Additional training/CLE	31%
Finite hour contribution opportunities (clinics, limited scope)	30%
Co-counsel/paralegal/law clerk	23%
Administrative/staff support	21%
Experienced attorney mentor	21%
Referrals from an organized program	21%

# With MLSA's phone-advice program, attorneys can do the Montana public good — in just 1 hour

By **ANGIE WAGENHALS**  
Montana Legal Services Association

Did you know that the average American adult spends one hour and 39 minutes a day on a smartphone? For many of us with busy and demanding schedules, that's no surprise but the number is a good reminder of the sheer volume of time we spend engaging with our phones. At Montana Legal Services Association (MLSA), we want to encourage you to utilize some of your smartphone time putting your legal expertise to work for the public good.

Attorney volunteer feedback helped MLSA to develop the Montana Pro Bono Connect Phone Advice Project. Since its inception in November 2015, pro bono attorneys have served 370 clients with one hour over the phone advice on a host of legal issues including family law, wills and estates, housing law, and employment law. That is 370 fellow Montanans who would have never received legal assistance without the donation of time from a pro bono attorney.

The process is simple — volunteer attorneys choose the day, time, subject matter, and frequency of their advice shifts, while MLSA staff deal with the scheduling. All applicants are screened for financial eligibility and matched with pro bono volunteers based on their legal issue and the attorneys' preferences. Most cases scheduled for phone advice are simple enough that a pro se litigant can move forward with just a little limited-scope assistance. MLSA provides the client's case information in advance of the appointments and the attorney can make the call from wherever they are. Volunteers can even access MLSA's case management system to streamline information sharing. Once the hour phone call is up, the attorney is done! It's that simple. MLSA asks for feedback on the advice provided and recommendations for follow-up and takes it from there.

While the program makes it easy for attorneys to provide pro

bono services with small amounts of time, the impact on clients is significant. Phone advice provides critical legal advice to pro se litigants at key junctures. As a case progresses, litigants are faced with an endless stream of new concepts, terms, protocols, and rules that are a product of a system intended to serve those who have counsel. Limited-scope legal advice is a critical stopgap at these stages and ensures that pro se litigants understand their own legal issues. Clients agree that the advice they received was helpful: an overwhelming 71 percent responded that the program helped them understand the next steps in their case and nearly 60 percent reported that advice helped them understand their rights and legal options. The value of legal understanding is immeasurable and it all comes from donating just an hour of pro bono time.

The Montana Pro Bono Connect Phone Advice project helps bridge the gaps across Montana for low-income households trying to access the justice system. It is a critical component in ensuring that Montanans living in rural and frontier communities have the same access to legal assistance as the folks living in Missoula, Bozeman, and Billings. It provides the legal advice that pro se litigants so desperately need to ensure that they have the best chance of advocating for themselves in a legal proceeding. Most importantly, it helps make our legal system more fair by providing more legal services to our low-income neighbors, who have a 1:12,133 ratio of legal aid attorneys to income-qualified Montanans.

Please check your schedule. See if you can find one hour this summer to donate critical legal advice to those who need it most. It will make you feel good, it will be easy, and it will make a difference to a fellow Montanan struggling to navigate our legal system to protect their basic civil legal rights. It's all good. To sign up, contact me at [awagenha@mtlsa.org](mailto:awagenha@mtlsa.org) or call 406-442-9830 ext. 148.

**Angie Wagenhals is the Pro Bono Coordinator for Montana Legal Services Association.**



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Because the Honorable Karla M. Gray did so much to support and further the mission of access to justice in Montana, MJF especially recognizes gifts made in her memory. Along with our supporters and other access to justice advocates across our state, we are saddened by the loss of this committed leader and honored to continue to build on the legacy she created.

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# TrumpCare or ObamaCare? Why clients, taxpayers care

By KRISTY BUCKLEY  
Crowley Fleck

The U.S. House of Representatives passed the American Health Care Act of 2017 (AHCA, H.R. 1628, as amended) on May 4, by a vote of 217-213. Although that vote conjures up a sense of certainty, the path forward for repeal and replacement of the Affordable Care Act (ACA) remains extraordinarily uncertain. The enrolled version of the House AHCA Bill requires a vote by the U.S. Senate, which could decide to adopt the bill, amend the bill, or propose an entirely new bill. As of the writing of this article (May 24), sentiments are strong that the Senate will either significantly amend the bill or propose an entirely new bill.

On a recent trip to Washington, D.C., I spent some time listening and learning from colleagues and commentators in D.C. and across the nation about the AHCA.

The demarcation line between Republican and Democrat views was clear.

Democrats focused their comments on various procedural objections under the Byrd Rule. Republicans focused their comments on the substance of the AHCA changes. In an effort to make this article as impartial as possible, we will first discuss the Byrd Rule and then discuss the substance of the AHCA changes in its current version.

## I. THE BYRD BATH THAT COULD DO MORE THAN RUFFLE A FEW FEATHERS

As many of us know, a normal legislative bill in Congress can take months to pass because debate is unlimited, filibusters can happen, countless amendments can be added, and the bill must pass with a two-thirds vote. The AHCA, however, was not drafted as a normal bill. It was drafted as a “reconciliation bill.” A reconciliation bill enjoys an expedited legislative process wherein debate is limited to 20 hours, it is not subject to filibuster, there are limitations on amendments, and it can pass with a simple majority vote. The reconciliation bill process spawns from the Congressional Budget Act of 1974 to assist Congress with enforcing budgetary laws.<sup>1</sup>

<sup>1</sup> Titles I-IX of P.L. 93-344, as amended.

Now that the AHCA has moved over to the Senate, Section 313(b) of the Congressional Budget Act, also known colloquially as the Byrd Rule (after former Sen. Robert Byrd, D-W.Va.), will prohibit the Senate from considering matters that are extraneous to budget reconciliation. Although the Senate parliamentarian has crafted the Byrd Rule over time, there are many questions about what constitutes “extraneous matters” in the context of the AHCA provisions, which will likely be tested in the weeks and months to come.<sup>2</sup> Any senator can raise a point of order during consideration of the AHCA, including in committees and conference reports. If the point of order is accepted by the Senate parliamentarian then the provision or amendment is stricken<sup>3</sup> unless proponents offer a three-fifths Senate majority vote, or 60 votes, to keep the language inside the bill.<sup>4</sup>

The Byrd Rule consists of six tests and at least four exceptions. It is decided upon by the parliamentarian of the U.S. Senate, currently Elizabeth MacDonough, through a team of advisers in the Office of the Parliamentarian. The six Byrd Rule tests under Section 313(b)(1) of the Congressional Budget Act are described in the box at right.

The Byrd Rule has four statutory exceptions. Byrd Rule exceptions must be certified by the Senate Budget Committee Chairman (Mike Enzi, R-WY) and ranking minority member (Bernie Sanders, I-Vt.), as well as the Chairman and ranking minority member of the committee of jurisdiction.<sup>5</sup>

The so-called Byrd Bath cannot commence until after the Congressional Budget Office (CBO) releases its report on the final enrolled version of the House AHCA as passed, with amendments. The first

## Common Understanding for Byrd Rule Test

- Provision must change a budget item.
- Provision must be in compliance with the fiscal year budget.<sup>6</sup>
- Provision must be under the Committee’s jurisdiction.
- Non-budgetary items in the provision must be merely incidental.
- The next fiscal year must remain budget neutral.<sup>7</sup>
- Provision cannot change Social Security trust funds.

## Byrd Rule Test

A provision is extraneous if such provision:

- Does not produce a change in outlays or revenue, including changes in outlays and revenues brought about by changes in the terms and conditions under which outlays are made or revenues are required to be collected;<sup>8</sup>
- Produces an increase in outlays or decrease in revenues whereby the net effect of the provisions fail to achieve reconciliation instructions;
- Is not in the jurisdiction of the Committee with jurisdiction over said title
- Produces changes in outlays or revenues that are merely incidental to the non-budgetary components of the provision;
- Increases (or would increase) net outlays, or decreases (or would decrease) revenues during a fiscal year after the fiscal year covered such bill and such increases or decreases are greater than outlay reductions or revenue increases resulting from other provisions in such title in such year; and,
- Contains recommendations with respect to the old-age, survivors, and disability insurance program (OASDI, or just the portion of federal payroll taxes to cover 6.2 percent for Social Security for each of the employer and employee; but not the 1.45 percent for Medicare).

CBO report (with the Joint Committee on Taxation) on the AHCA concluded on March 13 (March CBO) that AHCA would reduce federal deficits by a net of \$150 billion in 2016-2017 due to new health coverage provisions. The March CBO report anticipated an increase of uninsured persons by 14 million in 2018, rising to 21 million in 2020, and 24 million by 2026. The March CBO report further found a 15 to 20 percent increase in average premiums in the individual policy market before 2020, with a subsequent decrease in average premiums to roughly 10 percent lower than under the current law by 2026. The new CBO report was issued on May 24 (“May CBO”). It anticipates a federal deficit reduction by a net of \$119 billion in 2017-2016. The May CBO report anticipates an increase in uninsured persons by 14 million in 2018, rising to 19 million in 2020, and 23 million by 2026.

6 As some may recall, the Fiscal Year Budget includes a budget resolution from the Senate Budget Committee Chairman, Mike Enzi (R-WY), that was passed in January 2017 with reconciliation instructions to adjust ACA spending and revenues to achieve at least \$1 billion in deficit reduction over ten years (by each chamber, Senate and House). The Senate voted Jan. 12, 2017, with 51-48. The House voted Jan. 13, 2017, with 227-198.

## II. THE AMERICAN HEALTH CARE ACT OF 2017 – A SNAPSHOT AS OF MAY 24

As an employee benefits attorney with clients seeking clear guidance, I have been extremely reluctant to write about current trending issues for ACA repeal/replacement because speculation can be dangerous and efforts wasted on a bill that will ultimately change are counter-productive.<sup>8</sup> However, it became apparent to me that some employee benefits attorneys are beginning to sow the seeds of education about AHCA implications. I’ve decided those efforts are worthwhile because the activities of the coming months could transpire quickly and we need to be getting ready with our strategies. This next section will review some of the key

7 The jurisdictional rule is under Section 313(b)(1)(C) of the Congressional Budget Act of 1974, as amended. Section 313(b)(3) provides that a reconciliation bill will not be considered extraneous for jurisdictional purposes if the bill could be referred to such committee for special circumstances (e.g., for implementation or to create an exception).

8 I heard at least one commentator describe this test as budget neutrality over the entire 10-year period that the Congressional Budget Office uses to review fiscal impacts for bills, which might be a reflection of the budget reconciliation instructions passed in January 2017.

2 Byrd Rule implications likely will be similar regardless of whether the Senate uses the House AHCA version or crafts its own version of the AHCA because there is a clear preference to pass ACA repeal/replacement under the structure of a reconciliation bill. There is no timeline for considering Byrd Rule requirements, except that each objection can be given 2 hours of debate time.

3 Section 313(d)(2), Congressional Budget Act of 1974, as amended.

4 Section 904(c)(1), Congressional Budget Act of 1974, as amended.

5 The U.S. House Committees with jurisdiction appear to be the (1) Energy and Commerce; and (2) Ways and Means. The U.S. Senate Committees with jurisdiction appear to be the (1) Health, Education, Labor and Pensions; and (2) Finance. The Chairman and ranking member of Senate Finance are Orrin Hatch (R-UT) and Ron Wyden (D-OR). The Chairman and ranking member of Senate Health and Education are Lamar Alexander (R-TN) and Patty Murray (D-WA).

implications of the AHCA.<sup>9</sup>

## A. Essential Health Benefits

One goal of the ACA was to prevent insurance issuers and self-funded health plans from offering “skinny” plans that were less expensive but without meaningful health coverage. Essential Health Benefits (EHB) were implemented to achieve that goal. Currently, EHB require that non-grandfathered plans cover: (1) ambulatory patient services; (2) emergency services; (3) hospitalization; (4) maternity and newborn care; (5) mental health and substance use disorder services including behavioral health treatment; (6) prescription drugs; (7) rehabilitative and habilitative services and devices; (8) laboratory services; (9) preventive and wellness services and chronic disease management; and (10) pediatric services, including oral and vision care. All 50 states and the District of Columbia define coverages for EHB based on a state benchmark plan. Self-funded plans nationwide have the ability to select any state EHB benchmark plan to use when defining coverage.<sup>10</sup>

The MacArthur Amendment to the current draft AHCA includes the ability of states to request a waiver of any of the 10 EHBs, after 2020. If a state requests a waiver, such waiver can be in place for a period of up to 10 years. The state waivers of EHB requirements are still being debated heavily. However, self-funded plans are paying close attention and wondering if plan designs could include dollar limits, including lifetime limits, on EHB coverage items if the plan chooses a state EHB benchmark plan with EHB waivers.<sup>11</sup>

## B. Temporary 30 percent Surcharge

The current draft AHCA allows

insurance issuers<sup>12</sup> to impose a temporary 12-month surcharge in an amount equal to 30 percent of the monthly premium rate otherwise applicable if an individual has 63 continuous days without health coverage. An individual is required to demonstrate having creditable coverage without a continuous gap of coverage for 63 days. Although that gap is similar to the HIPAA pre-existing condition exclusion framework, including creditable coverage certification rules that existed pre-ACA, the draft AHCA is focused more on the amount of premium that can be charged (rather than rendering the individual totally uninsured).

Employers are watching the surcharge debate to determine how much more reporting and disclosure obligations might be imposed if the AHCA passes, including how frequently creditable coverage assertions might be required.

## C. Large Employer Mandate and Penalties

There are two different employer penalties that can apply to Applicable Large Employers (with 50 or more full-time employees or full-time equivalent employees, generally known as “large employers”) under the ACA. First, a large employer must (1) sponsor an eligible plan; and (2) offer the plan to full-time employees and their dependents or else pay a penalty of roughly \$2,000 per year per full-time employee.<sup>13</sup> Second, a large employer that offers an eligible plan to full-time employees and their dependents must also certify that the plan coverage (1) provides minimum value; and (2) is affordable, or else pay a penalty of roughly \$3,000 per year per full-time employee who seeks a

an individual tax credit.<sup>14</sup>

The current draft of the AHCA reduces both of the large employer penalties described above down to zero, retroactively to all months beginning after Dec. 31, 2015.<sup>15</sup>

As an adviser to many of the large employers in our region, we found that large employer penalties were usually avoided, resulting in zero or low costs for large employers’ penalties. There were, however, very significant costs associated with reporting obligations for large employers, on IRS Forms 1094-C and 1095-C, the associated system upgrades for tracking employees and coverages offered, and any new contracts by large employers to outsource the reporting and tracking obligations. The current version of AHCA does not eliminate any of the large employer tracking and reporting obligations.<sup>16</sup> We anticipate that large employers will be anxiously watching AHCA developments to understand whether reporting obligations and tracking obligations will be alleviated.<sup>17</sup>

We further anticipate that removal of future large employer penalties could motivate some employers to reassess how they define benefit-eligible individuals (e.g., whether to define full-time employees as those working 30 hours per week). However, certain eligibility standards will continue to apply (e.g., all employers, regardless of size, are subject to the strict limit for 90-day waiting periods).

14 IRC 4980H(b), indexed for inflation with \$3,390 applicable for 2017, except that the penalty is calculated on a monthly basis rather than an annual basis, certain exceptions can apply for employees in a limited non-assessment period, and this penalty is limited to equal the IRC 4980H(a) if the 4980H(a) penalty is less.

15 We anticipate that some large employers that paid these penalties for 2016 offers of coverage will be quickly filing requests for refunds if the AHCA passes. See AHCA Section 206.

16 IRC 6056. Since the reconciliation rules associated with Byrd Rule requirements might limit Congress’ ability to change IRC 6056, there has been speculation about whether the reporting obligations could be addressed directly by the Secretary of Treasury.

17 During informal comments by the IRS at the mid-year American Bar Association Tax Section meeting in Washington D.C., May 12, 2017, we were repeatedly told by the IRS to not read too much into the Presidential Executive Order from Jan. 20, 2017, and that taxpayers should continue to file tax returns as they normally would. See also, IRS comments at <https://www.irs.gov/tax-professionals/aca-information-center-for-tax-professionals>, visited May 17, 2017.

9 Any terms that are capitalized in this Section have a very specific definition under either the ACA or the draft AHCA. The definitions can be found in the law and are beyond the scope of this article.

10 Self-funded plans are not required to offer coverage consistent with the EHB standards. However, if the self-funded health plan does offer coverage for an EHB item, then it is not allowed to place a dollar limit on the EHB covered and must offer the coverage consistent with a state EHB benchmark plan.

11 The ability for self-funded plans to select any state EHB benchmark is written directly inside the ACA law, but more importantly, the concept is also described in the Preamble.

12 The current draft AHCA has specific language for “insurance issuers” and the premium rates allowable. As of today, it appears that self-funded group health plans might not be able to use a temporary 30% surcharge. The MacArthur Amendment to the AHCA provides that states can apply for a waiver, beginning in 2019 (and 2018 special enrollment), and apply the 30% surcharge for individuals with a break in coverage of at least 63 days as well.

13 IRC 4980H(a), indexed for inflation with \$2,260 applicable for 2017, except that the penalty is calculated on a monthly basis rather than an annual basis and certain exceptions can apply regarding the percentage of people who receive an offer of coverage and for employees in a limited non-assessment period. Further, IRC 4980H penalties (both subpart (a) and (b)) only apply to the extent that an individual employee secures individual exchange insurance coverage and applies for an individual tax credit.



## D. Overall ACA Penalties for All Employers

All employers, regardless of size,<sup>18</sup> are subject to an overall ACA penalty that can be assessed at a rate of \$100 per day of non-compliance “with respect to each individual to whom such failure relates.”<sup>19</sup> Non-compliance means any failure to comply with the laws governing group health plan requirements. The current draft of the AHCA does not address overall ACA penalties. We anticipate that employers will become more cognizant of the overall ACA penalties and we remind employers to continue to maintain compliance with group health plan laws.

## E. Small Employer Tax Credits

Currently a small employer can receive a tax credit if it has (1) 25 or fewer full-time equivalent employees<sup>20</sup>; (2) average annual wages that do not exceed approximately \$51,000, indexed; (3) payments by the employer at a uniform premium payment of not less than 50 percent; and (4) purchased a qualified health plan through the Small Business Health Options Program (SHOP) marketplace for small employers.

The current draft AHCA makes two changes for small employer tax credits. First, the tax credit will no longer be available for SHOP coverage that includes coverage for abortions.<sup>21</sup> Second, the tax credit will not apply after Dec. 31, 2019.

The SHOP marketplace had one of the rockiest starts of all ACA-implemented items, at first crashing on the HealthCare.gov website and then only being available for the first 12 months if a small employer filed a paper copy application by mail. The topic of smooth SHOP enrollment procedures continues to garner attention. The U.S. Department of Health and

Human Services, through its Centers for Medicare and Medicaid Services (CMS), recently issued a letter that proposes less use of the HealthCare.gov website and greater use of private brokers and insurance companies, targeting Jan. 1, 2018, effective plans.<sup>22</sup>

## F. Individual Mandate and Penalties

One of the hotly litigated issues surrounding the ACA was the individual mandate.<sup>23</sup> The individual mandate requires individuals to maintain minimum essential coverage, for each month, for the individual and the individual's dependents. The penalty for noncompliance is either a percentage of the person's household income in excess of the return filing threshold [for 2017, 2.5 percent of income above the threshold<sup>24</sup>] or a flat dollar amount [for 2017, \$695 per adult or \$347.50 per child, and \$2,085 family maximum], whichever is greater.<sup>25</sup>

The current draft of the AHCA reduces the individual mandate penalty described above down to zero, retroactively to all months beginning after Dec. 31, 2015.<sup>26</sup>

## G. Individual Tax Credits

The ACA provides individuals with a refundable tax credit, also called a subsidy, in certain circumstances.<sup>27</sup> An individual is not eligible for the tax credit if he or she is eligible for Affordable, Minimum Value, employer-sponsored health coverage. There are several tax

credit requirements<sup>28</sup>, but it generally applies on a sliding scale based on a household income range from 100 percent of the federal poverty line (full credit) to up to 400 percent of the federal poverty line (credit fully phased out). For one person in 2016, 400 percent of the federal poverty line was approximately \$47,000 per year (\$63,720 for a family of two). The credit itself is calculated based on the difference between the individual contribution and the premium.

The current draft of the AHCA makes several changes to the individual refundable tax credit. First, an individual is not eligible for the tax credit if he or she is eligible for any employer-sponsored health coverage (eliminates Affordability and Minimum Value factors). Second, the sliding scale calculation for federal poverty line requirements will not apply for taxable years beginning after Dec. 31, 2017, and before Jan. 1, 2020. Instead, the tax credit will use a sliding scale based on modified adjusted gross income, phased out for income starting at over \$75,000 for a person filing single.<sup>29</sup> Third, the credit will not be available if the individual exchange insurance policy includes coverage for abortions, for taxable years beginning after Dec. 31, 2017.<sup>30</sup> Fourth, the credit is not determined based on actual premiums paid, it is a straight age-banded sliding scale.<sup>31</sup> Fifth, the tax credit is available regardless of whether an individual purchases the insurance on the exchange.<sup>32</sup>

We anticipate that employers and

18 The overall ACA penalty applies to all employers except those offering “governmental plans.” The overall ACA penalty applies to employers offering “church plans.”

19 IRC 4980D, subject to certain minimum and maximum excise tax thresholds.

20 Note that “full-time equivalent” employees for purposes of the small employer tax credit is defined very differently than full time equivalent employees for purposes of determining Applicable Large Employer status.

21 See a later footnote regarding abortion coverage in the context of individual tax credits. The definition of abortion coverage is nuanced and continues to be the subject of debates. The apparent legislative intent is to follow the so-called Hyde Amendment, which bars use of federal funds to pay for certain types of abortions.

22 CMS Letter, dated May 15, 2017, at: <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/The-Future-of-the-SHOP-CMS-Intends-to-Allow-Small-Businesses-in-SHOPs-Using-HealthCaregov-More-Flexibility-when-Enrolling-in-Healthcare-Coverage.pdf>, visited May 18, 2017. Some news sources inaccurately reported the CMS Letter as though SHOPs were going to disappear altogether. CMS issued two additional letters during the week of May 15, 2017, which indicate an intent to structurally change HealthCare.gov for individual coverage as well.

23 IRC 5000A.

24 The applicable income filing threshold is based on filing status and age, ranging from gross income excesses of \$10,350 up to \$23,200.

25 IRC 5000A(c). Total penalty is capped at the national average premium for a bronze level health plan available through the exchange.

26 See AHCA Section 205. We anticipate that CPAs may experience an increase in filing amended Form 1040s for the 2016 taxable year for individuals who will be seeking a refund for penalties paid.

27 IRC 36B.

28 The tax credit is available for individuals that: (1) have a certain household income range; (2) do not file as Married Filing Separately; (3) cannot be claimed as a dependent by another person; (4) have health insurance from the individual exchange marketplace; (5) are not eligible for Medicaid, Medicare, CHIP, or TRICARE; and (6) pay a share of premiums not covered by an advance credit.

29 See AHCA Section 215(c).

30 The definition of abortion coverage has a nuanced background. Policies may cover abortions necessary to save the life of the mother or any abortion with respect to a pregnancy that is the result of an act of rape or incest. Further debates include concepts about “medically necessary” abortions versus “elective abortions” and the general notion that federal tax credits are not available for policies that cover elective abortion. Nothing prohibits an individual from securing separate abortion coverage, provided that no tax credit is offered for such separate coverage.

31 See AHCA Section 215(c).

32 See AHCA Section 202(a)(1)(A). If there is no enticement (individual subsidy) to offer insurance policies on the individual exchange, many are wondering whether fewer insurance companies will offer exchange policies.



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employees alike will be watching AHCA carefully with respect to the reporting and certification obligations. The AHCA would require an employee to obtain a statement from his or her employer to determine whether the employee has been offered employer-sponsored health coverage in connection with their employment.<sup>33</sup> Some professionals are wondering how often an employer might be required to make such statements and whether the obligation will be ongoing throughout the entire taxable year. In addition, there is a new proposed reporting obligation under the AHCA that would require employers to report on Form W-2 “each month with respect to which the employee is eligible” for employer-sponsored health coverage.<sup>34</sup>

Below is a chart of the allowable credits, age-banded (age measured as of the beginning of the taxable year). At right are two example charts of the modified adjusted gross income thresholds

Age	Credit (stated Annually; calculated Monthly) <sup>4</sup>
Under 30	\$2,000
30 - 39	\$2,500
40 - 49	\$3,000
50 - 59	\$3,500
60 and Over	\$4,000

## Modified Adjusted Gross Income Thresholds

The example charts below (one for single filing status and one for married filing jointly status) show the modified adjusted gross income (MAGI) thresholds, phased out using different scenarios to illustrate age-banding and filing status.

MAGI	Single, Age 29	Single, Age 61	Single, Age 35, 2 Dependents
<b>\$75,000</b>	\$2,000	\$4,000	\$6,500
<b>\$85,000</b>	\$1,000	\$3,000	\$5,500
<b>\$95,000</b>	\$0	\$2,000	\$4,500
<b>\$105,000</b>	\$0	\$1,000	\$3,500
<b>\$115,000</b>	\$0	\$0	\$2,500
<b>\$125,000</b>	\$0	\$0	\$1,500
<b>\$135,000</b>	\$0	\$0	\$500
<b>\$145,000</b>	\$0	\$0	\$0
<b>\$155,000</b>	\$0	\$0	\$0

MAGI	Married, Both age 29	Married, Both age 61	Married, Both 35, 2 Dependents
<b>\$150,000</b>	\$4,000	\$8,000	\$9,000
<b>\$160,000</b>	\$3,000	\$7,000	\$8,000
<b>\$170,000</b>	\$2,000	\$6,000	\$7,000
<b>\$180,000</b>	\$1,000	\$5,000	\$6,000
<b>\$190,000</b>	\$0	\$4,000	\$5,000
<b>\$200,000</b>	\$0	\$3,000	\$4,000
<b>\$210,000</b>	\$0	\$2,000	\$3,000
<b>\$220,000</b>	\$0	\$1,000	\$2,000
<b>\$230,000</b>	\$0	\$0	\$1,000
<b>\$240,000</b>	\$0	\$0	\$0

## H. Account-Based Health Benefits: HSAs, FSAs, HRAs

Health Savings Accounts (HSAs) have several component features that could change under the current draft AHCA. Notably, the annual contribution limits are almost doubling and have been set to mimic the total annual out-of-pocket

maximums that can apply to high deductible health plans. The AHCA further contemplates an account set-up grace period that would permit reimbursements with HSA dollars for expenses incurred during the initial 60 days of high-deductible health plan coverage provided that the HSA is established within the 60-day period.

Health Flexible Spending Arrangements (Health FSAs) would have at least two features from pre-ACA that might come back again:

The ACA made several changes for Health Reimbursement Arrangements (HRAs), such as formally defining an HRA as a group health plan and

correspondingly requiring an HRA be “integrated” with an employer-sponsored health plan that satisfies the coverage mandates (e.g., first dollar preventive care coverage). The AHCA is silent regarding general HRA structure, which means it leaves HRA group health plan restrictions intact. For reimbursements, the AHCA proposes to allow all over-the-counter drug expenses for HRAs. Further, the 21<sup>st</sup> Century Cures Act (passed in December 2016) created a Small Employer Qualified HRA, or QSEHRA, that entitled small employers to a new tax credit. The current draft AHCA disallows QSEHRA tax credits if the plan pays for abortions, effective Dec. 31, 2017.

<sup>33</sup> See AHCA Section 215(b).

<sup>34</sup> Discussions are starting to surface about the implications for using Form W-2 rather than modifying the existing health coverage reporting on Forms 1094 and 1095. If the reporting remains on Form W-2, the codes could be fairly complicated in order to capture several variations of month-to-month coverage offers. If the reporting shifts to Forms 1094 and 1095, the employers who already invested significantly in resources and tracking to complete the original forms should anticipate substantial form changes.

## I. Other Taxes and Credits

There are a few other taxes and credits that have been getting attention with the AHCA. Most of these are loosely considered negotiating items or issues that can be added or dropped to achieve budget neutrality.

**COBRA Subsidies:** The AHCA was originally proposed to include tax credits to pay for COBRA coverage that is unsubsidized. The COBRA subsidy language was removed in a subsequent manager's amendment to the AHCA, but it remains a negotiating chip for future discussions.

**Age-Banded Rating Ratio:** The AHCA includes a change to the allowable difference in age-banded rating. The ACA only allows a 3-to-1 ratio difference between the premiums for the youngest person and the oldest person on a particular policy. The AHCA increases the age-band ratio to 5-to-1 for those states that request the increased ratio, for plan years beginning on or after Jan. 1, 2018.<sup>35</sup>

**Cadillac Tax Delay:** The largely unpopular ACA Cadillac Tax<sup>36</sup> is currently under a temporary delay. It is no surprise that the AHCA also delays the Cadillac Tax, to Jan. 1, 2025.<sup>37</sup> There seems to be support on both sides of the aisle for some type of delay with the Cadillac Tax, but not complete repeal, because it continues to play a role in balancing out the 10-year budget neutrality goal.

**Net Investment Income Tax:** As of Jan. 1, 2013, the ACA includes a 3.8 percent tax on net investment income items for individuals with modified adjusted gross income above \$250,000 (married filing jointly). The taxed items include interest, dividends, capital gains, rental income, royalty income, and certain passive activities. The current proposed AHCA repeals net investment income tax, effective for taxable years beginning after Dec. 31, 2016.<sup>38</sup>

**Health Insurance Tax:** The ACA includes a health insurance tax (HIT), calculated based on a health plan's gross premiums over \$25 million. The current proposed AHCA repeals HIT, effective for

<sup>35</sup> See AHCA Section 135.

<sup>36</sup> Cadillac Tax, as originally set forth under the ACA, would impose a 40% excise tax on the value of employer sponsored plans exceeding \$10,200 for individuals and \$27,500 for family coverage, indexed for inflation.

<sup>37</sup> See AHCA Section 207.

<sup>38</sup> See AHCA Section 251, see also manager's amendment for new effective date.

## Health Savings Account Comparison

	Current Law	Draft AHCA
Annual Contribution Limit, Self-Only Coverage	\$3,400, indexed	\$6,650, indexed
Annual Contribution Limit, Family Coverage	\$6,750, indexed	\$13,300, indexed
Catch-Up Contributions	Only allowed for the account-holder	Allowed for both account-holder and spouse
Over-the-Counter Drugs	Only allowable if under a prescription (except insulin)	Allowable expense
Distribution Tax for Non-Medical Expense	20% tax rate	10% tax rate (effective 2017)

## Flexible Spending Arrangement Comparison

	Pre-ACA	Current Law	Draft AHCA
Annual Contribution Limits	No limit	\$2,500, indexed	No limit (after 12/31/2017)
Over-the-Counter Drugs	Allowable expense	Only allowable if under a prescription (except insulin)	Allowable expense

calendar years beginning on Jan. 1, 2017.<sup>39</sup>

**Medical Device Tax:** The ACA includes a 2.3 percent tax on the sale of medical devices. The current proposed AHCA repeals the medical device tax, effective for sales after Dec. 31, 2017.<sup>40</sup>

**Medicare Additional Tax:** As of Dec. 31, 2012, the ACA includes an additional Medicare tax of 0.9 percent, assessed on taxable earned income in excess of \$250,000 (married filing jointly). Technically, the Medicare portion of payroll taxes has historically been established at a rate of 1.45 percent. The ACA change implemented a rate of 2.35 percent for high-income earners. The draft proposed AHCA reverts Medicare taxes back to pre-ACA status, at just 1.45 percent for all income earners, effective for taxable years

beginning after Dec. 31, 2017.<sup>41</sup>

**Individual, Itemized Medical Expenses:** Individuals who qualify for federal income tax itemized deductions have historically been required to satisfy a floor of 7.5 percent of a person's modified adjusted gross income before being entitled to itemized deductions for medical expenses paid out of pocket. Effective as of Jan. 1, 2013, the ACA changed the itemized medical expense floor to 10 percent of a person's modified adjusted gross income. The current draft AHCA, through a manager's amendment, includes a change to the itemized medical expense floor to 5.8 percent, for taxable years beginning after Dec. 31, 2016.<sup>42</sup>

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<sup>39</sup> See AHCA Section 222, see also manager's amendment for new effective date.

<sup>40</sup> See AHCA Section 211.

<sup>41</sup> See AHCA Section 214.

<sup>42</sup> See AHCA manager's amendment #5.



# Serving on a nonprofit board can be fun and rewarding — but don't ignore the risks

Mark Bassingthwaighe, Esq.  
ALPS Risk Manager

Look, I get it. An opportunity to sit on the board of a local nonprofit is finally yours for the taking. Better yet, it's a charitable cause you strongly believe in, the opportunity will allow you to get your name out there, and one would expect that the new contacts made will lead to new clients down the road. Your desire is to accept because the bottom-line is you will be able to give back to the community in a meaningful way in exchange for the marketing and business benefits of your donated time. Works for me as long as you remember our ethical rules are in play and, as a director of a nonprofit, so too are certain duties.

Before discussing the consequences of accepting this opportunity, let me share one thought that can make life so much easier. Sitting on a nonprofit board starts to get messy when the attorney board member wears two hats. In a number of situations the nonprofit is seeking attorney board members because the board hopes to have the attorney handle a little legal work on a pro bono basis. There is an obvious solution here that allows you to avoid so many of the issues I'm about to discuss. Keep it clean. Say no to sitting on the board and offer to serve as outside counsel on a pro bono basis instead. The opportunity to give back to the community remains and you have not lost the marketing and business benefits of being involved with the nonprofit.

That said, the title of board member is enticing so let's talk about the issues and we'll start with your duties. The duties of an attorney-director are codified in some states and arise from common law obligations in others. There are duties of care, loyalty, and obedience and be aware that the attorney-director will often be held to a higher standard than non-attorney directors due to the fact that he or she is an attorney. At its most basic level, the attorney-director must be willing and able to devote sufficient time and attention to the matters of the nonprofit in order to ensure that all duties and responsibilities are discharged in good faith. In addition, the director must always act in the best interests of the nonprofit as well as be obedient to the organization's founding principles. Stated another way, directors of nonprofits can be sued by donors for failing to hold true to the nonprofit's mission. I share all this because the decision to sit on a nonprofit board is one not to be taken lightly.

As a risk management and ethics guy, however, I'm more concerned about our rules of professional conduct and how

they play out in this setting. At the outset, many of the concerns I'm about to discuss can be easily avoided if you limit your participation to serving solely as a director and commit to never giving the nonprofit any legal advice, other than perhaps identifying situations where legal advice should be obtained. While not completely risk free, this approach will help minimize the concerns.

Regardless, the reality is many attorney-directors will wear two hats by agreeing to serve as a board member and to provide legal advice and/or services to the nonprofit. The consequence of making this decision is that the issues of independence, conflicts of interest, and attorney-client privilege must now be addressed. We'll start with a few questions. What if you are asked to put your attorney hat on for the purpose of taking an action on the nonprofit's behalf related to an issue that you opposed while wearing your director hat? In short, how can you as an attorney-director maintain professional independence and responsibly voice objections while serving on the board of a client? Navigating these waters can be problematic to say the least; but let's cut to the chase. Never allow yourself to become a rubber stamp for the decisions of the board because sometimes what's good for business doesn't jibe with what the law requires.

Now let's add conflicts into the mix. Can you vote as a director on your own legal advice? I would encourage you not to; but wouldn't abstaining from voting as a director be a disservice to the nonprofit, particularly if this were to occur on a regular basis? What if the board decides to sue another client of your firm? What if you make charitable donations to the nonprofit and shortly thereafter you are hired by the board? While having some type of conflict of interest policy in place with the board can help – and I would strongly encourage you to see this is done – it will be an imperfect solution.

And finally, the attorney-client privilege problem. As an attorney-director many of your conversations will include business and legal advice. How will others know when are you wearing your attorney hat and when are you wearing your director hat? While you may try to address the problem by specifically noting in board minutes that your advice is strictly legal advice, if non-privileged business advice is also part of the discussion you haven't accomplished much. Making matters worse, there can be confidentiality problems because outside donors may have certain rights to review the board minutes

*Now that you know what you need to think about, go for it. Go out and make the world a better place. Serving on a nonprofit board really can be a fun gig.*

# Thompson retiring after 12 years as chief disciplinary counsel at ODC

By JOE MENDEN  
Montana Lawyer

Chief Disciplinary Counsel Shaun R. Thompson has been at the helm of the Office of Disciplinary Counsel (ODC) for most of the office's existence. At the end of this month, Thompson will hand over the reins to a new chief.

Thompson, 65, recently informed Chief Justice Mike McGrath that he will retire after 12 years in the position, effective June 30.

Thompson was appointed disciplinary counsel by the Montana Supreme Court in July 2005, three years after ODC's inception.

Some things about working at ODC are inherently difficult, he said – mainly dealing with some unpleasant people, some of them complainants and some attorneys. Still he has enjoyed his time there.

"I would like to think that ODC, over the years I've been here, has improved the profession and protected the public," he said. "It's a work in progress. You can never be complacent or completely satisfied, but I believe during my tenure, the office now has stability, and the staff functions well. I'm pleased overall with where we're at. There's always room for improvement."

"On a more personal note, I enjoy the interaction with ODC staff. I'll miss that."

Thompson said he weighed the usual factors people look at when considering retirement. But a big part of the decision is that it will give him more time to visit his kids. His two sons live in Washington, D.C., and Los Angeles. The oldest has two of his own children, one who was just born this spring.

"The bottom line is, whatever quality time I have left, I don't want to spend it sitting in an office," he said.

Thompson intends to take time off, travel, and visit family – he says he just booked a trip to the Cayman Islands in



Shaun Thompson, who has been chief disciplinary counsel at the Office of Disciplinary Counsel since 2005, is retiring effective June 30.

January. He is still considering whether to continue his legal career, which has spanned 40 years.

Thompson's accomplishments during his tenure at ODC include:

- processing nearly 4,000 grievances, prosecuting cases resulting in 180 orders for sanctions or transfers to disability inactive status involving 123 attorneys (30 of those were sanctioned multiple times; 26 attorneys were disbarred);
- initiating or participating in extensive revisions to the Montana Rules for Lawyer Disciplinary Enforcement.
- winning the 2016 Frank I. Haswell Award for outstanding article in the Montana Lawyer magazine;
- negotiating a Memorandum of Understanding with the State Bar of Montana to resolve boundary issues between the two entities;
- moving out of the Court Administrator's Office into private

offices in downtown Helena;

- petitioning the court for an assessment increase, which was granted; and
- increasing staff from three persons to six, including Deputy Disciplinary Counsel Jon Moog.

"To the extent I accomplished anything during my tenure, it was a team effort by the entire ODC staff," Thompson said.

And for every unpleasant person he's dealt with, he said, he has met many more great people.

"I would like to thank the court for the opportunity to serve the legal profession and the public. I believe being disciplinary counsel has given me the opportunity to not only render a public service but allowed me to meet a lot of people I wouldn't have normally met and to do things I wouldn't have had the chance to do if I hadn't been disciplinary counsel."

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

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# Moore, longtime rancher, lawyer and 2006 Jameson Award winner dies at age 89

Perry James Moore III, the 2006 winner of the State Bar of Montana's William J. Jameson Award, died in Bozeman on May 19. He was 89.

Moore, who was called "Jim" throughout his life, was born on Dec. 21, 1927, in Lewistown. He lived most of his life on the family ranch in Two Dot, finding time to study the law and pass the bar all while managing the ranch and raising a family.

Jim finished elementary school at the two-room schoolhouse in Two Dot, and after graduation from Harlowton High School in 1945 he enlisted in the Navy. World War II having ended, he was discharged in 1946 and returned home to continue his studies.

While at Montana State College studying agricultural economics, Jim was a member of the original college rodeo team, riding bulls, saddle broncs and bareback horses, even competing at the Cow Palace in San Francisco. It was through rodeo that Jim met Kathryn Nash, who was also an excellent equestrian, and remains one to this day.

Jim and Kate were married in 1954 and remained together for 63 years, raising three children.

After graduation, Jim took over some of the ranch management responsibilities from his father, and when his father died, he took over the whole operation.

Even as he was juggling responsibilities with the ranch and a growing family, Jim found time to enroll in a correspondence course in law, studying during winter days when ranching slowed down.

He passed the Montana Bar Examination and was admitted to the



Perry James "Jim" Moore

practice of law in 1967. He was elected to the Montana Senate the same week. He then began his law practice with Gordon Hickman in Harlowton, earning \$7,000 during the first year. He told family members with a grin, "I couldn't charge my friends and neighbors."

In 1975, he opened a law practice in Bozeman but continued to manage the ranch, which he said was "only possible because of reliable ranch employees and an extraordinary employee at the law office." In 2006, Jim, who had retired from law in 1997, received the Jameson Award from the State Bar of Montana, given to an attorney who has exemplified the

highest values of the legal profession.

Jim served three sessions in the Senate and was selected by his colleagues as the Republican Minority Leader for his last two. People admired his ability to listen and deliver measured but direct responses in a discussion, a trait that he passed on to his children. He had an interest in hearing other people's stories and never failed to say in his crisp way, "Well, tell me about yourself." He loved talking politics with his brother-in-law, Harry Cosgriffe, the two on opposite sides of the fence. There was a lot of chuckling on both parts. Having a severe hearing loss in later life was particularly difficult for Jim, a social and likable man, although he handled even that with humor.

Jim and Kay had three children, who like their father were educated at the Two Dot Grade School, Harlowton High School, and Montana State University.

Jim spent his retirement years tending to his pristine two-acre lawn, advising family members (never without being asked), and writing fiction, including one volume of short stories and five novels, all published by Janet Muirhead Hill. He could spin a good yarn, a trait he inherited from his father. His stories were influenced by his background as a rancher and lawyer.

Jim was empathetic with Native Americans and published an article in Montana Magazine about their plight. He told family members with regret that his grandfather homesteaded in Montana, as many did, and "ran off the Crows."

Contributions in Jim Moore's name to Resurrection Parish in Bozeman would be appreciated.

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## George W. Huss

George W. Huss, a prominent attorney, former District Court Judge, loyal friend, loving grandfather, and tireless scholar, passed away May 11, 2017, after suffering a series of major myocardial infarctions.

He was born July 6, 1949, in Miles City to the late Dewey M. Huss and Elizabeth



Huss

A. Huss. He was an honors graduate of St. John's University in Collegeville, Minnesota, and the University of Montana School of Law.

After law school, Huss returned to Miles City to practice law alongside his father in 1976 and for nearly 36 years provided legal counsel to countless eastern Montanans, many of whom rewarded him with their friendship. He continued to practice law until he became 16th Judicial District judge in January of 2013. Huss was an avid student of the law and was honored to be elected judge. During his time on the bench he worked tirelessly to

upgrade the information and communications systems to ensure that the 16th Judicial District was fully digital capable. He also traveled throughout the state assisting other judicial districts. He retired from the bench in 2016 after suffering health problems.

Concurrent to his professional life, Huss devoted himself to the local community. He was elected and served in the Miles City Council and spent a number of years as the city attorney. One of his greatest joys in life was serving alongside the Miles City Fire Department as a part-paid fireman and EMT, a place where he established many lifelong friendships. He was one of the people responsible for the revitalization of the historical Miles City Club where he served as a director, president, and historian. As a result he became a history buff and authored several monographs and lectured about the history of eastern Montana and Wyoming.

Should friends desire, in lieu of flowers, donations may be made to the Custer County Art & Heritage Center or the charity of one's choice. Condolences may be sent to the family by visiting: [www.stevensonandsons.com](http://www.stevensonandsons.com).

## Deborah Harten-Moore

Deborah "Deb" Harten-Moore, 68, died in May 2016 in Seattle, after a brief illness.

She was born in Altoona, Pennsylvania, daughter of the late Emes and Cleova Harten.

Deb received a Bachelor of Science degree in journalism from Penn State University, a Bachelor of Science in psychology from University of Pittsburgh and a Juris Doctor from University of Montana School of Law. She practiced law as a prosecuting attorney in Montana, and she was a member of the United States Court of Appeals for the 9th District, serving as attorney and counselor. She was admitted to the United States District Court and served as a clerk on the Montana Supreme Court.

She retired to do what she loved: spending time with her husband, Robert, stepsons, step-grandchildren and her four rescue dogs.

A Buddhist memorial ceremony was given to her by her stepson Shawn and his wife, Nadia.

Memorials may be made to animal rescue shelters or organizations.

## HEALTH, from page 22

### III. Conclusions

A few disclaimers are in order. This article is not meant to be all-inclusive of the AHCA provisions. Most of the analysis is focused on the employer's obligations as a plan sponsor. Further, I have purposefully left out the discussion about Medicare. No doubt, the AHCA makes significant changes to Medicare provisions, but it is

also one of the most hotly debated topics under the AHCA that could see equally significant changes during the Senate process. The AHCA state stability fund grants are one other item missing from this article. Those grants attempt to address potential state waivers of EHBs and risks associated with high health cost individuals. A better discussion of the state stability grants and high cost health care can be found in the May CBO report. Finally, this article is merely a snapshot in time

and by the time this article reaches print in the Montana Lawyer many of the AHCA provisions may have changed.

**Kristy Buckley is a partner in the Bozeman office of Crowley Fleck PLLP, practicing in employee benefits law. The Health Care Reform compliance team at Crowley is continually monitoring legislative activity. If you have questions about Affordable Care Act compliance or potential new federal legislation, you can contact her at 406-522-4522 or [kbuckley@crowleyfleck.com](mailto:kbuckley@crowleyfleck.com).**

## NONPROFIT, from page 23

and/or non-attorney directors may disclose the communication for business reasons. Either way privilege is lost. This is why it is so important for the attorney-director to fully inform the client and the board of the potential risks relating to loss of privilege and this should always be done in writing.

Please understand that my intent in sharing this cursory overview of the risks associated with sitting on nonprofit boards is not about trying to talk you

out of agreeing to do so. It's quite the opposite actually. I would encourage you to participate if and when these kinds of opportunities arise. Speaking personally, I do believe that giving back to the community in this fashion is a wonderful gift for an attorney to give. All I am trying to do is to see that you are informed in order to help you make decisions about how to give back in a way that will hopefully garner the greatest rewards for all involved. Now that you know what you need to think about, go for it. Go out and make the world a better place. It really

can be a fun gig.



**ALPS Risk Manager Mark Bassingthwaite, 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. You can contact him at: [mbass@alpsnet.com](mailto:mbass@alpsnet.com).**



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