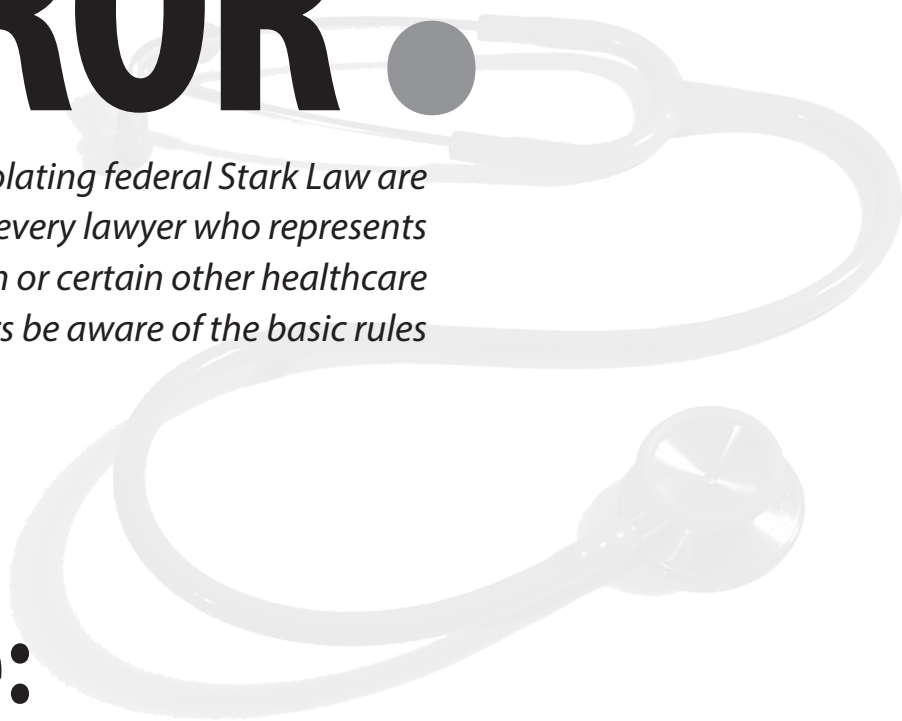
MONTANA LAWYER
State Bar of Montana
April 2014 | Vol. 39, No. 6

STARK TERROR!

The consequences of violating federal Stark Law are severe. It is essential that every lawyer who represents a hospital, a physician or certain other healthcare services providers be aware of the basic rules



Also inside:

Medicaid look-backs, exploitation and the elderly | Awards nominations needed | Court summaries

Law Library staff and resources at the ready | Retirement planning | FBI fraud alert | President's message

2013 pro bono report | and more ...

MONTANA LAWYER

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Correction for March edition: Email address for the "LAW OFFICE FOR SALE" classified on page 47 was incorrect. The correct address is rectorlo@nemont.net. Full ad on page 31 in this edition.

PAID ADVERTISEMENT

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Whitefish, MT Stuart, FL

Open Letter to Montana's Lawyers

Although I know a few of you, I have not had the pleasure of meeting or working with the vast majority of you. I would like to take this opportunity to introduce myself as a full-time dispute resolution professional, offering mediation and arbitration services throughout Montana.

Fifteen years ago my wife and I visited and fell in love with the great state of Montana. In 2001, twenty-five years after graduating from law school, I sat for and passed the Bar Exam in Montana and have been a member of the Montana Bar since that time. I have continued to offer my dispute resolution services, full-time, in the state of Florida. However, I am pleased to announce that I will be expanding my geographic area of practice to include all jurisdictions in Montana, commencing in the summer of 2014. Let me explain a little about myself and why I believe I have something of value to offer you and your clients in the areas of mediation, arbitration and Special Master services.

After serving two years as a paratrooper in the 82nd Airborne Division in Fort Bragg, North Carolina, I graduated from law school, with the assistance of the G. I. Bill, in 1976. I am a Florida Bar Board Certified Civil Trial Lawyer, Emeritus, and a Florida Certified Circuit Civil, Family, and Appellate Mediator. As a trial lawyer I represented private and public sector clients in hundreds of millions of dollars of disputes in complex construction, commercial, real estate, and probate matters throughout the state of Florida. Since 1991, I have mediated thousands of disputes, served as an arbitrator on single and multi-member panels and served as a Court Appointed Special Master on many occasions. In 2001, I left the active practice of law, transitioning into a full-time dispute resolution practice and continuing my focus on complex, multiparty disputes.

During the summer of 2014, I have blocked out five weeks of time available for mediation and arbitration matters in the state of Montana. I will be offering my professional services at discounted half and full day rates throughout the state, with no charge for travel time – only a mileage charge from Whitefish. It is my goal to earn your trust and eventually increase the amount of time I can designate for dispute resolution services in Montana. I hope to have the opportunity to work with each of you in your respective areas of practice in the future. I am proud to be a Member of the AAA's Roster of Neutrals, in both Mediation and Arbitration, and a charter member of the National Academy of Distinguished Neutrals. I will gladly provide references, if desired. More detailed contact information and my c.v. are available on my website, at **www.hunstonadr.com**.

I look forward to meeting and working with you this summer, as your needs may require.

Sincerely,

Face-to-face meetings keep us grounded

Journal of Meriwether Lewis, March 22, 1806:
[Chief Coboway] has been much more kind an[d] hospitable to us than any other indian in this neighbourhood.

Coboway was chief of a village in Oregon where the Corp spent its final winter before their return trip. Coboway frequently visited the expedition at Fort Clatsop throughout the winter. He traded a sea otter pelt for fishhooks and a bag of tobacco. When the expedition nearly exhausted the local elk herd, the Clatsops told the Corps that a whale had washed ashore some miles to the south.

My travels don't approach a 17th century expedition. But the patterns and lessons are instructive. Last week the Bar's Executive Committee visited Great Falls, holding its March meeting at a local firm, then joining the Cascade County Bar's monthly gathering. These exchanges are one of the best things we do. That and it was Western Art Week and the C.M. Russell Auction. I missed the auction, but read that a single piece, "Horsetalk" aka "Offering a Truce" brought a record $1.25 million. Not even my favorite.

Meeting up with the local bar keeps us grounded. Talking about Bar-sponsored legal research for members (Fastcase – firing up in June), outlining what'll be new at the convention at Big Sky; and what's happening with the District Judge substitution petition. It's all been in print, but you can't beat face to face dialogue. I like questions from members I can't easily answer – a lesson that we always need to rethink what we do for folks.

And better yet is simply knocking on doors. It's always friendly, but never predictable. Kind of like Russell's "In Without Knocking," which I do love.

Like Lewis and Chief Coboway, we don't know what to expect & sometimes talk pretty different – I seemed to find litigation or personal injury folk this trip. One visit likened to riding a horse into the hotel. But we trade stories; I'll pass out a Deskbook where needed. We trade. Some folk save up just to unload their frustration with a rule, the court or whatever the State Bar doesn't do right. I may not have a good answer, but we'll never know what's gnawing at you unless we ask. Mostly just good stories.

C.M. Russell's "Offering a Truce"

Like Lewis and Chief Coboway, probably won't meet up again. But we're better for sharing that coffee. So thanks for the visit! If I missed you and you got the itching and a spare moment, drop a note, give a call or you just come on in. This legal stuff can be a tough go – best if we keep talking. In our Master's words,

When you come to my lodge the robe will be spread and the pipe lit for you.

Yer Chief Deputy
Randy Snyder
(406) 837-4383
rsnyder@rsnyderlaw.us

Notes From the Trail: February to March

How 'bout this winter that won't let go? I haven't driven so many darn awful roads in . . . well, in a long while. Here's the latest from the snowy trail:

- **Law School Clerk's Presentation, February 18.** In our next to last presentation to the law students, the State Bar gathered some former clerks and judges and answered student's questions on this unique form of first practice out of school. About 30 such positions offer students a unique experience at federal, district court and Montana Supreme Court levels. Thank you to the presenting judges and attorneys for your time.
- **"Miner's Bar" to reform for Butte-area Attorneys, February 21.** We ignored some weather advisories and headed south to Butte to meet up with the local group there. Past President & Professionalism Committee Chair Peggy Probasco invited counsel from surrounding areas to reactivate a regional Bar Association for local fun, education & benefit. Appropriately, we met at the "Metal's Bar" just as the U.S. Hockey team lost to Canada, 2-1. Unfortunately,

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risky roads & snow kept folk home. Still a good group arrived, shared lunch and discussed future plans. The State Bar Executive Committee met by phone shortly after & we then hit the trail for home, trying to beat the bad roads.

- **Presentation to Yellowstone Area Bar Association.** Friday morning, February 28 greeted us with one of the best, late-winter blizzards on the chart. Dampened attendance a tad, but a still enthusiastic group met for the Where's the Boundary CLE, a fun discussion of history, old maps, wagon roads and Montana's early boundary law. Billings is also the only proud town to have an "over 60" club of counsel who meet from time to time. Careful now, we're almost qualified members. Unfortunately, pretty bad roads forced the coach to head west and north again. About as rough a ride as Montana has to dish out, but lots fresh snow.

- **Rekindle 20th District Bar.** Sometimes our best work is encouraging local members and bars. We met with a spirited group on March 20 at the Thai restaurant in Polson. (Don't order extra hot.) Thanks to County Attorney Mitch Young for bringing his entire posse! This group's already planning their first CLE and meeting. Watch for Wanted Posters.

- **Stage Stop in Great Falls.** The Posse wandered to Great Falls March 20th. Here's where Meriwether Lewis first laid eyes on that big waterfall – and the corps spent a month getting around them – going right through the south side of town. Wished we'd have known it was Western Art Week and Charlie Russell's 150th birthday. Art in every hotel, events all week and of course the big auction Friday night, March 21st . I knocked on a few doors – mostly meeting friends and classmates from my hometown. A fraternity brother from college had no idear I was chief – only read our magazine to see who'd gone to final reward! Worth pondering – there's more than a few of our members who'd hardly know they have an Association but for dues & CLE requirements. Got an earful that hour – but well worth hearing all sides from members. Only way we'll know what you want or need is to ask.

20th District Bar meeting in Polson.

The Executive Committee gathered at 2:30. Chris, Mike Larson, the Great Falls Trustees and I met at the Fauer, Holden firm (Thanks Bruce, for remembering it used to be the Taco Treat) for high level talks. Great looking, new office, complete with chocolate lab to greet you.

We adjourned in time to head down to "Machinery Row" to meet up with the Cascade County Bar. Kinda informal gathering with refreshments sponsored by rotating firms. We deputized local chair Paul with the official red scarf and deputy's badge. And then shared news & events about Fastcase, the upcoming annual meeting, District Judge substitutions, questions & answers from the group & awards for trivia questions. (Wine still wins over CLE certificates.)

Dang if we didn't drive through another blizzard back to the Flathead – and fresh snow as we pen this. We're back home in the Flathead, happy to have the coach in the garage and supper cookin' by the fire. March 26 we head to Western States Bar Conference in sunny California. No more long underwear! We'll take notes & send postcards. 'Til then, keep the campfire going and that coffee warm. I hope see your town soon!

MLSA executive director selected for health/law fellowship


Paul

Montana Legal Services Association (MLSA) Executive Director Alison Paul has been selected for a national fellowship in the "Where Health Meets Justice" program. This fellowship was awarded to 24 leaders providing legal aid to the poor and is designed to improve the intersection of health and the law in each of their communities.

The program, a collaboration of the National Center for Medical-Legal Partnership (MLP) and the National Legal Aid and Defender Association (NLADA), with funding by the Public Welfare Foundation, will build healthcare expertise in the legal aid community so that organizations such as MLSA can better meet the legal needs of clients that affect their health.

"Legal needs related to housing, domestic violence and public benefits are inextricably linked to the health and well-being of low-income communities," said Camille Holmes, Director for Leadership and Racial Equality at NLADA. "For decades, civil legal aid offices have worked to improve housing conditions, protect utility access and appeal benefit denials. But what has been missing is a concerted effort to align these services with the delivery of healthcare for the same populations. This fellowship aims to remedy that."

MLSA is a nonprofit law firm that empowers low-income people by providing legal information, advice, and other services free of charge, thereby protecting and enhancing the civil legal rights of, and promoting systemic change for, Montanans living in poverty.

While MLSA has a long-standing partnership with Riverstone Health in Billings to assist with the legal needs of its patients, participation in the fellowship program will allow MLSA to learn new funding strategies and opportunities within the healthcare sector, as well as to strengthen the organization's tools and processes for providing exemplary services across the state.

Paul joins twenty-three other senior level staff from legal aid agencies in 21 states, the District of Columbia and Puerto Rico as inaugural fellows. During the year-long program, a faculty of national experts in healthcare administration, policy, research and economics will guide the fellows.

Luxan & Murfitt welcomes back Hopgood


Hopgood

Luxan & Murfitt, PLLP, is pleased to announce that former partner, Tom Hopgood has rejoined the law firm in an of-counsel role. Tom has practiced law for 35 years. He has represented clients before state courts, federal courts, and administrative agencies, and as a lobbyist before the Montana Legislature. He has served as associate general counsel for a large natural resources and energy company. Senior partner Candace Payne said "We are glad to have him back. His experience will go a long way in helping us continue this firm's tradition of providing the best legal services to its clients at a reasonable cost." Tom's practice will focus on natural resources, general business and government relations.

Women's Law Section annual dinner

The Women's Law Section is pleased to invite you to attend our Annual Spring Dinner to celebrate and honor women in the legal profession. At the dinner, we will announce the winners of the Fran Elge Scholarship and the Margery Hunter Brown Assistantship.

WHERE: The Bonnie Heavyrunner Gathering Place in the Payne Family Native American Center. Located on the Oval of the University of Montana Campus next to the Grizzly statue

WHEN: Friday, April 25, 2014- reception begins at 6:30 p.m., dinner begins around 7:00.

RSVP: Kelly J. C. Gallinger by email at KGallinger@brown-firm.com or by phone at (406) 247-2824 by 5 p.m. on Friday, April 18th.

Event includes full dinner, including appetizers and dessert for $35/per person. The menu will also include vegetarian and gluten free options so everyone can fully enjoy the meal.

Crowley Fleck welcomes Good, Harkins, Mowry

Nathan J. Good is an associate in the firm's Bozeman Commercial Department. Nate focusses his practice on business, governance and transactional matters, including business structuring, formation and governance, mergers and acquisitions, and securities matters. Prior to joining Crowley Fleck, Nate was an associate in the Denver office of Hogan Lovells US LLP. Nate received his J.D. in 2008 from Duke University School of Law and received a B.A. in 2003 from Colby College.

Justin W. Harkins is an associate in the firm's Billings office. His practice includes all types of litigation, with an emphasis on natural resources and environmental law. Justin graduated from the University of Montana School of Law in 2013, where he served as treasurer of the Environmental Law Group and was on the editorial board of both the Montana Law Review and the Public Land & Resources Law Review. Justin worked as a clinical intern for U.S. Magistrate Jeremiah Lynch while in law school and was a Crowley Fleck summer intern in 2012 and 2013.

James L. Mowry is senior counsel in the firm's Sheridan Energy, Environment & Natural Resources Department. Prior to joining Crowley Fleck, Jim clerked for Honorable Norman Young in the Ninth Judicial District Court in Lander, Wyo.; served as a public defender for the State of Wyoming; was an associate with White & White, P.C. in Riverton, Wyo.; and was an Associate at Throne Law Office, PC in Sheridan, Wyo. Jim served as president of the Fremont County Wyoming Bar Association and as Vice-President of the Riverton Country Club.

On March 18, the Student Bar Association and the State Bar sponsored a panel presentation at the University of Montana School of Law. The panel included some exceptional attorneys: Pam Bucy, the director of the department of labor and industry; Kathleen Magone who is a bank trust officer; Annie Goodwin, chair of the Court's Commission on Character and Fitness, and who served as the state's Commissioner for Banking; Chris Newbold from ALPS. MC for the event was Shane Vannatta, State Bar president 2011-2012 and current ABA delegate. They spoke about working in a nontraditional legal setting. The students were very engaged and appreciated hearing about practice options.

New Lawyers Workshop and Road Show

Friday, June 13 in Helena at the Great Northern. New Format for both NLW and Road Show. NLW is 4.5 hours of ethics CLE. Road Show is 3 hours of ethics. Topics include: Cybersecurity, inadvertent disclosure of privileged information, social media, representing challenging clients and excellent fee agreements.

Bar seeks award nominations

Nomination forms for the William J. Jameson Award, George L. Bousliman Professionalism Award, Karla M. Gray Equal Justice Award, and the Neil Haight Pro Bono Award are available at www.montanabar.org. Gray and Haight forms are available on pages 10-11 in this edition. Jameson and Bousliman forms were printed in March. Information and criteria are listed on the individual awards.

Dues statements mailed March 1

The State Bar of Montana mailed annual dues statements to attorneys on March 1. Payments for all fees are due April 1 and can be made by check or online with a credit card. CLE transcripts will be mailed separately in April with a filing deadline of May 15.

ABA offers complimentary membership

Discover the value of the American Bar Association with a free ABA and section membership. ABA membership is more valuable than ever. New member benefits include CareerAdvice LIVE! which is a free monthly webinar series that offers practical tips from legal experts, as well as live and on-demand access to the Premier Speaker Series, our free CLE webinars. For additional information visit http://www.ambar.org/joinme . Offer expires May 31, 2014.

No more CLE affidavits?

Montana attorneys will no longer have to provide a notarized affidavit form to report their CLE activities. See about this and other changes to the CLE requirement and compliance process at MTCLE's new website: www.mtcle.org/lawyer/Frequently_Asked_Questions.asp.

Interested in learning about statewide E-filing?

The Montana Supreme Court has a developed an E-filing quarterly newsletter that will be published quarterly. Read the newsletter or get additional information through the Court's website http://courts.mt.gov/efile/default.mcpx.

1-888-385-9119

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 .

2013 Montana pro bono report

Value of attorneys' volunteer legal services approach $20M

The Montana Supreme Court and the State Bar of Montana are pleased to announce the results of the State's 2013 attorney pro bono report, which shows a significant increase in the number of attorneys providing free legal services. According to the report, more than 2,000 Montana attorneys volunteered in excess of 157,000 hours of free and substantially reduced fee legal services to low-income Montanans across the state in 2013. The value of pro bono legal services approaches $20M.

"Each year, thousands of low-income Montanans gain meaningful access to our legal system because our attorneys fulfill the ideal that such access should be available regardless of economic condition," said Chief Justice Mike McGrath. "We highly commend Montana's attorneys for advancing the goal of access to justice through volunteer service."

The need for civil legal assistance continues to grow in Montana as organizations like the Montana Legal Services Association contend with funding cuts that have reduced their ability to represent clients in court. The state-funded Court Help Program provides services to assist people who are representing themselves in court, but cannot offer legal advice or assistance.

Current State Bar President Randy Snyder notes that many professions donate services to those who cannot afford them. Licensed attorneys do so not just of moral duty, but because we are the only profession where our code of professional conduct urges us to perform a minimum of 50 hours each year, directly to a client who cannot afford to pay. Many attorneys exceed this.

Pro bono services are most often provided to low-income clients in family law matters, including adoptions, guardianships, divorces, parenting plans and child support issues and includes victims of domestic violence. However, attorneys provide pro bono services to many other qualifying clients, including the elderly, military veterans and organizations serving low-income individuals.

The Montana Rules of Professional Conduct state that "[a] lawyer should render at least fifty (50) hours of pro bono public legal services per year."

Attorneys who volunteer their legal services report a great deal of personal satisfaction with 93% indicating the pro bono work was a positive experience. The full pro bono report is available at www.montanabar.org or www.courts.mt.gov.

State Bar of Montana elections under way

Election season is under way for State Bar positions. See schedule below for details. The following positions are up for election: Areas A, B, C, D, G; State Bar delegate to ABA, president-elect.

2014 election calendar

- Feb. 15 Finalize notice and nominating petition for March Montana Lawyer
- March Letters to Areas A, B, C, D & G trustees, and ABA delegate whose terms are expiring, enclosing nominating petition and deadline for returning to bar
- April 7 Filing deadline for original nominating petitions (Postmarked or hand-delivered 60 days before election)
- April 16 Ballots to printer (only contested races)
- May 7 Ballots mailed no later than 30 days before election (contested races only)
- May 27 Ballots postmarked or hand-delivered no less than 10 days before the date of the election
- June 6 Ballots counted, affidavit signed by canvassors; Winners and losers notified by executive director

The New Lawyers Section's Toolkit CLE: Essential Skills for Modern Practice

When: April 11, 2014, 11:30 a.m. – 4:30 p.m. Immediately following Montana Supreme Court oral arguments in *Phillips v. City of Whitefish*, DA 13-0472, at U of M.

Where: University of Montana School of Law

Lunch Provided?: Yes

CLE Credits Pending: 4.0, including .5 Ethics

Cost: Advance online registration at www.montanabar.org - $25; Registration/payment at the door, $35.00.

Law clerks: Free, but need to register with Gino Dunfee at gdunfee@montanabar.org.

Topics include: Super Glued to Richardson: Writing Answers to Interrogatories and Requests for Production, Blasting Past IRAC: Writing Motions to Compel and Motions for Sanctions, Turnkey for Tribal Court: What You Need to Know about Jurisdiction and Procedure, C-Clamped to the State Bar: Updates and Opportunities for New Lawyers , Ratcheting Up Your Appellate Practice: The Montana Supreme Court's Pro Bono Program, Duct Tape in Fashion Colors: Legal Research to Make You Look Good Fast, Not Charles Dickens's Steno Machine: Procedural Rules & Pointers for Real Time Reporting

New Lawyers Section's Social & Wine Tasting 101

When: Immediately following the CLE, 4:30 p.m. – 6:30 p.m.

Where: 520 S. 5th St. E., Missoula, MT (approximately 2 blocks from the law school)

Food Provided?: Yes

Please RSVP for the Social: Debra Steigerwalt, NLS President, at NLSrsvp@yahoo.com. Space is limited.

The New Lawyers Section looks forward to seeing you on April 11, 2014. If you have any questions, please contact Debra Steigerwalt at *NLSrsvp@yahoo.com*.

For more information about upcoming State Bar CLE, please call *Gino Dunfee at* ***(406) 447-2206.*** You can also find more info and **register at *www.montanabar.org*,** just click the CLE link in the Member Tools box on the upper-right side of the home page. We do mail out fliers for all multi-credit CLE sessions, but not for 1-hour phone CLE or webinars. The best way to register for all CLE is online**.**

April

April 8 -Child Support Best Practices (ALJs' Perspective) - Basics in Statute, ARMs and CSED Policy: Noon webinar. (1 CLE credit.) Sponsored by the Family Law Section. Register by April 4. Hear what administrative law judges have to say about child support statutes, Administrative Rules of Montana (ARMs) and Child Support Enforcement Division (CSED) policy.

April 10 - Annual Bench-Bar Conference: Missoula, DoubleTree Edgewater. 7 CLE credits, including 2 ethics. Topics include: A Briefing Prelaunch Checklist, Discovery and Frivolous Requests: Where's the Line?, Probate Basics: How, Where, What, Reopening and Notice, Pro Se and Newer Lawyers: How Much Latitude Does the Bench Have?, Federal and State Case Update on Technology Issues, Commonly Missed Rules and the Fabled Motion for Reconsideration, Trial and Oral Argument

April 11 - New Lawyer's Section Toolkit CLE: Essential Skills for Modern Practice. (Social to follow.) Details above.

April 22 - Child Support Best Practices (ALJs' Perspective) - MT Child Support Guidelines Practice Tips: Noon webinar. 1 CLE credit. Administrative law judges for the Department of Public Health & Human Services will provide "practice tips" with regard to the MT Child Support Guidelines.

April 25 - Diverse Issues & Judges' Panel: Hilton Garden, Kalispell. 6 CLE credits, including 1.5 ethics. The morning session will cover Ethics, State and Federal Consumer Protection Laws and Law Firm Technology. The afternoon session will cover Indian Law, Top 10 Tips for Law Firm Administration and What Judges Want.

May

May 2 - Recent Developments in Water and Oil & Gas Law Northern Hotel, Billings. 6.5 CLE credits. Morning session will cover water law, the "Bakken" and tax essentials for the oil and gas industry. Afternoon session will cover fracking and water rights, mineral leases and "flaring" litigation update, panel discussion on current issues in water rights.

May 9 - Employment Law: Colonial Inn, Helena. 6.5 CLE credits, including 1.5 ethics. The morning session will cover Unemployment Appeals Process, conflicts in Private and Public Legal Employment; Workers' Compensation Court Update, Equal Pay Task Force Update and Employment Discrimination. The afternoon session will cover Counseling Clients with Possible Employment Claims; Avoiding and Defending Employment Claims and Federal Medical Leave Act (FMLA) and Americans w/ Disabilities Act (ADA) updates.

May 20 (tentative) - Cybersleuth's Guide to the Internet: Holiday Inn, Missoula. Back by popular demand, Carole Levitt and Mark Rosch, internationally recognized internet trainers and authors of seven ABA Internet research books, will show you how to be a Cybersleuth to unearth information for FREE (or at low cost) on the Net. Each attendee will receive a copy of their book, The Cybersleuth's Guide to the Internet, 12 Ed., revised 2014, -- a $65 value.

May 20 - Family Law Update - Red Lion, Kalispell. Details pending.

September

Sept. 4-5 - Annual Bankruptcy Section Conference - Missoula (in conjunction with Grizzly Football Game against Central Washington). CLE will start around 1 pm, Thursday, September 4 at the Holiday Inn Downtown. There will be a reception and dinner at the hotel that evening. The CLE will resume Friday morning, September 5. The Section Luncheon Meeting will take place at Noon, followed by more CLE that afternoon. The UM Grizzly Football team will host Central Washington on Saturday, Sep 6. More information on CLE to follow.

Sept. 10 - Annual Construction Law Institute - Bozeman. Details pending. Sponsored by the Construction Law Section. More info to follow.

Neil Haight Pro Bono Award

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

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

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

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

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

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

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

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

a. *be a dedicated, committed leader instrumental in the delivery of civil legal services to Montanans living in poverty; or*

b. *be a key person in the development of a pro bono program for a bar association or community organization; or*

c. *contribute significant work toward creating new and innovative approaches to delivery of volunteer civil legal assistance through a new or existing pro bono program sponsored by a bar association; or*

d. *perform significant and meaningful civil pro bono activity which resulted in satisfying previously unmet needs or extending services to underserved segments of the population; and/or*

e. *Successfully litigated pro bono civil cases which favorably resulted in the provision of other services to Montanans living in poverty.*

Nominee Information:

Name:_____

Address: _____

Organization (if applicable) _____

Nominator Information:

Name:_____

Address: _____

Organization _____

Phone: _____

Email:_____

On separate pages, please describe the following:

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

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

Nominations and supporting documents will not be returned. Send them no later than June 1 to:

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

Karla M. Gray Equal Justice Award

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

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

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

Nominee: _____

Address: _____

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

Your signature: _____

Print your name: _____

Your address:_____

_____

Your phone number: _____

Please mail the nomination by June 1, to:

Karla Gray Award
c/o Janice Frankino Doggett
State Bar of Montana
P.O. Box 577
Helena MT 59624

Oral argument: Phillips, et al. v. City of Whitefish

Summarized from Feb. 14 order DA 13-0472

Pursuant to the Internal Operating Rules of this Court, this cause is classified for oral argument before the Court sitting en bane and is hereby set for argument on April 11, 2014, at 10:00 a.m. at the George Dennison Theater, University of Montana, Missoula , Montana, with an introduction to the oral argument beginning at 9:30 a.m.

IT IS FURTHER ORDERED that pursuant to M. R. App. P. 17(3), oral argument times in this cause number shall be (40) minutes for the Appellant and (30) minutes for the Appellee.

Counsel should be mindful of the provisions of M. R. App. P. 17(6).

Oral argument: State v. 9th Judicial District

Summarized from Feb. 20 order OP 14-0096

Pursuant to the Internal Operating Rules of this Court, this cause is classified for oral argument before the Court sitting en bane and is hereby set for argument on Monday, April 28, 2014, at 10:00 a.m. in the Strand Union Building, Ballroom A on the campus of Montana State University, Bozeman, Montana, with an introduction to the oral argument beginning at 9:30 a.m. A briefing schedule was previously issued by Order of this Court on February 19, 2014.

IT IS ORDERED that the Honorable Brenda Gilbert, District Judge, will sit for the vacant position on the Court.

IT IS FURTHER ORDERED that the Honorable Holly Brown, District Judge, will sit for Justice Laurie McKinnon, who has recused herself.

IT IS FURTHER ORDERED that pursuant to M. R. App. P. 17(3), oral argument times in this cause number shall be 40 min utes for the Petitioner and 30 minutes for the Respondent.

Counsel should be mindful of the provisions of M. R. App. P. 17(6).

Oral argument: Malcomson v. Liberty NW

Summarized from March 5 order DA l 30610

Pursuant to the Internal Operating Rules of this Court, this cause is classified for oral argument before the Court sitting en bane. It is hereby set for argument on Tuesday, May 6, 2014, at 10:00 a.m. at the Auditorium of the Library/Auditorium Building, Montana Tech of the University of Montana , Butte, Montana, with an introduction to the oral argument beginning at 9:30 a.m.

IT IS FURTHER ORDERED that pursuant to M. R. App. P. 17(3), oral argument times in this cause number shall be 40 minutes for the Appellant and 30 minutes for the Appellee .

Counsel should be mindful of the provisions of M. R. App. P. 17(6).

Disciplinary complaint: Order of dismissal

Summarized from March 4 order PR 12-0451

On August 3, 2012, a formal disciplinary complaint was filed against Montana attorney Chad M. Wright. The disciplinary complaint may be reviewed by any interested persons in the office of the Clerk of this Court.

The complaint in this matter is based upon Wright's representation of an individual in relation to potential habeas corpus claims following the individual's exhaustion of state proceedings attacking his conviction of sexual assault. The Commission on Practice held a hearing on the complaint on October 17, 2013, at which hearing Wright appeared with counsel, presented witnesses, and testified on his own behalf.

On January 23, 2014, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation that the complaint against Wright be dismissed. No objections were filed within the time allowed.

The Commission has concluded, based on the evidence produced at the hearing, that the Office of Disciplinary Counsel did not prove any of the allegations pled in the complaint by the necessary clear and convincing standard of proof. As a result, the Commission recommends that the complaint filed against Chad M. Wright be dismissed and this matter be closed.

Based upon the foregoing and upon our examination of the record, IT IS HEREBY ORDERED:

1. The Commission's Findings of Fact, Conclusions of Law, and Recommendation are ACCEPTED and ADOPTED.

2. This disciplinary complaint against Montana attorney Chad M. Wright is DISMISSED. See M. R. Prof. Cond. 22.1, which provides that a complaint which is dismissed or upon which no disciplinary action is taken, "shall be expunged from Commission and Disciplinary Counsel Records and for all purposes shall be considered as null, void, and nonexistent."

IN RE A PROPOSED NEW RULE TO BE ADDED TO THE MONT. UNIFORM DISTRICT COURT RULES

Summarized from March 24 order AF 07-0110

The members of the Uniform District Court Rules Commission have offered a proposal for a new rule to be added to the Uniform District Court Rules as Rule 16. The proposed new rule deals with electronically-generated signatures.

Proposed Rule 16 would provide as follows:

> **Rule 16 - Attorney's Copied or Electronically-Generated Signature.**
>
> **An attorney's copied or electronically-generated signature shall be deemed original for all court-filed documents.**

Commission Comments:

Presently, there is no consistency among the judicial districts or uniform rules concerning the filing of documents with the copy of an attorney's signature or an electronically-generated signature of an attorney. Local district court rules vary from the Fourth Judicial District's Rule 3F ("Documents may be submitted for filing by email or facsimile ...") to the Sixth Judicial District's Rule IO (no fax filing "absent actual emergency"). Some judicial districts require the filing of an original copy after a facsimile copy is filed, e.g. the Eighteenth

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Judicial District's Rule 15 ("...provided the original document is filed with the Clerk of the District Court within five business days of the receipt of the facsimile copy"). With the recognition of electronic records, signatures and contracts (see "Uniform Electronic Transactions Act," §§ 30-18-101 et. seq., MCA, particularly

§ 30-18-106, MCA ("If a law requires a signature, an electronic signature satisfies the law.")), the proposed rule will conform to contemporary recognition of copy and electronically-generated signatures. With the movement toward electronic filings in Montana district courts, this ru le will provide initial consistency among the judicial districts. Concerning any possible abuse, Rule 11, M. R. Civ. P., provides for sanctions if an attorney were to violate the rule. The rule will not apply to self-represented litigants.

IT IS ORDERED that all members of the bench and bar of Montana and any other interested persons are granted ninety days from the date of this Order in which to file with the Clerk of this Court comments and/or suggestions to the above proposed Rule 16. IT IS FURTHER ORDERED that this Order shall be posted on the Court's website, and the State Bar of Montana is asked to post a link to this Order on the Bar's website. The State Bar is further asked to give notice of this Order and of its website posting in the next available issue of the Montana Lawyer.

IN THE MATTER OF THE CODE OF JUDICIAL CONDUCT

Summarized from March 25 order AF 08-0203

In 2008, this Court adopted a version of the American Bar Association Model Code of Judicial Conduct that had been adapted and refined to reflect the realities of the operation of the judicial system and judicial elections in Montana. The Court now wishes to add to the 2008 Montana Code of Judicial Conduct a rule requiring members of and candidates for the Court to comply with the same statutory financial disclosure requirements that apply to other state officials. With that purpose, we have drafted and solicited public comment on a proposed new Rule 3.15 of the Rules of Judicial Conduct. No public comments were filed within the time allowed.

In addition, the Court has concluded that additions to the comments to Rules 2.2, 2.5, and 2.6 of the Code of Judicial Conduct will aid Montana judges in determining what they may do to assist self-represented litigants.

IT IS ORDERED that the following new Rule 3.15 is hereby adopted for inclusion in Montana's Code of Judicial Conduct, as are the highlighted portions of subsection [5] of the comment to Rule 2.2, subsection [4] of the comments to Rule 2.5, and subsection [1] of the comments to Rule 2.6 of the Code of Judicial Conduct, as set forth below.

*(**Editor's note:** Highlights do not reproduce well and have been changed to* underlines *in this publication.)*

Rule 3.15. Financial disclosure

Justices of the Montana Supreme Court and candidates for justice of the Montana Supreme Court shall comply with the financial disclosure requirements set forth in Section 2-2-106 of the Montana Code Annotated.

COMMENT

Claims of violation of this Rule shall be filed with and considered by the Judicial Standards Commission.

RULE 2.2

Impartiality and Fairness

A judge shall uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*

COMMENT

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] A judge should manage the courtroom in a manner that provides all litigants the opportunity to have their matters fairly adjudicated in accordance with the law.

[5] A judge may make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard. Steps that are permissible in ensuring a self-represented litigant's right to be heard according to law include but are not limited to: liberally construing pleadings; providing brief information about the proceeding and evidentiary and foundational requirements; modifying the traditional order of taking evidence; attempting to make legal concepts understandable; explaining the basis for a ruling; and making referrals to any resources available to assist the litigant in preparation of the case. Self-represented litigants are still required to comply with the same substantive law and procedural requirements as represented litigants.

RULE 2.5

Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties competently and diligently.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

COMMENT

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

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[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. In accomplishing these critical goals in the increasing number of cases involving self- represented litigants, a judge may take appropriate steps to facilitate a self- represented litigant's ability to be heard. See Rule 2.6, Comment 1.

RULE 2.6

Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.*

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

COMMENT

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed. Steps judges may consider in facilitating the right to be heard include, but are not limited to: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) asking neutral questions to elicit or clarify information; (3) modifying the traditional order of taking evidence; (4) refraining from using legal jargon; (5) explaining the basis for a ruling; and (6) making referrals to any resources available to assist the litigant in the preparation of the case.

[2] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should consider when deciding upon an appropriate settlement practice for a case are: (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.12(A)(1).

STARK TERROR!

What Montana lawyers need to know about the federal "Stark Law"

By Tony Patterson

Many lawyers in Montana have the privilege to represent their local hospital or local physicians and other healthcare professionals. Yet they may not consider themselves a "healthcare lawyer". Much of the law regulating the delivery of and payment for healthcare services is very complex, whether state or federal. While it is not necessary to have a working knowledge of the broad expanse of these laws, it is essential that every lawyer who represents a hospital, a physician or certain other healthcare services providers be aware of the basic rules of the federal law commonly known as the "Stark Law" (42 USC 1395 nn; 42 CFR § 411.350 - § 411.389).

The general rule is simply stated as: a physician who has a financial relationship with an entity that provides designated health services may not make a referral to that entity for a designated health service for which payment may be made by the federal Medicare or a state Medicaid program. The terms used here need amplification. A "physician" is an M.D. or a D.O., a doctor of dental surgery or dental medicine, a podiatrist, an optometrist and a chiropractor, as well as an immediate family member of the "physician". An "immediate family member" includes a husband, wife, natural or adopted child, a sibling, parent or step-parent, in-laws, grandparents and grandchildren. "Financial relationships" are both indirect and direct and are of two types: an ownership or investment interest (like stock, an LLC member interest, partner interest and certain loans) and a compensation arrangement. A compensation arrangement is essentially any type of arrangement under which remuneration passes between the physician and the entity. "Designated health services" are categories of services and items that are identified in the law and expanded upon in the regulations, including clinical laboratory services; physical, speech pathology, and occupational therapy services; durable medical equipment and supplies; hospital inpatient and outpatient services; home health services and outpatient prescription drugs.

Consider several examples of what most lawyers would consider a normal business arrangement, but which create a significant regulatory risk under the Stark Law. First, Dr. Smith's wife and sister own a flower shop in town. The local hospital regularly buys floral arrangements from the flower shop for hospital reception areas, for sale in its gift shop and at various events. Dr. Smith, a surgeon, regularly refers patients to the hospital for inpatient and outpatient surgeries, with many of these patients being Medicare beneficiaries. Unless an exception to the Stark Law's prohibitions is found, this arrangement violates federal law. It is a compensation arrangement between a physician (because Dr. Smith's wife and sister are immediate family members) and the hospital and Dr. Smith makes referrals to the hospital for designated health services that are paid by Medicare. It is not a requirement that the financial relationship be tied to healthcare services! Second, Dr. Smith and two other physicians, who are independent physicians, share space in a medical office building owned by the hospital and they want to share an x-ray unit, or clinical laboratory, or have a side business selling durable medical equipment to patients. The physicians do refer patients to each other and to the hospital. Whether and in what way they may be able to do so, requires an analysis of the Stark Law rules. Unless these relationships meet an exception to the Stark Law they are subject to penalties under the Stark Law and other statutes.

What are the consequences of violating the Stark Law? They are extremely severe. First, no payment may be made for referrals while the improper arrangement is in effect – so years of payments may be at issue. If payment has been made, the payments must be refunded, by the physician and the entity. Any payments by the patient (e.g. a copayment) must be refunded to the patient. A civil penalty of up to $15,000 per claim may be assessed. If the arrangement is found to be a knowing scheme to assure referrals, a penalty of up to $100,000 and exclusion from Medicare may be assessed. Even more problematic, a violation of the Stark Law has been held to constitute a false claim under the federal false claims statutes – exposing the parties to further civil and even criminal penalties.

So how are these Draconian penalties avoided? The statue and regulations provide exceptions of three types. First, there are exceptions that apply to ownership and investment arrangements. Second, there are exceptions that apply to compensation arrangements. Third, there are exceptions that apply to both forms of financial arrangements. As an example, a lease of space by a physician from a hospital is eligible for the rental of office space exception (42 CFR § 411.357(a)). The exception has seven criteria, each of which must be met under the facts of the particular situation. Remember, compliance with the Stark Law is not tied to any subjective intent. You meet the exception criteria or you do not. An unfortunate, but all too frequent example is a lease of office space that is not signed by both parties, or a lease that has expired by its terms but has continued in place nonetheless. Each of those facts means a technical violation of the law has occurred.

There is a process by which parties who discover they have violated the Stark Law can voluntarily submit to the federal

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Medicaid look-backs and undue hardship

Are the elderly being denied access to basic human rights due to exploitation?

By Fawn Kirkpatrick

With the unprecedented graying of America,[1] the Nation's attention has turned to economic problems that will accompany the largest generation's entrance into retirement. The public is aware that economic reform is needed, and Congress has responded with changes to Social Security and Medicare/Medicaid programs.

While many of these reforms laudably strive to protect the elderly that need it the most—the financially insecure—some have had the unintended consequences of depriving those same people. The purpose of this article is to highlight just one of these unintended consequences—the effect of Medicaid's "look-back" period on defrauded seniors.

Medicaid is a joint federal and state funded program created under Title XIX of the Social Security Act of 1965. It provides a source of funding for long-term care to elderly, blind and disabled individuals. [2]

Eligibility for Medicaid is based upon financial need. Necessarily, then, eligibility depends in part on the value of the applicant's assets. If the applicant's assets exceed a certain value, he does not qualify for Medicaid, whereas an applicant with assets valued less than the cap does qualify. This diametric system has led many seniors to divest themselves of enough assets to qualify for Medicaid. Congress is aware of this practice, which often includes giving substantial assets to family members. In order to discourage seniors from simply giving their assets away to meet these financial restrictions, federal and state rules assess a "penalty period" against an elder who gives away his assets instead of spending them on care or support. Medicaid laws look at all uncompensated transfers made during the five years before the date that the applicant first applies. This is commonly referred to as the look-back period.[3] Federal Law establishes that an applicant must be temporarily disqualified if assets were disposed of after the onset of the look-back period.[4]

When an asset is transferred for less than fair market value in the five years preceding application for Medicaid, a time penalty is imposed in which the applicant is unable to receive Medicaid assistance until the penalty has expired. The length of the penalty is determined by the value of the transferred assets divided by what a state determines is the average cost of care at the time of the application.[5] This system presents a particularly complicated obstacle in circumstances where the applicant has been the victim of exploitation. To address this, under Montana law, an applicant whose Medicaid application has been denied, his legal representative or another affected person may apply to the department for a waiver based on undue hardship.[6] In 2006 President Bush signed the Deficit Reduction Act ("DRA"), which contained changes to the Medicaid program, many of which related specifically to transfers of assets.[7] In particular the DRA established that each state has the power and responsibility to establish provisions for a hardship waiver process.[8]

Essentially, the undue hardship exception provides a penalty period may not be imposed after an asset transfer is made if the penalty would cause an 'undue hardship' to the Medicaid applicant/recipient. Montana has adopted rules consistent with 42 U.S.C. 1396p, establishing that undue hardship only exists when the following circumstances are met: 1) the asset was transferred as a result of theft, exploitation, fraud, misrepresentation, or coercion perpetrated against the applicant/recipient and/or spouse; and 2) the applicant and/or spouse have explored and pursued all reasonable, available legal recourse to acquire the transferred resource or its equivalent value—including but not limited to filing charges with the police and

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pursuing civil action. At the minimum, an applicant (or the

1 The "graying of America" refers to the steady march of the Baby Boomer generation toward retirement age. That generation, because of its sheer size, has dominated the country's economics and politics for decades.

2 42 U.S.C. §1396 (2012).

3 Id

4 *Id.*

5 20 C.F.R. § 416.1246.

6 Mont. Code Ann. § 53-6-166 (2013).

7 5 West Fed. Admin. Prac. §6329 (2013).

8 *Id.*

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applicant's representative) must file a report with the police and pursue civil action against the recipient of the transferred asset.[9]

Though they are fact specific, eligibility determinations involving financial exploitation of an applicant will likely additionally involve: establishing the applicant's knowledge of, or consent to, the transfer(s); the applicant's relationship to the wrongdoer; and the applicant's competency at the time of the transfer.

Even with the undue hardship waiver exception, the exploited are still being denied access to Medicaid benefits as a result of three common scenarios. First, circumstances that lead to an individual's exploitation are often directly correlated to their mental state. In order to not count an asset transfer against the applicant, he must show the presence of undue influence: specifically, that he lacked the mental capacity to consent to the transfer. A person lacks capacity when he is impaired by a mental illness, mental deficiency, physical illness or disability to the extent that he lacks sufficient understanding to make or communicate responsible decisions or is incapable of realizing and making rational decisions with respect to his needs.[10] A person is competent if he has the capacity to understand the nature of the act, to understand and recollect the nature and situation of his property and his relations to person receiving the transfer. Further, there must exist sufficient strength and clearness of mind and memory to know, without prompting, the nature and extent of the gift to be transferred as well as his relation towards the transferee. [11] Disproving as well as proving capacity is often difficult. For instance, as relatives of Alzheimer victims will explain, the victim's capacity often diminishes at an erratic and sometimes back-and-forth pace—one day the victim seems like himself, the next he cannot recognize loved ones. Exploitation is rarely discovered at its onset, so deciphering the mental state of someone regarding a gift that occurred years in the past is difficult to do.

Second, litigation of an elder abuse case is often costly and time-intensive. If the victim of elder abuse had limited assets prior to the exploitation, it is likely that victim may be left without funds necessary to pursue his rights against the perpetrator. Further, if a perpetrator is discovered, often the stolen resources have been disposed of or are tremendously difficult to find. With such a grim outlook on compensation for losses, the cost/benefit analysis of litigation does not incentivize bringing even meritorious cases. Attorneys who are willing to take these cases pro-bono are certainly helping to combat this issue, though elder abuse cases can be tremendously time-consuming and a strain on resources. Rendering these pro-bono opportunities is therefore often less-than-desirable. States across the nation are establishing new ways to combat legal costs exploited elders face. For example, last fall California passed several laws designated to hold people more accountable for financial elder abuse. Among them was a law allowing the courts to award attorney's costs and fees in situations where people who have power of attorney financially abuse seniors.[12] In their last session, the Massachusetts legislature created a commission specifically to study the elder protective services in place. The commission is responsible for making recommendations to enhance those services, examine strategies to address the high cost of elder abuse investigations and to explore how to expand the availability of affordable legal services.[13]

Finally, experience confirms that the elderly are often unwilling to sue loved ones, rendering the applicant unqualified for the undue hardship exception entirely. When a family member or loved one is the source of the fraud or exploitation, an elderly victim is often hesitant or unwilling to take the necessary legal steps to expose the misconduct. The perpetrators of the abuse are often the ones who appear to be providing the bulk of the care and companionship to victims. The sense of loyalty the victim has to the loved one coupled with the unlikely chance of recovery creates an environment where there are few incentives to litigate.

Access to legal assistance is essential in battling this growing problem. While the nation is rightly concerned about Medicaid fraud, we must not allow reforms to deny care to those that deserve and need it. The growing number of elder abuse cases demands attention from the legal community. If you have a client who may qualify for the undue hardship exception, you can contact the DPHHS for additional information.

Fawn R. Kirkpatrick *is a third-year student at the University of Montana School of Law.*

9 DPHHS, What you need to know about asset Transfers, http://www.dphhs.mt.gov/sltc/programs/Medicaid/AssetTransfers.pdf (2010).

10 Mont. Code Ann. §72-5-101

11 *In re Estate of Harms*, 2006 MT 320, ¶ 14, 335 Mont. 66, 149 P.3d 557.

12 Cal. Prob. Code Ann. § 859

13 National Conference of State Legislatures, *Financial Crimes Against the Elderly*, http://www.ncsl.org/research/financial-services-and-commerce/financial-crimes-against-the-elderly-2013-legis.aspx (accessed Mar. 11, 2014).

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Centers for Medicare & Medicaid Services ("CMS") the facts of the situation and seek a settlement of the violation. The protocol for the voluntary disclosure submission can be found on the CMS website at https://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/Self_Referral_Disclosure_Protocol.html. If you find that your client needs advice about a possible violation of the Stark Law or use of the Voluntary Self-Referral Disclosure Protocol, it is time to seek expert advice from an attorney who is experienced in this area of the law. The best situation is for Montana attorneys who do represent physicians, hospitals and other entities that provide designated health services to have a working knowledge of the Stark Law prohibitions and its exceptions, so their clients' covered financial relationships are compliant.

The Healthcare Law Section of the State Bar of Montana will be providing additional guidance about the Stark Law and other laws affecting healthcare services providers that all lawyers in Montana need to be aware of, not just healthcare law "specialists".

J.A. ("Tony") Patterson, Jr., *is the chief administrative officer and general counsel for Kalispell Regional Healthcare System and a member of the State Bar's Health Care Law Section.*

A plan to die at your desk is not the best of plans

By Mark Bassingthwaighte

The past few years have been a bit rough in terms of the economy and there are few signs that things will dramatically improve anytime soon. The national debt continues to rise and there are still way too many who are unemployed or under employed. For those who went into this extended downturn living paycheck to paycheck, the past few years have been particularly hard. There is a lesson that can be taken from all this however. There is value in planning ahead in order to be financially prepared for the unexpected. How prepared are you? Perhaps it will come as no surprise; but I see the failure of an attorney to appropriately plan ahead as not only a financial misstep but a risk management concern as well.

I constantly meet and work with attorneys who have done, and will continue to do, all that they can to provide quality legal services to their clients for a fair and reasonable fee. This is a good thing. However, add into the mix a desire to provide a decent wage and some sort of benefit package to keep and reward competent and dedicated staff then couple this with the all the other costs of running a law practice and financially things starts to get complicated. Of course there are also the realities of life that might include raising a family, providing a college education for the kids, purchasing a home for the family, caring for elderly parents, covering unexpected medical bills, rebuilding the nest egg after a divorce, recovering from that one hot investment tip that unfortunately led to a large loss, or taking the vacations that helped you keep it all together. You see where this start to go. Life happens, whether we want it to or not, and it also happens at a speed that can take so many of us off guard.

For some, as the retirement years finally near, there is a harsh awakening to the reality that somewhere along the line the retirement plan that was always meant to be a priority never actually did become one and therein lies the problem. I have visited with attorneys who shared that they simply aren't able to retire because there is no adequate retirement fund. Life and/or the practice kept getting in the way. Unfortunately, claims and disciplinary matters can and do arise as a result of financial pressures and sometimes the reason is as simple as an attorney no longer has the energy or desire to practice law but can't afford not to. When one's heart is no longer in it, the odds of a misstep go up.

When I stumble upon an "unable to retire" situation, I often wonder whether it might have been prevented with appropriate financial advice and planning. I suspect that for some it truly could have. Too many attorneys fail to develop formal business plans for their practices, see that their own wills get drafted and signed, or set up retirement accounts just for starters. Perhaps one reason is that they're too busy seeing that these kinds of things get done for their clients. Be that as it may, there is value in taking the necessary steps to plan for your future while the advantage of time is still on your side. More importantly, commit to the plan and follow through in its implementation.

There is no one right way to go about this. Certainly seeking advice from a financial planner, reading investment and/or business planning books, working with a CPA and/or an estate planner are all worthwhile ideas. Personally, as our children entered the workforce, I tried to teach them the importance of paying themselves first. I believe that the saving and investing habits that I tried to ingrain in them would serve them well for years to come if they were able to start and remain committed to the process. In fact I wish that someone would have shared that advice with me thirty five years ago as my financial picture would be significantly different today if they had. Regardless, it is never too late to start. Take time to review your personal and business financial plan and, if one isn't developed, establish a time line to get it done.

It really is important to take to heart the advice that we so often insist our own clients follow. Get that will written, the business plan drawn up, and open that retirement account. In short, it's about preparing for what the future may bring. The bottom line is that retirement planning is about being fiscally responsible both personally and professionally. Yes, proper financial planning can actually help prevent claims and or ethical complaints that so easily arise when facing unforeseen financial pressures in either your personal or professional life; but more importantly, it can also provide a little peace of mind for you, your family, and those with whom you practice. In spite of what some seem to believe, planning to die at one's desk isn't a sound business plan at all because unexpected things can and will happen.

ALPS Risk Manager Mark Bassingthwaighte, Esq. *has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. Check out Mark's recent seminar, Succession Planning: Managing the Transition from Start to Finish, by visiting our on-demand CLE library at alps.inreachce.com Mark can be contacted at: mbass@alpsnet.com.*

Helpful resources and staff on tap at State Law Library

By Lisa Mecklenberg Jackson

If you've ever had occasion to look, you'll know that the State Law Library of Montana has many easily accessible legal research materials and original legal information on its website at courts.mt.gov/library. However, if you happen to be in the Helena area, you're in even better shape because we have more terrific legal research tools available to you within the walls of the State Law Library. And they are all free for you to use while you are at the law library.

REASONS TO VISIT THE STATE LAW LIBRARY OF MONTANA

Free Westlaw

Information resources on Westlaw include more than 40,000 databases of case law, state and federal statutes, administrative codes, newspaper and magazine articles, law journals, law reviews, treatises, legal forms, and other information resources.

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The Lexis database contains current United States statutes and laws and a large volume of published case opinions dating from the 1770s to the present, as well as publicly available unpublished case opinions from 1980 on. In 2000, Lexis began building a library of briefs and motions.

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HeinOnline is a premier online research product with more than 100 million pages of legal history available in an online, fully-searchable, image-based format. HeinOnline bridges the gap in legal history by providing comprehensive coverage of more than 1,800 law and law-related periodicals. In addition to its amazing collection of law journals, HeinOnline also contains the Congressional Record bound volumes in their entirety, complete coverage of the U.S. Reports back to 1754, famous world trials dating back to the early 1700s, legal classics from the 16th to the 20th centuries, the United Nations and League of Nations Treaty Series, all United States Treaties, the Federal Register from inception in 1936, the CFR from inception in 1938, and much more. Also, a very cool feature of HeinOnline is that it provides exact page images of the documents in PDF format just as they appear in the original print. This means that all charts, graphs, tables, pictures, handwritten notes, photographs, and footnotes appear where they belong. It's pretty nifty.

Space

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RESEARCH TIP OF THE MONTH

Did you know you can find and read full -text legal opinions from U.S. federal and state district, appellate and supreme courts using Google Scholar (http://scholar.google.com)? Currently, Google Scholar allows you to search for opinions for U.S. state appellate and supreme court cases since 1950, U.S. federal district, appellate, tax and bankruptcy courts since 1923 and U.S. Supreme Court cases since 1791. On the Google Scholar Advanced Search page, you can limit results to: all legal opinions and journals; only U.S. federal court opinions; or only state court opinions. You can select any combination of the 50 states and the District of Columbia. The search engine is not as sophisticated as Westlaw or Lexis, but considering the price (free!), it's definitely worth checking out.

Lisa Mecklenberg Jackson *is the state law librarian and director of the State Law Library of Montana.*

Court summaries: July 23 - Aug. 6, 2013

Editor's note: *After months of experimenting and collecting constructive feedback, we've settled on a format. The shortened versions did not provide enough useful information. Apologies for the inconsistency. Summaries are also available online at* ***http://brennanlawandmediation.com/mt-supreme-court-summaries****.*

STATE V. HAMMER

Keywords: 5-0 panel, Affirmed, Ineffective assistance of counsel, Sentencing

***State v. Hammer,* 2013 MT 203 (July 23, 2013) (5-0)**
(Wheat, J.)

Issue: (1) Whether the district court sufficiently inquired into Hammer's pretrial complaint about his counsel; (2) whether the district court erred in denying Hammer's motion for a new trial; and (3) whether the district court erred in assessing fees, costs, and surcharges when those amounts were not orally pronounced.

Short Answer: (1) Yes; (2) no; and (3) yes.

Affirmed and remanded to conform written judgment to oral sentence

Facts: Floyd Hammer was charged with criminal possessions of dangerous drugs with intent to distribute in April 2011. The court appointed counsel. Two weeks before trial, Hammer sent a letter to the court stating he was unhappy that his counsel had not contacted a potential witness, Cheryl Combs, and asking the court to appoint new counsel. The court held a meeting in chambers the morning of trial to discuss Hammer's concerns. Hammer told the judge he was satisfied with his attorney, and the attorney stated that Ms. Combs would not be called except as a surrebuttal witness.

At trial, Hammer's counsel did not call any witnesses, choosing instead to attack the state's case through cross-examination. The jury found Hammer guilty of criminal possession with intent to distribute.

The day after trial, Hammer sent the court another letter asking the court to appoint him a new attorney in a different matter. In the letter, Hammer stated that he believed if Cheryl Combs had been allowed to testify, he might have gotten a different outcome. The letter was filed in the other case.

Hammer was appointed new counsel in October 2011. His lawyer moved for a new trial in December 2011, claiming that the first lawyer's failure to call Ms. Combs denied Hammer the opportunity to present "a major defense" because she would have testified that other people actually possessed the drugs. It also alleged that the failure to call Ms. Combs amounted to ineffective assistance of counsel.

Procedural Posture & Holding: The district court denied Hammer's motion for a new trial because it was filed beyond the 30-day statutory limit. The court further found that Hammer acquiesced in his attorney's trial strategy, and denied the motion on the grounds that Hammer's first counsel was ineffective. The court sentenced Hammer orally to 20 years in prison, and did not impose fees and costs as recommended in the presentence report "unless the defendant can work given his age and the sentence of the Court." The written judgment stated that all conditions recommended in the presentence report be imposed. Hammer appeals, and the Supreme Court affirms the judgment, but remands for the written judgment to be amended to conform to the oral sentence.

Reasoning: (1) The district court conducted an adequate inquiry into Hammer's request for new counsel prior to trial. The court gave Hammer the opportunity to address the concerns he raised in his letter, and Hammer denied having concerns. It was not an abuse of discretion not to hold a hearing, or to deny Hammer's request for new counsel.

(2) Hammer was convicted on Set. 27, 2011. Section 46-16-702 provides a 30-day limit on motions for new trial. Hammer contends his letter to the court on Sept. 28, 2011, should be construed as a motion for a new trial. However, the letter requested new counsel in a separate case. It was not error to decline to treat the letter as a motion for a new trial. Although courts have discretion to grant a new trial sua sponte is justice so requires, § 46-16-702(1), the Supreme Court adheres strictly to the 30-day deadline when defendants move for a new trial under § 46-16-702(2). The district court did not abuse its discretion in denying Hammer's motion for a new trial.

(3) The district court suspended the assessment of fees as part of Hammer's sentence based on his age (65), financial resources, and the 20-year sentence imposed. The oral pronouncement of a sentence controls when there is a conflict between the oral and written judgments. The district court has authority to impose conditions on a sentence, including fines and surcharges, when specifically authorized by statute. The Supreme Court remands for an amendment of the written judgment to restate the costs imposed, and suspend them pending Hammer's future ability to obtain work, so as to conform to the oral judgment.

HARRIS V. ST. VINCENT HEALTHCARE

Keywords: 5-0 panel, Affirmed, Breach of contract, Constructive fraud, Montana Supreme Court summaries

***Harris v. St. Vincent Healthcare*, 2013 MT 207 (July 25, 2013) (5-0)**
(Cotter, J.; McKinnon, J., concurring)

Consolidated appeal with *Harris v. Billings Clinic*

Issue: Did the district court err in dismissing the plaintiffs' breach of contract and constructive fraud claims for failure to

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state a claim?

Short Answer: No.

Affirmed

Facts: Plaintiff Tedeen Holbert was in a car accident in November 2008. The at-fault driver was insured by Farmers Insurance. Holbert was treated at Billings Clinic from the time of the accident until December 2009. The clinic billed Holbert $6,073, and Farmers paid the expenses in full.

Plaintiff Dorothy Harris was injured in a different car accident caused by a different driver in February 2010. The other driver carried State Farm auto insurance. Harris was treated at St. Vincent Healthcare on two occasions, and was billed $777, which State Farm paid. Harris was also treated at Billings Clinic on nine occasions, and State Farm paid Harris's $8,993 bill.

Both Holbert and Harris were members of health plans administered by Blue Cross and Blue Shield of Montana. BCBS entered into preferred provider agreements with the Billings Clinic and St. Vincent Heathcare under which the defendants agreed to accept payment from BCBS at a discounted rate for certain medical services provided to BCBS insureds.

Procedural Posture & Holding: In January 2012, Harris sued Billings Clinic for individual and class claims of breach of contract and constructive fraud, seeking damages equal to the difference between the amount the insurers paid to Billings Clinic and the reduced reimbursement rates under the agreements with BCBS. The district court granted Billings Clinic's motion to dismiss in July 2012, holding that an insured plaintiff may recover only the amount of medical expenses paid and accepted by the medical provider, not the amount billed. The court further held that the plaintiffs did not show proof of damages, as they did not owe the clinic any money and were therefore made whole, they were in the same position they would have been had the alleged breach never occurred, and there was no allegation that they had been deprived of settlement or insurance proceeds.

In January 2012, Harris also filed a complaint against St. Vincent Healthcare, alleging similar claims as those made against the clinic. The case was assigned to a different judge than the one against Billings Clinic. Harris moved for class certification in August 2012, a day before St. Vincent moved to dismiss. The court held argument on both motions, and in October 2012, granted St. Vincent's motion to dismiss. The court reasoned that St. Vincent had no contractual obligation to bill insurers at its discounted rates, as those rates applied only when BCBS was billing for services provided to its insureds. Harris and Holbert appeal, and the Court consolidated their appeals. It affirms both decisions.

Reasoning: The Court notes that a recent decision it rendered under similar facts is "instructive." In Conway v. Benefis Health System, 2013 MT 73, the Court determined that while Benefis was required under its preferred provider agreement with health insurer TRICARE to accept TRICARE's discounted payments for covered services, nothing in the agreement prohibited Benefis from accepting the full amount from a responsible auto insurer. It further held that Conway was not entitled to receive the difference between the TRICARE reimbursement rate and the amount actually paid by the auto insurer, reasoning it would be a windfall to the plaintiff.

Here, the interpretation of the term "covered services" in the preferred provider agreement is essential to the outcome of this case. The defendants' obligation to bill and collect the reduced reimbursement rate applies only to "covered services." The district courts determined that the defendants are contractually obligated to bill or collect discounted rates only when a plaintiff receives services that are paid for under a BCBS health plan. The courts also looked to the Preferred Provider Agreements Act, § 33-22-1702, MCA, which says that the purpose of a preferred provider agreement is to allow an insurer to entered into agreements in which the providers accept negotiated fees for services the health insurer is obligated to provide or pay for under the health plan. Both district courts concluded that when a person or entity other than BCBS is liable for the cost of the medical services, the preferred provider agreement does not govern and the defendants may bill and collect at their usual rates.

Harris and Holbert argue that "covered services" are not restricted only to services paid for by BCBS, pointing to different sections of the agreement and arguing the document must be construed as a whole. They identify inconsistencies in the use of the term "covered services" to argue that the agreement is ambiguous, and the ambiguity must be construed against the defendants. The Court "reject[s] Harris and Holbert's attempt to import our rules regarding interpretation of an insurance policy into our construction of the [preferred provider agreement]." ¶ 23.

Where third party coverage is available and responsible for paying medical expenses, the medical services are not "covered services" under the preferred provider agreements. Harris and Holbert did not allege that BCBS was billed for the services, or made any payment on plaintiffs' behalf. State Farm and Farmers were not parties to the preferred provider agreement, and therefore not obligated to comply with its terms. The defendants did not breach the preferred provider agreement by acce: pting payments above the rate set by that agreement.

Because the medical providers had not duty to bill the auto insurers at the BCBS reduced rates, the plaintiffs' constructive fraud claims must fail.

Justice McKinnon's Concurrence: Justice McKinnon concurs in the Court's decision, but writes separately to acknowledge two other deficiencies in the plaintiffs' breach of contract claim. First, Harris and Holbert are neither parties to nor third-party beneficiaries of the preferred provider agreements. Second, they have suffered no loss, and any recovery would be a windfall. They asserted in their motion to amend the judgment that they suffered damages because a high portion of the policy limits were applied to medical expenses, leaving less for their general damages. This district court agreed this could be a compensable injury, but no such facts were alleged in the complaint, and a motion to alter or amend a judgment is not the proper vehicle for amending a complaint.

DVORAK V. STATE FUND

Keywords: 5-2 panel, Occupational disease, Reversed, Summary judgment

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***Dvorak v. State Fund,* 2013 MT 210 (July 30, 2013) (5-2) (Cotter, J., for the majority, Rice, J., dissenting)**

Issue: Whether the Workers' Compensation Court properly granted summary judgment to the State Fund after concluding Dvorak's claim for occupational disease benefits was barred by the 12-month statute of limitations in § 39-71-601(3), MCA.

Short Answer: No.

Reversed and remanded

Facts: Dianne Dvorak began working at Wheat Montana in 2002. She first sought treatment for back pain in 2006, and periodically thereafter. Her condition worsened over time, and in May 2011, her doctor referred her to an orthopedic specialist and told her she could not work until the specialist evaluated her. That day, Dvorak filed a report of injury with her employer for the first time. She did not state a claim for benefits for any conditions suffered or treated before December 2010.

The specialist concluded Dvorak had thoracic strain and possible exacerbation of an underlying spinal condition secondary to industrial injury. Dvorak did not return to work after May 2011.

Procedural Posture & Holding: The State Fund denied Dvorak's claim on the basis that it was untimely filed, asserting the 12-month statute of limitations applied. Dvorak petitioned for a hearing in the Work Comp Court in August 2011, and the State Fund moved for summary judgment in December. The court heard argument in April 2012, and granted the State Fund's motion in October 2012. Dvorak appeals, and the Supreme Court reverses.

Reasoning: An occupational disease arises out of employment if the disease is established by objective medical findings and events occurring on more than a single day or work shift are the major contributing cause. § 39-71-407(9), MCA. The statute begins to run when the worker knew or should have known that her condition resulted from an occupational disease. The question is when Dvorak knew or should have known. The State Fund argues February 2006 triggered the statute, as that was when Dvorak first sought medical treatment for work-related pain, followed by regular pain medication and occasional treatment. Dvorak argues her condition had stabilized and was then aggravated in late 2010 or early 2011, and that the aggravation constituted a new compensable occupational disease.

The WCC did not reference the affidavit or deposition of Dvorak's treating physician's affidavit. Because this testimony raised genuine issues of material fact, summary judgment was improper.

Justice Rice's Dissent (joined by Justice McKinnon): The Court "has deftly remade the case" by determining an issue neither raised by Dvorak nor contested by the parties. The issue is whether the aggravation of Dvorak's pre-existing condition was a new compensable occupational disease that triggered the 12-month statutory period. Neither the law nor the record support such a holding. Dvorak received a continuing course of medical treatment for a work-related condition to her back and shoulder that worsened over time, but was the same condition. She did not suffer a new occupational disease.

FISHER V. STATE FARM

Keywords: 7-0 panel, Insurance policy exclusions, Reversed, Summary judgment, Unconscionability

***Fisher v. State Farm*, 2013 MT 208 (July 30, 2013) (7-0) (Rice, J.)**

Issue: Whether the district court properly granted summary judgment to the plaintiffs on the basis that the family member exclusion in the plaintiffs' umbrella policy was unconscionable.

Short Answer: No. A household exclusion in an umbrella policy does not violate Montana public policy, and the plaintiffs did not meet their burden of proving unconscionability.

Reversed

Facts: Les and Sharon McCartney (represented by a limited conservator, Kathleen Fisher) were in a car accident in December 2007. Les was driving when he negligently hit a parked vehicle. Sharon, a passenger, sustained serious injuries.

Les has an auto liability policy with bodily injury limits of $250k/$500k, and a personal liability umbrella policy with a $2 million limit. State Farm paid the per-person bodily injury limit of $250k to Sharon, but denied her claim for additional coverage under the umbrella policy on the basis of a family member exclusion.

Procedural Posture & Holding: Les and Sharon sued for declaratory relief, arguing the exclusion was ambiguous, violated their reasonable expectations, violated Montana public policy, and was unconscionable. The district court granted summary judgment to Les and Sharon on the basis of unconscionability. State Farm appeals, and the Supreme Court reverses for entry of judgment in State Farm's favor.

Reasoning: The policy excludes coverage for bodily injured to an insured, and defines insured as including the named insured and any relatives whose primary residence is the named insured's household. Sharon is Les's spouse and lives with him; thus, she is an insured under the umbrella policy and her bodily injury claims are not covered. The Court holds that the policy is unambiguous, and did not violate Les and Sharon's reasonable expectations because it unambiguously precludes coverage. While the Court has voided auto policy exclusions as against public policy when they contravene mandatory statutory minimum coverage, the exclusion here applies to optional coverage, and does not violate any statute. The exclusion does not violate the made-whole doctrine or result in illusory coverage. The Court joins the majority of jurisdictions in holding that a household exclusion in an umbrella policy does not violate public policy.

Unconscionability requires a finding of contractual terms that are unreasonably favorable to the drafter, and no meaningful choice on the part of the other party regarding acceptance of those provisions. Terms are unreasonably favorable when they are so one-sided as to be unconscionable. Plaintiffs have not made this showing. Family member exclusions are not arbitrary, as they make it possible to provide broad coverage at an economical cost by excluding those in the family circle who are likely to be riding frequently in the family car.

HARRINGTON V. THE CRYSTAL BAR

Keywords: 5-0 panel, Affirmed & reversed, Dram shop,

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Negligence

***Harrington v. The Crystal Bar*, 2013 MT 209 (July 30, 2013) (5-0) (Rice, J.)**

Issue: (1) Whether the district court properly granted summary judgment to the Crystal Bar on Harrington's negligence claim, **and (2) on Harrington's dram shop claim.**

Short Answer: (1) No, and (2) yes.

Affirmed in part, reversed in part, & remanded

Facts: Dennis Harrington visited the Crystal Bar in October 2007 with a group of friends. He got into an "abrasive conversation" with the bouncer, Duane Aune, and Jason Howard, an acquaintance of Aune's. After the bar manager was told of the escalating argument, Harrington was asked to leave multiple times. He eventually left through the front door, followed by Howard 15-20 seconds later. Outside, Howard hit Harrington on the head, causing him to fall and hit his head on a parked car. Harrington sustained a serious head injury, was rendered unconscious, and hospitalized.

Procedural Posture & Holding: Harrington sued the Crystal Bar, alleging claims of negligence, dram shop, spoliation of evidence, and punitive damages. The Crystal Bar moved for summary judgment on the negligence and dram shop claims. The district court granted the motion and Harrington appeals. The Supreme Court reverses summary judgment on the negligence claim and affirms it on the dram shop claim.

Reasoning: (1) A tavern keeper has a duty of reasonable care to protect patrons from injury by other patrons. Kipp v. Wong. Whether closing the bar door on a potentially violent situation that has moved outside breaches a tavern keeper's duty of reasonable care is a factual question for the jury. Moreover, Harrington has raised genuine issues of material fact that are in dispute.

(2) A tavern owner is liable for foreseeable injury-producing accidents of a patron if the owner provided alcohol to a visibly intoxicated patron. § 27-1-710(3), MCA; Cusenbary, ¶ 22. Here, there is no evidence that Howard had been served any alcohol at the Crystal.

STATE FARM V. SCHWAN

Keywords: 5-0 panel, Insurer's duty to defend, Reversed, Summary judgment

***State Farm v. Schwan*, 2013 MT 216 (Aug. 6, 2013) (5-0) (Rice. J.)**

Issue: Whether the district court properly concluded that State Farm breached its duty to defend.

Short Answer: No.

Facts: In June 2004, Whitney Schwan was a passenger in a car driven by Travis Turner and owned by Travis's mother. Travis lost control and the car left the road and rolled. Both Travis and Whitney were killed.

Travis's parents had an auto liability policy and a homeowners policy, the first with State Farm Auto and the second with State Farm Fire. Travis's license was suspended at the time of the accident because of traffic violations, and he was expressly excluded from coverage under the auto policy. Schwans sued Travis's estate and the Turners in 2007, alleging negligence, negligent entrustment, providing Travis with alcohol, and failing to warn Whitney of Travis's poor driving record.

State Farm Auto retained Billings attorney Cal Stacey to defend the Turners. Several months later, Stacey advised State Farm Fire's in-house counsel that Schwans had demanded the policy limits under both policies. Although the homeowners policy generally excluded auto coverage, Schwans contended coverage was triggered under *Pablo v. Moore*, 2000 MT 48, by their claims other than negligent operation of a vehicle.

State Farm Fire acknowledged a potential duty to defend under the homeowners policy and confirmed with Stacey that he was defending the Turners on all claims. Stacey advised that additional counsel was not necessary. State Farm Fire sent a letter to Turners stating its understanding that Turners were not tendering defense of the lawsuit to State Farm Fire at this time. State Farm Fire maintained contact with State Farm Auto and Stacey throughout the litigation. State Farm Fire's in-house counsel advised Stacey that if State Farm Auto's defense of the Turners terminated for any reason, State Farm Fire would assume responsibility for Stacey's continued defense.

Shortly after, in January 2008, State Farm Fire filed a declaratory judgment action seeking a declaration that it did not owe a duty to defend or indemnify the Turners under the homeowners policy. State Farm Fire retained Michael Young, an attorney chosen by Turners, to defend Turners in the dec action.

A mandatory mediation was held in September 2008. Stacey attended with the Turners. Michael Young attended, as did State Farm Fire's in-house counsel, Bauer. Mediation concluded with a consent judgment against the Turners for $750,000 and assignment of all of Turners' right and claims under the homeowners policy to Schwans, who agreed not to execute against Turners. The district court entered judgment pursuant to these terms.

Procedural Posture & Holding: Schwans replaced Turners in the declaratory action and filed a counterclaim alleging State Farm Fire breached its duty to defend by not retaining counsel for Turners in the underlying action. The district court granted summary judgment to Schwans on this claim because State Farm Fire did not retain separate counsel or pay for any of Stacey's fees. Having found State Farm Fire breached its duty to defend, the court held State Farm Fire was estopped from denying coverage and was liable for the full amount of the stipulated judgment, $750,000, as well as Schwans' attorney fees and costs. State Farm Fire appeals, and the Supreme Court reverses and remands.

Reasoning: State Farm has never taken the position that it did not have its own obligation to defend the Turners. The issue is whether its actions fulfilled that duty. An insurer must defend all counts in a complaint as long as one count potentially triggers coverage. Cal Stacey represented Turners against all of Schwans' claims. Turners were fully defended, but that in itself does not necessarily mean State Farm Fire's duty to defend was fulfilled. However, the facts show that State Farm Fire "gave the necessary substance to the duty to defend." There is no bright-line rule requiring co-insurers to hire separate counsel, and no

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requirement that the insurer pay some portion of the attorney's fees.

ROLAN V. NEW WEST

Keywords: 7-0 panel, Affirmed, Class action, Class definition, Montana Supreme Court summaries

***Rolan v. New West*, 2013 MT 220 (Aug. 6, 2013) (7-0) (Baker, J.)**

Issue: Whether the district court abused its discretion by adopting the class definition proposed by Rolan and denying New West's motion to modify the class definition.

Short Answer: No.

Affirmed

Facts: Dana Rolan was injured in a car accident in November 2007, and incurred medical expenses of about $120,000. Rolan's health insurer was New West. The tortfeasor's liability insurer paid about $100,000 of Rolan's medical bills.

Rolan's policy stated that New West had a subrogation right as well as the right to be reimbursed for benefits paid to an insured who recovered from or settled with a third party. The policy also excluded injuries covered by a medical payments provision of a liability carrier.

Rolan sued New West in January 2010 alleging individual and class claims for breach of contract, violation of made-whole rights, and unfair claims settlement practices. She alleged New West failed to pay about $100,000 of her medical expenses because the tortfeasor's liability insurer paid them.

Rolan proposed a class defined by four parameters. New West opposed class certification, arguing Plaintiffs did not meet Rule 23(a) criteria and failed to appropriately define a class. The district court held a hearing. In May 2012, the court certified a Rule 23(b)(2) class for declaratory and injunctive relief. The class definition substantially mirrored the one proposed by Rolan.

Procedural Posture & Holding: New West moved to limit the class to only those insureds who had timely filed claims for benefits. Rolan objected, citing New West's practice of directing liability carriers to pay medical bills for those insureds whose injuries were covered by a third-party's liability insurance, as this would result in no claim being filed against New West. The district court denied the motion on this basis. New West appeals, and the Supreme Court affirms.

Reasoning: This decision and *Diaz II*, also issued today, address substantially similar issues. The class definition approved by a district court is afforded great deference, and can be modified by the lower court at any time until final judgment. The class definition approved by the district court is adequately precise. The fact that Judge Sherlock narrowed the class definition in *Diaz II* does not require a similar narrowing here, unless the district court determines it is necessary as discovery progresses.

COVENANT INVESTMENTS V. DEPT. OF REVENUE

Keywords: 5-0 panel, Constitutionality of statute, Equal protection, Reversed, Tax appraisal

***Covenant Investments,* Inc. v. Dept. of Revenue, 2013 MT 215 (Aug. 6, 2013) (5-0) (Morris, J.)**

Issue: Whether the district court properly determined that section 15-7-111, MCA, mandating a six-year tax cycle, violated Covenant's right to equal protection.

Short Answer: No.

Reversed

Facts: Covenant owns property for residential subdivision development in Gallatin County. Section 15-7-111, MCA, requires the reappraisal of residential property every six years. The department valued Covenant's property in 2008 at $17.6 million, and used that appraisal to establish Covenant's tax liability for the ensuing six years. Covenant challenged the appraisal, and the Gallatin County tax assessment board reduced it to $13.7 million. Covenant then petitioned the State Tax Appeal Board (STAB) for a further reduction. Based on evidence of artificially high sales prices for the first four parcels in the subdivision, STAB ordered the department to further reduce the value.

Covenant further challenged the 2008 assessment by presenting evidence that its property value had decreased from 2008 to 2010. It argued that it was being forced to pay an inequitable share of taxes and that § 15-7-111, MCA, violated its right to equal protection. STAB rejected that claim, and Covenant appealed to the district court.

Procedural Posture & Holding: The district court determined that the department's failure to conduct a mid-term reevaluation of property values caused some to pay more than their fair share of taxes and others to pay less. Finding this outcome was not rationally related to the legislative purpose of § 15-7-11, MCA, the district court held that the statute violated Covenant's right to equal protection, and ordered the department to conduct mid-term appraisals. The department appeals, and the Supreme Court reverses.

Reasoning: Any cyclical revaluation plan will create temporary disparities among individual property valuations. The Court has previously held that these disparities do not violate equal protection as long as they are not intentional, systematic, arbitrary or fraudulently discriminating. The Montana Constitution requires only periodic attainment of equality in tax treatment. ¶ 18.

Moreover, Montana courts are not at liberty to amend statutes. By requiring the department to conduct mid-term evaluations of property value, the lower court improperly exercised legislative power by inserting a provision into the statute.

DIAZ V. STATE

Keywords: 6-1 panel, Affirmed, Class action, Class definition, Montana Supreme Court summaries

***Diaz v. State,* 2013 MT 219 (Aug. 6, 2013) (6-1) (Baker, J., for the majority; Wheat, J., dissenting)**

Issue: Whether the district court abused its discretion by defining the class to include only those insureds who had timely filed claims for covered benefits.

Short Answer: No.

Affirmed

Facts: Blue Cross and Blue Shield of Montana (BCBS) and New West Health Services administer the state's self-funded

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healthcare benefit plan, which was created by statute. Plaintiffs were insured through the plan. Each was injured in separate car accidents caused by insured tortfeasors whose insurers accepted liability. The third-party insurers paid Plaintiffs' medical expenses.

BCBS and New West allegedly exercised their subrogation rights without first confirming that the insureds had been made whole. According to Plaintiffs, BCBS refused to pay Diaz for medical expenses already paid by the tortfeasor's insurer, and New West refused to pay Hoffman-Berhnardt the reimbursement it received from her medical providers following payment by the tortfeasor's insurer to the medical providers.

Plaintiffs filed a class complaint in 2008, alleging the state, BCBS and New West violated the insureds' statutory made-whole rights, and seeking declaratory and injunctive relief. The district court denied class certification in 2009. Plaintiffs appealed, and this Court remanded for a determination of whether the made-whole statutes apply to third-party administrators such as BCBS and New West. On remand, the district court determined they do not. The Court affirmed that decision but reversed the order denying class certification. *Diaz I.*

On remand, the district court dismissed BCBS and New West.

Procedural Posture & Holding: Plaintiffs again moved to certify the class, and the state sought to limit the proposed definition. Plaintiffs contended they should be allowed to conduct discovery prior to any modification of the class. After a hearing, the court issued a class certification order, adopting the eight-year statute of limitations suggested by Plaintiffs but also adopting a one-year filing limitation proposed by the state. Plaintiffs appeal the filing limitation, and the Court affirms.

Reasoning: The state first argues the Plaintiffs do not have standing; however, a class certification order is appealable and Plaintiffs have a direct interest that was prejudiced by the district court's decision and could benefit from its reversal.

Plaintiffs argue that providers usually file claims, not insureds, and because providers know of the exclusion, they tend not to file claims for medical expenses with the health insurers. As a result, Plaintiffs argue, these non-filing insureds will be excluded from the class unfairly precisely because they complied with the policy exclusion being challenged. The state responds that the original class could not be accurately and effectively identified, and could include members who have no actual claim against the state. Given a potential class of 32,000 people, the state argued, managing such a huge class would border on the impossible.

"Absent a showing that potential class members who never filed claims because of the policy exclusion constituted a significant portion of the putative class and could be identified through a manageable process that was not overly burdensome, the District Court's decision to limit the class to insureds who timely filed claims for covered benefits was not arbitrary or unreasonable." ¶ 26.

Justice Wheat's Dissent: Justice Wheat would modify the class definition to conform to the one just approved by the Court in Rolan v. New West.

LANDA V. ASSURANCE CO. OF AMERICA

Keywords: 5-0 panel, Affirmed, Insurer's duty to defend, Summary judgment, UTPA

***Landa v. Assurance Co. of America,* 2013 MT 217 (Aug. 6, 2013) (5-0) (Wheat, J.)**

Issue: (1) Whether the district court properly granted summary judgment to Assurance on the basis that Assurance had no duty to defend because the complaint did not allege an "occurrence" and did not involve "bodily injury," and (2) whether the district court properly held that Assurance had no duty to conduct an independent investigation.

Short Answer: (1) Yes, and (2) yes.

Affirmed

Facts: Landa was the sole managing member of Landa-Harbaugh & Associates, LLC, a Montana LLC licensed to sell securities and insurance. Landa carried commercial general liability insurance through Assurance. In 2008, Olan "Bubba" Alsup, a former employee of Landa's, sued Landa for fraud, misrepresentation, negligence, breach of contract, and other claims. Landa tendered the defense, and Assurance refused to defend because Alsup's claims did not allege "bodily injury" or "property damage" caused by an "occurrence," as defined by the policy.

Landa filed for a declaratory judgment that Assurance had a duty to defend and indemnify Landa, and also alleged violations of the Montana Unfair Trade Practices Act, common-law bad faith, negligence, and other claims.

Procedural Posture & Holding: Assurance moved for summary judgment on all of Landa's claims. The district court granted the motion because Alsup did not allege "bodily injury" as the result of an "occurrence," as those terms were defined in the policy. The court further held that Assurance was not liable for statutory bad faith because the denial of coverage was grounded on a legal conclusion. Landa appeals, the Supreme Court affirms.

Reasoning: (1) To determine whether Assurance had a duty to defend Landa, the Court looks first to the terms of the policy and then to the facts alleged in the complaint. Landa's policy defines "occurrence" as an "accident." The n has previously held that this term in a policy "refers to any unexpected happening that occurs without intention or design on the part of the insured." ¶ 20 (quoting Safeco v. Liss, 2000 MT 380). Alsup's complaint does not allege any accidental, unintentional conduct. Moreover, the focus is on the facts, not the legal theories, and the conduct underlying all of Alsup's claims is intentional. It is unnecessary to determine whether Alsup alleged bodily injury or property damages, as the complaint does not allege an "occurrence."

(2) Landa argues Assurance has an obligation under the UTPA to investigate a claim. Assurance contends that when an insurer has a reasonable basis in law for denying a claim, it is not liable under the UTPA. The Court agrees.

***Case briefs courtesy of Beth Brennan,** who practices in Missoula with Brennan Law & Mediation, PLLC. http://brennanlawandmediation.com/*

No more affidavits? How do I report my CLEs?

The Montana Commission of Continuing Legal Education has adopted a new method of tracking CLE activities that will reduce paperwork and help attorneys comply with the CLE requirement. The end-of-year reporting by affidavit that was used in prior years is being replaced by an official MCLE transcript that will be maintained by the MCLE Commission throughout the year.

Individual transcripts will be sent to active attorneys around April 15, 2014. They will clearly indicate whether the attorney is in compliance with the MCLE requirements or if more credits are needed. No further action is required of members whose transcript indicates compliance.

If more credits are needed, they can be reported by sending attendance certificates or other documentation to cle@montanabar.org. There is no need to return the transcript to the CLE Commission. Additional information on how to report CLE attendance, as well as information on the recent ethics rule change, can be found at: www.mtcle.org/lawyer/Frequently_Asked_Questions.asp.

What's Changing…

- Notarized affidavits will no longer be required at year-end.
- Official transcripts of reported CLE activities will be sent to all attorneys.
- Transcripts need not be returned to the MCLE Commission.

What's Staying the Same…

- The reporting year still runs from April 1 to March 31 each year.
- The grace period for attending and reporting programs ends May 15.
- A $50.00 penalty fee will be assessed to all attorneys who have not earned and reported CLE activities by May 15.
- Noncompliant attorneys will be transferred to inactive status July 1.

What You Should Do Now…

- Report CLE credits by sending attendance certificates or other documentation to the MCLE Commission at PO Box 577, Helena, 59624, or to cle@montanabar.org
- Remember to include your Member Number.
- Read through the Frequently Asked Questions at mtcle.org/lawyer/Frequently_Asked_Questions.asp.

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It's easy to join: Membership of the LRIS is open to any active member of the State Bar of Montana in good standing who maintains a lawyers' professional liability insurance policy. To join the service simply fill out the Membership Application at www.montanbar.org -> For Our Memebers -> Lawyer Referral Service (http://bit.ly/yXI6SB) and forward to the State Bar office. You pay the registration fee and the LRIS will handle the rest. **If you have questions or would like more information, call Kathie Lynch at (406) 447-2210 or email klynch@montanabar.org.** Kathie is happy to better explain the program and answer any questions you may have. We'd also be happy to come speak to your office staff, local Bar or organization about LRIS or the Modest Means Program.

Willis M. McKeon

Willis M. McKeon died March 10, 2014 at the Phillips County Hospital in Malta at the age of 92. Willis was born in Anaconda in 1921, four years prior to his beloved brother, John "Luke" McKeon. After graduating from St. Peter's High School in Anaconda, he attended Gonzaga University until he enlisted in the U.S. Army. Following his petition to take several examinations early, he graduated before reporting to boot camp. His graduation ceremony occurred 50 years later when, again on his petition, he participated in that year's graduation ceremony with a fellow graduate, one of his granddaughters.

After 3 years serving with the 308th Engineer Battalion in England, France, Luxembourg, Belgium and Germany, Willis was honorably discharged as a Staff Sergeant in December of 1945. He then married Laura Svendson of Miles City and enrolled in the University of Montana Law School. Willis graduated law school with the class of 1948. His brother Luke graduated a few years later. By the end of this school term, five descendants of these lawyer/brothers will have graduated from there.

Following graduation, Willis became an assistant law clerk with the Montana House of Representatives. He then opened a private practice in Malta where he practiced law for the next 50+ years, with nearly 20 of those years with his son, John. For nearly 7 of those years, he was associated "of counsel" with the law firm of Bosch, Kuhr, Dugdale, Warner, Martin and Kaze of Havre where his son was a partner.

Willis believed strongly in public service. From the early years of his practice, Willis would periodically appear before the state legislature and congressional committees to advocate for a cause. He was part-time Malta City Attorney for 11 years and part-time Phillips County Attorney for 23 years. In this process, he became closely acquainted with several Montana office holders, including Senators Mike Mansfield and Lee Metcalf. Then Gov. Forrest Anderson appointed him to serve on the State Board of Institutions and he served there for 11 years, the last 6 years as its chairman. Later, he was appointed by Governors Thomas Judge, Ted Schwinden and Marc Racicot to other state-wide boards, including the State-County Compensation Board, the State Banking Board, and the Montana Board of Personnel Appeals. Willis was also an organizer and initial board member of the First Security Bank of Malta, a founding member of the Malta Athletic Club, first President of the St. Mary's Home and School Association and a 20 year member of the Phillips County Hospital Association. He was always proud of his military service and remained active for many years with the VFW, serving as its State Department Commander in 1954 and at various times as local Post Commander and Post Quartermaster.

Willis was most proud of his family. He and Laura raised six children, including two sons, John McKeon (Terry) of Malta and Jim McKeon (Sandy) of Helena, and four daughters, Pat Stene (John) of Polson, Barb Sunford (John)of Saco, Reene Wasson (Kent) of Whitewater and Jo Lindon (Tom) of Missoula. Willis is survived by his wife Laura, his 6 children and numerous great-grandchildren. He was preceded in death by his parents, Michael and Mary Eleanor "Tootie" McKeon, by his brother, Luke and by his grandson, Joey McKeon.

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Questions?

Please email: Kathie Lynch at *klynch@montanabar.org*. You can also call us at 442-7660.

Transnational organized crime groups target US-based attorneys with debt collection wire fraud scheme

Reprinted from a Feb. 26 FBI public advisory

Transnational organized crime[1] (TOC) groups are targeting attorneys across the United States with a sophisticated debt collection fraud scheme. The TOC groups hire unwitting attorneys to represent them for a fraudulent legal scenario, solicit them to deposit large counterfeit checks into their client trust accounts, and then persuade them to immediately wire the deposited amount to a foreign bank account controlled by members of the TOC group. This advisory will inform the reader how the scheme works, offer measures to help mitigate the threat, and advise how to report incidents to law enforcement.

HOW THE SCHEME WORKS

Step 1 – Initial Contact: A member of a TOC group contacts an attorney or law firm, henceforth referred to as the victim, and purports to be a representative of a foreign company. The perpetrator informs the victim that the foreign company is looking for a US-based attorney to help settle debt litigation with a US business. The reason for the alleged dispute may relate to a defaulted loan repayment or an attempt to recoup losses for a purchase in which the item was never received.

Whether or not the victim agrees to work with the foreign company, the perpetrator will—often within the next several business days—inform the victim that the US business has contacted the foreign company and will immediately make a partial or full payment directly to the victim.

Step 2 – Receipt of Counterfeit Check: The victim receives a counterfeit cashier's check for part of the disputed amount, typically several hundred thousand dollars. The perpetrator asks the victim to deposit the cashier's check into the victim's client trust account. If the victim deposits the check, the bank typically makes the deposited funds available before it is able to fully clear the check.

Step 3 – Remittance of Genuine Money: The perpetrator will send wire instructions to the victim and request that, due to extenuating circumstances, the victim must wire a large portion or all of the cashier's check (less a small retainer fee) to a specified foreign bank account.

Step 4 – Victim's Account Suffers Loss: The bank will notify the victim that the cashier's check was counterfeit and the client trust account suffers a loss for the amount of the deposited check.

INCIDENTS IN THE UNITED STATES

The FBI has received numerous complaints from victims across the United States who were contacted by suspected TOC members misrepresenting themselves as a German or English company in a loan dispute with a US business. In each case, the victims received counterfeit cashier's checks, ranging between $200,000 and $500,000, and were directed to deposit the checks and wire large sums of the deposited money to various bank accounts in Japan.

COMMON INDICATORS OF FRAUD

- Perpetrators of this fraud scheme claim to be representatives of foreign companies.
- Initial contact is often made using e-mail or social networking sites such as LinkedIn.
- The sender's e-mail address may appear unprofessional or attempt to closely replicate a legitimate foreign company's true e-mail address.
- The sender's IP address may resolve to Nigeria or Canada.
- The companies identified by the perpetrators are genuine companies that tend to be well established but not well known. If contacted, the US businesses typically have no knowledge of the situation or that their identities are being exploited for fraud.
- Perpetrators are not able to provide a reasonable explanation as to why the victim was chosen to represent their legal interests.
- The debt dispute is inexplicably settled within several days of initial contact. The victim may not have an opportunity to perform any legal work.
- The victim receives a large and often unsolicited cashier's check and is asked to take their retainer fee from the check. The cashier's check is typically postmarked in Canada, despite the fact that neither party in the dispute is based in Canada.
- The perpetrator requests the victim perform a wire transfer before the bank can officially clear the check. The wire recipient is an unrelated business or individual in an unrelated foreign country, often Japan.

MITIGATION TO COUNTER THE SCHEME

The FBI suggests verifying check authenticity from bank officials before depositing a check received under these, or other, suspicious circumstances. In addition, the FBI recommends verifying the legitimacy of the suspicious debt disputes by contacting the US business using independently obtained contact information rather than relying on information provided by the foreign company.

REPORTING THE CRIME

The FBI encourages victims of the debt collection wire fraud scheme to report it to their local FBI office (www.fbi.gov) or the Internet Crime Complaint Center (www.ic3.gov). A victim filing such a report will be asked to reference the debt collection wire fraud scheme and any known ties to TOC and then to provide the following information:

- Identifiers for the perpetrators, e.g., name, telephone number, e-mail address information, wire instructions;
- Details on how and when you were defrauded; and
- Actual and attempted loss amounts.

1 The FBI defines organized crime as any group having some manner of a formalized structure and whose primary objective is to obtain money through illegal activities.

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