MONTANA LAWYER

State Bar of Montana

June 2014 | Vol. 39, No. 8

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New benefit coming soon

As of July 1, members of the State Bar of Montana will have access to nationwide legal research through Fastcase, as a free benefit of membership.

Also inside:

Clergy privilege | Law Library can help research legislative intent | Medicare basics | Updates to CLE reporting | Stark and anti-kickback law | New ethics opinion from the State Bar

MONTANA LAWYER

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Coming soon! Fastcase legal research benefit from the State Bar of Montana

As of July 1, members of the State Bar of Montana will have access to nationwide legal research through Fastcase, as a free benefit of membership.

Fastcase is one of the nation's most popular legal research services. Twenty-five state bar associations have subscribed to Fastcase, as well as scores of the nation's largest law firms. The service costs $995 per year for an individual subscriber, but the service will be included for free in the cost of dues for active members of the bar.

To log in to this free benefit after July 1, visit the bar's web page at www.montanabar.org and log in with your bar user name and password. Once you're logged in, you'll have access to a Fastcase link; when you click the link you'll be logged in to Fastcase automatically.

The Fastcase service includes nationwide coverage from state and federal courts, state statutes and administrative regulations, as well as court rules, constitutions, and other valuable libraries. You can access the scope of coverage on the Web at www.fastcase.com/whatisfastcase/coverage.

Fastcase supports most major terms and connectors search operators, so there's no need to learn anything new. But if you want to learn more, Fastcase sponsors free training webinars weekly and offers short video tutorials on the site. You can download a free user guide or call for toll free support weekdays from 8 a.m. to 8 p.m. You can find more reference materials and training schedules at www.fastcase.com/support.

In addition to powerful search tools and extensive law libraries, Fastcase also includes several unique features that will be a benefit to members.

Mobile sync. The ABA's 2013 Tech Survey showed that Fastcase's legal research apps for iPhone, iPad, and Android devices are by far the most popular smartphone apps for lawyers. When you sync your app with your new member benefit on the desktop, you can save documents on your app to print later from the desktop, share research history across your devices, or create mobile trial notebooks for tablet devices. (You can find more information about Fastcase Mobile Sync at www.fastcase.com/mobile-sync.)

Annotated statutes. Fastcase's statutes include a free annotation service, so you can see how courts interpret statute sections. If you want to know what a statute means, now you can see what courts say it means. Scroll to the bottom of a statutes section to view the annotation of citing cases.

Batch printing. You can use Fastcase's dual-column printing utility to print clean copies of cases in Word or PDF format. And you can batch print multiple cases, either in a single document, or as a .zip file with each document saved as a separate file. It's a quick and easy way to pull cases, in a format that you could show a judge, opposing counsel, or a client.

Data visualization. Only Fastcase includes the Interactive Timeline, a visual map of search results. Search results in text look all the same – but when you map them, the best answers jump off the page. Click the Interactive Timeline tab behind search results, and look at the first and best data visualization tools for legal research.

Bad Law Bot. Fastcase includes Bad Law Bot for free, the world's first Big Data tool for negative treatment history. When your case has been cited with negative history, Bad Law Bot flags the case.

HeinOnline. Fastcase now integrates with HeinOnline, the largest library of law reviews in the world, with more than 2,000 American journals going back to the first page – more than double the size of the law review catalog of traditional research providers. Members can search the HeinOnline catalog for free and view results for free. To read individual articles, members can subscribe to Hein at a discount for as little as a day-long subscription. If you're already a subscriber to HeinOnline, you can access the journals without an additional purchase!

These are just a few of the great features that have made Fastcase America's most popular legal research member benefit, with more than 700,000 subscribers and more member benefit deals than any other provider. The Fastcase service, which ordinarily costs $995 per year, is now free as a part of your bar membership.

To log in to Fastcase after July 1, visit www.montanabar.org, log in, and click Fastcase. Happy searching!

Montana Law Student Pro Bono Service Award

This award is a collaborative effort between the University of Montana Law School, private firms and attorneys, Montana Legal Services Association, and the local judiciary to recognize the outstanding volunteer work of law students. The award is given annually in October during National Pro Bono week to a 3L student who has demonstrated extraordinary commitment to public service-in particular the field of pro bono legal work. For this award, pro bono is defined as: *work taken voluntarily, without payment, and done as a public service*.

Eligibility criteria for the award are:

1) The student has demonstrated a passion for public service, his or her community and the law, especially in terms of providing legal services to under-served populations. These include, but are not limited to low-income residents, veterans, handicapped, children or Native populations.
2) The student has performed meaningful pro bono legal work which has met a need or extended services to underserved segments of the community. This work can include but is not limited to projects at major firms that benefit an underserved population, work at the public defender's office, for veterans or native organizations, CASA, legal aid/services or the Housing Authority.
3) The student has participated in other public service oriented activities or groups such as an official student group, a religious institution, or a nonprofit. Community service activities will also be considered. These activities can include but are not limited to Kiwanis, legal aid or advice clinics, tax preparation clinics, Veterans Stand Down, Project Homeless Connect, or volunteering at soup kitchen/food pantry or as shelter advocates.
4) A total of at least 50 hours of completed legal pro bono work is suggested. Hours completed for course credit or mandatory clinicals may *not* be counted, but any hours over the course work requirement will count. Example: student completed 20 hours of pro bono for the Professional Responsibility class. The 4 hours mandated for the class may not be included, but the student can count the remaining 16 hours.

Students can either apply for the award or be nominated by a third party. For self -applicants, please provide two references along with this application. For nominations, see below criteria.

On a separate sheet of paper, please describe the candidate's involvement in the community and identify the ways in which they have met the eligibility criteria in narrative form. Supplemental supporting documents such as volunteer logs, letters of support, news articles or the student's resume may also be included in the nomination packet.

All nominations must be received by **Friday, October 3rd.** Send to:

Montana Law Student Pro Bono Award Committee
c/o Montana Legal Services Association
211 N. Higgins Avenue Suite 401
Missoula, MT 59802

Electronic submissions can be emailed to: eweaver@mtlsa.org

Nominee Name_____

Nominee phone_____ Nominee email_____

Your name_____ Your phone or email _____

Using the State Law Library to determine legislative intent

By Lisa Mecklenberg Jackson

Although the Judiciary Building, housing the Montana Supreme Court, and the State Capitol Building, host to the Montana Legislature during session, are physically only two blocks apart on the State Capitol Complex, as separate branches of government, they sometimes seem worlds apart. But there are certain fortuitous times when the two branches can, and should, work together. Determining legislative intent by examining legislative documents housed at the state law library is one of those times. We call it compiling a legislative history. Usually the need for a legislative history arises after you have found a particular section of a statute in the MCA that seems unclear or ambiguous. If you cannot find Montana Supreme Court cases that explain what that section means, you may want to consult the legislative history to determine what the legislature meant when it enacted that ambiguous language. Staff at the law library can assist you with this process.

The primary sources for determining legislative intent in Montana are the minutes of the meetings of the legislative committees that considered the bills, the exhibits to those hearings, and the various versions of the bill that were processed throughout this process. The exhibits include such items as the proposed amendments, copies of written testimony, roll call attendance, roll call votes, and visitor registers.

In 1997, the legislature began making audiotapes of its committee hearings. And in 2005, the legislature began recording selected hearings that can be accessed over the Internet. In addition, beginning with the 2003 session, the legislature started recording the floor debate in each house of the Legislature.

A "typical" compiled legislative history from the State Law Library consists of the following documents:

A copy of the chronological history of the bill that shows what happened to the bill as it proceeded through the legislative process.

A copy of the bill as it was originally introduced, which enables the tracking of proposed changes to the bill throughout the process.

The minutes of the house committee hearing[s] about the bill and the minutes of the meetings at which the committees voted on the bills, as well as exhibits to those meetings.

The minutes of the senate committee hearing[s] about the bill and the minutes of the meetings at which the committees voted on the bills, as well as exhibits to those meetings.

Additional information may be available from the recordings of the floor debates, or versions of the bill beyond the introduced version.

The State Law Library will compile legislative histories for you! If you are in need of a legislative history, give us a call at 444-3660.

New exhibit

From June 1 to June 16, the State Law Library will be hosting a five-panel exhibit, "Leading the Way: Montana Woman Suffrage and the Struggle for Equal Citizenship," which chronicles the civic history of women in Montana. Montana women seized their right to vote in November 1914 when suffrage was extended to most women in the state. To help celebrate this important centennial, an ad hoc committee of staff from the Mansfield Library of the University of Montana created the exhibit the traveling exhibit. Libraries across the Treasure State are hosting the exhibit.

Many national suffrage supporters looked west for inspiration. Montana passed its suffrage referendum six years before it the 20th amendment to the U.S. Constitution became the law of the land. "Leading the Way: Montana Woman Suffrage and the Struggle for Equal Citizenship" uses historic photographs, archival documents, and other rare materials to highlight the role that Montana women played in fulfilling the promise of democracy and their full rights of citizenship. View the exhibit from 8-5 in the lobby of the Judiciary Building at 215 N. Sanders, Helena.

Recent additions to the law library print collection include

- Federal Criminal Trials, 8th ed. James C. Cissell, 2013.
- The Laws of Nature: Reflections on the Evolution of Ecosystem Management Law and Policy. Kalyani Robbins, 2013.
- Federal Income Taxation of Corporations and Stockholders in a Nutshell, 7th ed. Karen Burke, 2014.
- Introduction to Estate Planning in a Nutshell, 6th ed. Robert Lynn, 2014.
- The Executor's Guide: Settling a Loved One's Estate or Trust. Mary Randolph, 2014.
- Electoral Dysfunction (DVD). Mo Rocca, 2012.

Stop by and check them out or give us a call at 444-3660 and we'll mail them to you.

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

Federal Circuit rules in favor of small MT company that revolutionized an industry

In March of 2013, Trebro Manufacturing, Inc. ("Trebro"), a Billings-based company with 18 employees, filed a patent infringement suit against FireFly Equipment, Inc. ("FireFly"), a Salt Lake City-based company that was founded by an ex-employee of Trebro. Trebro is in the business of manufacturing sod harvesters. From 2010 to 2013, FireFly's primary business was selling replacement parts for Trebro machines. In early 2013, FireFly came out with its first sod harvester.

The name "Trebro" means "three brothers," and the company was founded by the three Tvetene brothers, who grew up on a sod farm in eastern Montana. Invention is born of necessity, and in 1990, the brothers invented the first automatic, stacking turf harvester in order to improve production times on the family farm. The machine was introduced to the market in 1999 and subsequently revolutionized the sod harvesting industry by providing labor savings, increased production, and improved quality of the finished product.

In its suit against FireFly, Trebro alleged that the FireFly machine infringed a patent owned by Trebro that addresses the way in which the sod is picked up off of a conveyor and deposited onto a pallet, and Trebro sought a preliminary injunction to enforce its patent. FireFly argued that its machine did not infringe the patent, the patent was invalid, and Trebro had not suffered irreparable harm. Judge Richard Cebull, U.S. District Judge for the District of Montana, agreed with FireFly on all three counts and denied Trebro's motion for a preliminary injunction.

In July of 2013, Trebro appealed the lower court's decision to the U.S. Court of Appeals for the Federal Circuit, which specializes in patent cases. The appellate court reversed the district court on all three grounds, finding that the patent was infringed, the patent was valid, and Trebro had suffered irreparable harm. Trebro Manufacturing, Inc. vs. FireFly Equipment, LLC, Case No. 2013-1437 (Fed. Cir. Apr. 9, 2014).

What is noteworthy about this case is the fact that in 2006, the U.S. Supreme Court made it more difficult for patent holders to show irreparable harm in patent infringement cases by eliminating the longstanding rule that irreparable harm was presumed in intellectual property infringement cases. In other words, since 2006, patent holders have had to make a separate showing of irreparable harm in order to obtain injunctive relief. The Trebro case is one of the few cases, and possibly the only case, since 2006 in which the Federal Circuit has reversed a district court's denial of a motion for preliminary injunction in a patent case.

With regard to irreparable harm, the Federal Circuit noted that the sod harvester manufacturing industry is a small one, the machines last for many years, and relatively few slab sod harvesters are sold per year. It was these factors, combined with the strong likelihood of success on the patent infringement and validity claims, that led the Federal Circuit to conclude that the district court had abused its discretion in denying a preliminary injunction.

Trebro is represented in this case by Antoinette M. Tease, a registered patent attorney in Billings, Montana. FireFly is represented by the Parr Brown law firm of Salt Lake City, Utah.

Member and Montana News

Young joins Watson Law Offices

Bozeman trial attorney, Chuck Watson, is proud to announce that he has joined forces with Christopher Young.


Young

Chris attended William Mitchell College of Law in St. Paul, Minnesota, where he earned his Juris Doctor degree in 2001, magna cum laude and was a member of Law Review. He has an undergraduate degree in Comparative Religion from Carleton College in Northfield, Minnesota. Chris is a Great Falls native and is eager to move his family back to Montana.

Chris has been practicing law in the Philadelphia area for over 12 years, where he represented Fortune 500 firms as both outside and in-house counsel. He brings a wealth of experience to the practice in areas of commercial litigation, insurance coverage, employment, protection of trade secrets and non-solicitation agreements, particularly in the financial services industry. He is a skilled negotiator, having successfully mediated numerous cases and negotiated the terms and conditions of many commercial contracts. In addition to just having passed the Montana Bar, Chris is a member of the Pennsylvania Bar and is admitted to practice in the state and federal courts in the Commonwealth of Pennsylvania.

Melville student receives UM law assistantship


Oiestad

Calli Oiestad of Melville recently received the Margery Hunter Brown Law Assistantship from the University of Montana School of Law.

Law students apply for the assistantship by submitting proposals for projects they anticipate completing by the next spring in one of the following areas: public land and natural resources, human rights or Indian law. One student each year

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is selected for the award.

The assistantship generally culminates in a presentation, publication or event by the recipient. Oiestad's project will explore the challenges inherent in the implementation of the Wild Free-Roaming Horses and Burros Act of 1971 and recommend possible reforms.

The assistantship was established in 1993 to honor Margery Hunter Brown when she retired from the School of Law. Hunter Brown was a legal educator and scholar who served for decades on the Montana Human Rights Commission and the Fort Peck-Montana Compact Board, and during the constitutional revision process.

She founded the Indian Law Clinic at the UM School of Law, the first of its kind in the U.S. She served for many years as the guiding force behind the Montana Public Land Law Review. Even after her passing in 1998, Hunter Brown continues to be a role model for generations of law students, scholars and citizens.

Tarlow elected to ACCL board

Tarlow

John H. "Buzz" Tarlow of the Bozeman law firm of Tarlow & Stonecipher, PLLC has been nominated and elected to the Board of Governors of the American College of Construction Lawyers at its annual meeting in Phoenix, Arizona, February 19, 2014 – February 23, 2014.

The ACCL is a national organization of lawyers who have demonstrated skill, experience and high standards of professional and ethical conduct in the practice, or in the teaching, of construction law, and who are dedicated to excellence in the specialized practice of construction law. Buzz has also been recently appointed by the American Arbitration Association as a member of its commercial and construction Roster of Neutrals.

Perkins awarded Fran Elge Award

University of Montana School of Law student Brooke Perkins of Hamilton has won the 2014 Fran Elge Award. The

Perkins

award is given annually to a third-year law student who has displayed commitment and enthusiasm about working for the rights of women and the equality of humanity.

The award was announced during the Women's Section of the Montana State Bar dinner on April 25. Perkins will graduate from the School of Law in May and has accepted a position as an associate attorney with the law firm of Gianarelli & Reno PLLC in Conrad.

Elge devoted countless hours to opening doors for women in the legal profession and advocating for women's causes during her 50 years as a member of the Montana State Bar. After graduating from the UM School of Law in 1930, she briefly had a private practice before being elected as one of the first female county attorneys in Montana.

Elge worked with Jeannette Rankin in the U.S. Congress and campaigned tirelessly for women's issues, such as seeing that women were included in the jury pool after 1939 and advocating for passage of the Equal Rights Amendment in the early 1970s.

Ortega joins Silverman Law Office

Ortega

Silverman Law Office, PLLC is pleased to announce that Brian Ortega has joined the firm as an associate attorney, practicing in the areas of tax controversies, estate planning, business law, real-estate transactions, and transactional law. In 2011, Brian graduated from the Gonzaga School of law and earned his Masters' in Tax Law from the University of Washington in 2012. Before coming to Silverman Law Office, Brian worked at the Gonzaga School of Law, the University of Washington tax clinics, and was an intern for the Office of Chief Counsel for the IRS. Brian is a member of the State Bar of Montana, State Bar of Washington, American Association of Attorney-Certified Public Accountants, ABA, and is admitted to practice before the U.S. Tax Court. He is also a licensed CPA in the State of Montana. Brian can be reached at (406) 449-4829 or brian@mttaxlaw.com

More tech upgrades on horizon

Substantial upgrades continue in the tech arena for the State Bar. The bad news is that unanticipated "technical difficulties" (gremlins, if you will) are likely to keep biting. The good news is that growing pains will be short-lived. You've likely experienced the new www.mtcle.org website and CLE reporting. Bug squashing continues, and each day we're getting more comfortable with the new system.

Up next is a website change for www.montanabar.org. Specifically, a new content management system that includes a website, membership database, e-commerce system, and a bunch of other tools good for running an association. Add the rollout of Fastcase (see story, page 3) and we've got lots to do in short order.

What does this mean for you? Well, for starters, everything will look different on the website. This includes the homepage, all of the content, and your log-in page. It also means that your log-in credentials will be reset: You'll need to follow the "forgot password" link to reset your password to whatever you'd like. The State Bar will no longer assign initial passwords.

URLs for content will be different. So if you have internal pages bookmarked, you'll need to update those. The homepage will still be www.montanabar.org. At first, the new website will be bland. Soon after launching, though, we'll do an aesthetic update, which won't affect URLs or any content. It'll just make everything look nicer.

Some of the administrative tools will help tremendously. A big complaint has been, let's be blunt, the horrible e-commerce functionality (bookstore). It's not just horrible for the end-user, it's difficult on the back-end, too. That system is all new, and will allow for better tracking of orders. We'll also have the ability to provide direct downloads of documents you order. So for example, it'll be possible for you to download a PDF file of a book immediately after purchase. That's just one example of what's possible. Many new tools are in the works, but it's easy to over-promise, so we won't go into too many details until new features are ready. It's safe to say, at the least, we'll have better website tools available.

Another great feature is that your access to Fastcase will be tied to your bar log-in. No need to set up a separate account. You'll simply go to www.montanabar.org and upon logging in, you'll get a link that will take you directly to your Fastcase account. The authentication happens behind the scenes, so you don't have to do anything extra.

The news site is set to go live **July 1**. We hope the transition goes smoothly, but are prepared for the unexpected. In the meantime, please excuse our mess and thank you for being so patient.

Special election set for Area B trustee

One of 3 trustee positions for Area B (Sanders, Lake, Missoula, Mineral and Ravalli counties) is vacant with the failure to have a petition filed by the deadline. This position's term starts September 2014 and is for a 2 year term. The State Bar Board of Trustees have determined a special election is required. They received letters of interest and 5 attorneys have indicated their willingness to be candidates on a special ballot. The special ballot with those five names will be mailed to all Area B attorneys and judges on Friday, **May 30**. The special ballot must be returned (postmarked or hand-delivered) to the State Bar office no later than **June 20**. The ballots will be counted on June 30.

Resolutions due by Aug. 11

Proposed resolutions for the State Bar's annual business meeting are due by Aug. 11. Please send to: Attn. Executive Director, State Bar of Montana, PO Box 577, Helena, MT 59624. Email to: cmanos@montanabar.org.

Please see Section 7 of the bylaws for more info:

Section 7 — Submission of Resolutions

(a)The Past Presidents Committee of the State Bar of Montana is responsible for review of all member resolutions at the Annual Business Meeting. No resolution shall be presented to the membership unless the proposed resolution has been first presented to the Committee pursuant to this Section. However, these rules do not apply to any proposed resolution seeking to amend or repeal the Constitution or By-laws as provided in Article XV of the By-laws.

(b) Every action of the membership provided for in Article VII, Section 4, of the By-laws (i.e. modifications or rescission of any action or decision of the Board, instructions to the Board, and any other action of the members for the purpose of declaring policy of the State Bar of Montana) shall be taken by the adoption of a resolution to be voted on by the members as further provided in the By-laws.

(c) Except for good cause shown to the Past Presidents Committee, and except for resolutions proposed by the Board, every resolution which any member desires to present to the membership for adoption shall be submitted to the Executive Director at least 45 days in advance of the annual meeting. The Executive Director shall deliver copies of the proposed resolution to the members of the Past Presidents Committee, who shall examine the resolution as provided in this Section.

(d) Every resolution, whether proposed by the Board or by a member of the State Bar of Montana, must be prepared in

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typewritten form and published to the membership attending the meeting in suitable form (i.e. hard copy, electronic form or projection) and not less than 48 hours before the commencement of the membership meeting. Copies of any member-sponsored resolution will be at the cost of the sponsoring member. The Executive Director shall deliver a copy of each proposed resolution to the members of the Past Presidents Committee and to the Trustees. The remainder of the copies shall be placed in a conspicuous place at the annual meeting so that members of the State Bar may receive copies for examination and study before the meeting.

(e) Within 20 hours of the annual meeting the Past Presidents Committee shall meet and consider each resolution properly
submitted to the Executive Director. Reasonable notice of the Past Presidents Committee will be provided to the membership by appropriate, cost-effective means. Any member of the State Bar of
Montana shall have the right to attend the meeting of the Past Presidents Committee. At such meeting the Past Presidents Committee shall:

(i)Hear explanations and comments from any member of the State Bar regarding the proposed resolution, but the Committee shall have the right to limit the time available to any member for such purpose.

(ii) Examine the proposed resolution for scurrilous or defamatory material and ensure that any proposed resolution is consistent with the Constitution of the State Bar (Article III), the By-laws of the State Bar of Montana, and Orders of the Montana Supreme Court unless the purpose of the resolution is to amend the Constitution or Bylaws. Where the proposed resolution contains scurrilous or defamatory material, or conflicts with the Constitution or By-laws (without seeking to amend the same), the Past Presidents Committee may either eliminate such material or, if such material cannot be eliminated without destroying the purpose of the resolution, suppress said proposed resolution from presentation at the time of the meeting.

(iii) Make minor changes in grammar, spelling or form, without changing the meaning of the resolution with the consent of the sponsor;

(iv) Endorse on the copy of the resolution to be retained in the minutes of the State Bar a recommendation that the resolution pass, not pass, be modified, or that it be transmitted without recommendation.

At the annual meeting any member of the Committee may express the member's personal views in a discussion of the resolution, but the Committee shall not state arguments for or against any particular resolution.

(f) Any resolution presented to the membership meeting under the foregoing procedure may be amended from the floor.

A summary of all resolutions shall be posted on the State Bar's website 30 days in advance of annual meeting and shall be published in the last issue of The Montana Lawyer before the annual meeting of the State Bar.

Obituaries

In Memorium—C. A. Daw

Daw

C. A. Daw, Helena, passed away on May 1 after a short battle with cancer. He had served as Chief Legal Counsel for the Montana Department of Revenue from January 2007 until his death.

C. A. received both his undergraduate degree in chemical engineering and his Juris Doctorate from the University of Idaho, with honors. He began his legal career with the Idaho Tax Commission, and was in private practice from 1988 until 2007 with the Boise firm of Bosch, Daw and Ballard. His practice primarily involved defending state tax agencies, especially in centrally assessed property cases and 4-R Act litigation.

C. A. was a nationally recognized expert in state and local taxation. He contributed to the work of national organizations, including the International Association of Assessing Officers (IAAO) and the National Conference of Unit Valuation States (NCUVS). He also consulted with numerous counties and states on issues related to complex tax valuation and equalization. The IAAO recently recognized C. A. for 25 years of contributions to standards of assessment, major textbooks on appraisal methods, and other work.

C. A. was a strong advocate for justice and equity in taxation, and for protecting the rights of individual taxpayers. One Montana DOR colleague noted, "In just seven years as chief legal counsel for the department, C. A. made a lasting impact on tax administration in Montana, with equity, fairness, and ethics the hallmarks of his legacy. These principles, C. A.'s legacy, are reflected in Montana tax law, administrative rules, and in many department practices."

He was also a gentle and kind person. He treated people with dignity, respect, and friendship. He genuinely cared for people around him.

C. A. was a great friend who will be missed by those closest to him—his family, friends, and colleagues. He is survived by his wife, Mari Victory-Daw of Helena, son Alex, and daughter Kelli and her husband Jeff.

ETHICS OPINION 140519

Facts:

The office of the Commissioner of Political Practices ("COPP") is a small state agency with a limited budget and a staff of six people. Two of the six COPP staff are attorneys licensed to practice law in Montana. COPP staff attorneys are Jonathan Motl (also Commissioner) and Jaime MacNaughton.

The Commissioner investigates complaints that allege campaign practice violations. The Commissioner's staff investigates these complaints and the Commissioner then drafts and writes a decision as to whether or not sufficient facts exist to show campaign practice violations. The final decision is a non-binding agency decision. The decision, however, can be a sufficient platform to allow the Commissioner and the candidate or political committee addressed by the complaint to settle the matter by the negotiation of a fine. The settlement is a final resolution of the complaint.

COPP is dealing with a number of complaints over Western Tradition Partnership, a nonprofit organization that is alleged to have been connected with "dark money" use in Montana's 2010 elections. The Commissioner has issued a number of decisions on this issue, which have not been settled and must now be prosecuted in state district court. COPP has filed nine civil enforcement actions against nine 2010 candidates for public office, and anticipates filing more.

COPP files each enforcement action as a civil complaint in the 1st Judicial District. The complaints list "Jonathan Motl and Jaime MacNaughton" as attorneys for the Commissioner of Political Practices.

COPP intends to use Jonathan Motl in an active litigation role in all of the district court enforcement actions. Mr. Motl will take and defend depositions (other than his own), prepare and send discovery, interview and prepare witnesses, and generally work on the case. Mr. Motl will not appear as trial lawyer or advocate as a lawyer in any trial of any enforcement action. Jaime MacNaughton (who will also be involved in discovery) will act as the trial lawyer. Mr. Motl will appear in court as the representative of the party and will advocate as a witness for the party. COPP indicates that it does not have the resources to engage another attorney and it is therefore dependent on use of Jonathan Motl and Jaime MacNaughton in the manner set out above.

COPP requests a determination that its attorney, Jonathan Motl, is in compliance with Rule 3.7, Mont.R.Prof. Cond., when he acts as set out above.

Short Answer:

Yes, COPP's intention to use Mr. Motl in the civil enforcement actions as an advocate and witness is appropriate under Rule 3.7, Mont. R. Prof. Cond. (sometimes referred to as the "lawyer-witness rule" or the "advocate-witness rule.") Rule 3.7(a) addresses advocating "at trial." Case law construing the rule generally limits disqualification of a lawyer-witness as trial counsel but not from participating in pretrial matters. Rule 3.7(b) makes it clear that disqualification is not automatically imputed to partners and associates of the disqualified lawyer- witness at trial, unless a separate conflict of interest is present.

General Discussion:

Rule 3.7, Mont.R.Prof.Cond., states:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> > (1) the testimony relates to an uncontested issue;
> >
> > (2) the testimony relates to the nature and value of legal services rendered in the case; or
> >
> > (3) disqualification of the lawyer would work substantial hardship on the client.
>
> (b)A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

As noted in Montana Formal Ethics Opinion 050317, the prohibition against a lawyer from serving as advocate and testifying as a witness in the same matter is essentially aimed at eliminating confusion about the lawyer's role. As an advocate, the lawyer's task is to present the client's case and to test the evidence and arguments put forth by the opposing side. A witness, however, provides sworn testimony concerning facts about which he or she has personal knowledge or expertise. When a lawyer takes on both roles, jurors are likely to be confused about whether a statement by an advocate witness should be taken as proof or as an analysis of the proof (see Comment 2, below).

Rule 3.7 is designed to preserve the distinction between advocacy and evidence and to protect the integrity of the advocate's role as an independent and objective proponent of rational argument. This is discussed in the Comments to the Model Rules:

> [1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party

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> and can also involve a conflict of interest between the lawyer and client.
>
> [2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

See also *Restatement (Third) of the Law Governing Lawyers,* §108 cmt. b (2000) ("combined roles risk confusion on the part of the factfinder and the introduction of both impermissible advocacy from the witness stand and impermissible testimony from counsel table.")

Further, the rule protects trial counsel from having to cross-examine opposing counsel and impeach his or her credibility, even if only on the obvious ground of interest in the outcome of the case. *See, e.g., Ford v. State,* 628 S.W.2d 340 (Ark. Ct. App. 1982) (opposing counsel handicapped in cross-examining and arguing credibility of lawyer-witness); Model Code EC 5-9 ("If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case.")

As noted, Rule 3.7(a) prohibits a lawyer who is likely to be a necessary witness from "acting as an advocate at trial." The majority of courts and ethics committees construing the rule have permitted pretrial preparation work by an attorney who likely will serve as a witness at trial. *See, e.g., Culebras Enter. Corp. v. Rivera- Rios,* 846 F.2d 94 (1st Cir. 1988) (lawyers who performed substantial pretrial work in case in which, had it gone to trial, they would have been called as witnesses but would not have served as trial counsel did not violate Rule 3.7 because they did not assume, and did not plan to assume, "advocate at trial" role); *United States v. Castellano,* 610 F. Supp. 1359 (S.D.N.Y. 1985) (lawyer for alleged organized crime group may participate fully in pretrial stage even though he will probably be called as witness, and other defense counsel are free to consult with him during trial); *United States v. Johnston,* 690 F.2d 638 (7th Cir. 1982) (prosecutor who testified at pretrial suppression hearing is not automatically disqualified from trying case); *Merrill Lynch Bus. Fin. Servs. v. Nudell,* 239 F. Supp.2d 1170 (D. Colo. 2003) (since the rule's purpose is to avoid jury confusion at trial, it does not automatically require that lawyers be disqualified from pretrial activities, such as participating in strategy sessions, pretrial hearings, settlement conferences, or motions practice; however, continued pretrial involvement cannot be used later as basis to argue that disqualification at trial works undue hardship); *Main Events Prods. v. Lacy,* 220 F. Supp.2d 353 (D.N.J. 2002) (companies' attorney would be properly disqualified as necessary witness but was appropriately allowed to represent client in pretrial matters; disqualification rule is designed to avoid confusing jury about what is testimony and what is argument); *Massachusetts Sch. of Law at Andover Inc. v. Am. Bar Ass'n,* 872 F. Supp. 1346, 1377, *aff'd,* 107 F.3d 1026 (3d Cir. 1997) (while plaintiff law school's administrators and faculty were disqualified by Rule 3.7 from serving as trial counsel, they were not prohibited from "attending any and all depositions, acting as an advisor, or as a consultant, or making 'the snowballs for somebody else to throw'"); *DiMartino v. Dist. Court,* 66 P.3d 945 (Nev. 2003) (rule doesn't necessarily disqualify counsel from pretrial proceedings; holding otherwise to permit total disqualification would invite rule's misuse as tactical ploy); *Cunningham v. Sams,* 588 S.E.2d 484, 487 (N.C. Ct. App. 2003) ("even though an attorney may be prohibited from being an advocate during trial, the attorney may, nevertheless, represent his client in other capacities, such as drafting documents and researching legal issues"); *Heard v. Foxshire Assocs.,* 806 A.2d 348 (Md. Ct. Spec. App. 2002) (rule applies only to trials and does not preclude giving of evidence by attorney of record for party before administrative agency). See also ABA Informal Ethics Op. 89-1529 (1989) (lawyer who expects to testify on contested issue at trial may represent party in pretrial proceedings, provided that client consents after consultation and lawyer reasonably believes that representation will not be adversely affected by client's interest in expected testimony); Colorado Ethics Op. 78 (revised 1997) (rule permits lawyer who may be necessary witness to continue to represent client "in all litigation roles short of trial advocacy"); Michigan Informal Ethics Op. CI-1118 (1985) ("advocate" in context of Rule 3.7 is best defined as person who "participates as a spokesperson for the client in open court"; lawyer who in his capacity as certified public accountant will be providing expert testimony in divorce case may also serve as

co-counsel to lawyer from another firm); Utah Ethics Op. 04-02 (2004) (if pretrial representation is not forbidden by another rule, lawyer who is necessary witness may represent client in pretrial stage and retain another lawyer to handle trial).

The Committee agrees with the majority of courts and ethics committees construing Rule 3.7(a). If Mr. Motl is a necessary witness, Rule 3.7(a) prohibits him from "acting as an advocate at trial." However, even though it is likely he will serve as a witness at trial, Mr. Motl is permitted to participate in pretrial matters such as pleadings, motions, and other papers, taking and defending depositions (other than his own), preparing and sending discovery, interviewing and preparing witnesses, appearing at and participating in hearings, and other work leading up to trial.

Rule 3.7(b) does not extend the prohibition on lawyer-witnesses to the partners and associates of the testifying lawyer such as other counsel for COPP. Comment [5] to Model Rule 3.7 notes that the Rule does not automatically forbid lawyers to act as advocates in a trial where other lawyers from the

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same firm are testifying as necessary witnesses. The comment explains that it is unlikely the trier of fact will be misled under these circumstances. Comments [6] and [7], however, encourage lawyers to stay alert to the conflicts of interest that may arise when an attorney, or a lawyer with whom the attorney is associated, is a necessary witness. Counsel ought to resolve such conflicts in accordance with Rules 1.7 and 1.9.

Cases construing the rule generally support the position that disqualification is not imputed to other associated attorneys. *See, e.g., Brown v. Daniel,* 180 F.R.D. 298 (D.S.C. 1998) (no disqualification of entire firm even though partner in firm would be necessary witness); *Ramsay v. Boeing Welfare Benefit Plan Comm.,* 662 F. Supp. 968 (D. Kan. 1987) (guided by Rule 3.7(b), court refused to disqualify firm from representing plaintiff whose wife was firm member and likely witness; any perception of testifying lawyer's interest is "attributable to her role as spouse," rather than her status as lawyer); *Syscon Corp. v. United States,* 10 Cl. Ct. 200 (Ct. Cl. 1986) (refusing to disqualify lawyer whose partner was general counsel and major stockholder in plaintiff company, where partner's testimony, if any, would be peripheral); *Owen & Mandolfo v. Davidoff of Geneva Inc.,* 602 N.Y.S.2d 369 (N.Y. App. Div. 1993) (under post-rules amendment to state's code, no disqualification of law firm in arbitration proceeding; even though lawyer who was closely involved in design and construction project at issue would be testifying, colleague who was "of counsel" to firm would be handling proceeding); see also *Restatement (Third) of the Law Governing Lawyers,* §108 cmt. b (2000) (any other lawyer in testifying lawyer's firm may serve as advocate despite disqualification so long as representation would not involve other conflict of interest such as giving adverse testimony).

Where, as here, the result would be to bar an entire government office from prosecuting cases, courts generally are even more hesitant to impute disqualification of a lawyer-witness to other lawyers in the office. See, e.g., *U.S. v. Watson,* 87 F.3d 927 (7th Cir. 1996) (U.S. attorney's office may prosecute cases where the office has interviewed a suspect and the statement is at issue); *In re Harris,* 934 P.2d 965 (Kan., 1997) (Rule does not disqualify deputy disciplinary counsel from prosecuting case in which another disciplinary counsel is a witness); *State ex rel. Macy v. Owens,* 934 P.2d 343 (Okla. Crim. App. 1997) (where two district attorneys were likely to be necessary witnesses, the entire district attorney's office could not be disqualified because the office is required by law to prosecute all crimes within the district and Rule 3.7(b) specifically allows other lawyers in the office to handle trial); *State v. Schmitt,* 102 P.3d 856 (Wash. Ct. App. 2004) (*ibid*).

For these reasons, under Rule 3.7(b), disqualification of Mr. Motl from serving as trial counsel is not imputed to other COPP counsel, unless a separate conflict of interest is present. The facts presented do not suggest that COPP's trial counsel would have a conflict in calling Mr. Motl as a witness at trial. However, counsel are encouraged to be mindful of any circumstances that might give rise to such conflicts.

Finally, as other authorities note, Rule 3.7 is used in disqualification motions far more than it is used in discipline. In this regard, paragraph 21 of the Preamble to the Montana Rules is an appropriate reminder that:

> The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies….
>
> Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.

Disqualification motions can be extremely burdensome, expensive, and time- consuming. So, the potential for abuse as a litigation tactic is well-recognized. See, e.g., Kalmanovitz v. G. Heileman Brewing Co., 610 F. Supp. 1319 (D. Del. 1985) (motions to disqualify "are often disguised attempts to divest opposing parties of their counsel of choice"), aff'd, 769 F.2d 152 (3d Cir. 1985); Council for Nat'l Register of Health Serv. Providers v. Am. Home Assurance Co., 632 F. Supp. 144 (D.D.C. 1985) (noting potential for tactical abuse of disqualification motions, court held that where lawyers testimony may be relevant but not necessary, "totality of circumstances," including client's desires, must be considered); *Devins v. Peitzer*, 622 So. 2d 558 (Fla. Dist. Ct. App. 1993) (refusing to disqualify lawyer for estate merely because contestants announced intention to call him as adverse witness on their own behalf, court rejected use of rule as means of removing opposing counsel by calling him as witness); Klupt v. Krongard, 728 A.2d 727 (Md. 1999) (courts "will take a hard look" at disqualification motions out of concern that movant will use motion as tactical ploy); May v. Crofts, 868 S.W.2d 397 (Tex. App. 1993) (refusing to disqualify lawyer who represented proponents of a will in a will contest against allegations of their, and his, undue influence despite plaintiff's assertion that she would be calling him as witness; court expressed disapproval of "tactical" use of lawyer-witness rule, and cited insufficient showing of prejudice).

Conclusion

If Mr. Motl is a necessary witness in the various civil enforcement actions, counsel for COPP are not violating Rule 3.7 as long as Mr. Motl does not act as trial counsel. Even though it is likely he will serve as a witness at trial, Mr. Motl is permitted to participate as counsel in pretrial proceedings. The disqualification of Mr. Motl as a witness-advocate at trial is not imputed to other attorneys for COPP, absent some other conflict of interest not described in the facts presented here.

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A (different kind of) Fathers' Day column

"Bless me, Father, for…" Montana's clergy privilege

By Cynthia Ford

This column deals with the application of Montana's clergy privilege. We have already covered privileges in general, and the spousal (yes) and parent-child (no) privileges specifically. Montana's privileges are statutory, and the statutes are construed narrowly to accommodate the competing public interest in full disclosure of relevant information.

The basic purpose for all privileges is to foster certain specified relationships:

> **26-1-801. Policy to protect confidentiality in certain relations.** There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the cases enumerated in this part.

The third of the thirteen specific privilege statutes in Montana protects certain religious communications:

> **26-1-804. Confessions made to member of clergy.** A member of the clergy or priest may not, without the consent of the person making the confession, be examined as to any confession made to the individual in the individual's professional character in the course of discipline enjoined by the church to which the individual belongs.

This statute was first enacted in 1867; its last amendment was in 2009[1], as part of a gender-neutralization bill.

In the 147 years of its history, the Montana Supreme Court has construed this statute in only two cases, one in 1998 and the other in 1999. (Both were criminal cases in which the defendants were convicted of sexual abuse of their respective stepdaughters.) The Court recognized two different approaches to this privilege in other states, and chose to adopt the broader (Utah[2]), rather than the narrower (Washington[3]) as a matter of public policy and freedom of religion. In both cases, however, the Court affirmed the trial judge's refusal to apply the statute and held the communications to be non-privileged and admissible even on the broader interpretation of the statute. These cases teach several lessons about how to maximize your chance of successfully invoking the clergy privilege at trial.

STATE V. MACKINNON (1998)

The Supreme Court's first encounter with the clergy privilege occurred when defendant Mackinnon's asserted the clergy-penitent privilege as to two conversations and a related document in which he confessed to the unlawful sexual conduct with which he had been charged. The Supreme Court observed:

> ¶ 21 Enacted in 1867, § 26-1-804, MCA, was left unchanged by the adoption of the Montana Rules of Evidence. See Commission Comments to Article V: Privileges, M.R.Evid.
>
> Despite this statute's long history, we are presented for the first time with an issue involving its application. In considering the application of this statute, we note that the United States Supreme Court has explained:
>
> > Testimonial exclusionary rules and privileges contravene the fundamental principle that " 'the public ... has a right to every man's evidence.' " As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.

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1 History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(3); amd. Sec. 532, Ch. 56, L. 2009.

2 In *Scott v. Hammock (Utah 1994), 870 P.2d 947*, the Utah Supreme Court held that the defendant's disclosures about his sexual conduct with his adopted daughters, made to the bishop of his local stake of the Church of Jesus Christ of Latter Day Saints, was privileged, even though LDS bishops are lay members of the Church, rather than ordained. I commend this case to you for its in-depth history of the privilege, beginning in pre-Reformation in Olde Englande and tracing its journey to the New World, as well as its lengthy discussion of the need to extend the privilege to all forms of religion.

3 In *State v. Buss*, 76 Wash.App. 780, 887 P.2d 920 (1995), the Washington Court of Appeals refused to apply the privilege, holding that the non-ordained "family minister" at the parishioner's Catholic Church was not a "member of the clergy" within the language of a privilege statute very similar to Montana's. Further, "LaMoria did not administer the Catholic sacrament of confession in the narrow, ecclesiastical sense. A narrow reading of "confession" or "course of discipline" includes only the sacrament of confession, which did not occur. Montana's refusal to follow this approach was later validated by the Washington Supreme Court (en banc) in *State v. Martin*, 137 Wash.2d 774, 975 P.2d 1020 (1999).

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> *Trammel v. United States* (1980), 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186, 195 (citations omitted). Additionally, we note that interpretations in other jurisdictions of clergy-penitent statutes similar to § 26-1-804, MCA, have varied. *See e.g. State v. Buss* (1995), 76 Wash.App. 780, 887 P.2d 920, and *Scott v. Hammock (*Utah 1994), 870 P.2d 947.
>
> *State v. MacKinnon*, 1998 MT 78, 288 Mont. 329, 336-37, 957 P.2d 23, 27.

The Court went on to discuss the differing approaches of our sister states, and concluded:

> ¶ 24 Notwithstanding that testimonial exclusionary rules and privileges are strictly construed and accepted, *Trammel, ...* under the federal First Amendment and under Article II, Section 5 of the Montana Constitution, all persons are guaranteed the free exercise of their religious beliefs and all religions are guaranteed governmental neutrality. See, for example, *Torcaso v. Watkins* (1961), 367 U.S. 488, 495, 81 S.Ct. 1680, 1683-84, 6 L.Ed.2d 982, 987; and *Rasmussen v. Bennett(*1987), 228 Mont. 106, 111-12, 741 P.2d 755, 758-59. Thus, in order to minimize the risk that § 26-1-804, MCA, might be discriminatorily applied because of differing judicial perceptions of a given church's practices or religious doctrine, and in order to least interfere with the federal and Montana constitutional protections of religious freedom referred to above, we conclude that Utah's broader interpretation of the clergy-penitent privilege as set forth in *Scott,* 870 P.2d 947, is the better view, and we adopt that approach.
>
> *State v. MacKinnon*, 1998 MT 78, 288 Mont. 329, 337-38, 957 P.2d 23, 28.

Thus, the Court, without being as direct as I am about to be, set the stage for application of this privilege to many different religions.

Here's my[4] less politic restatement: The privilege was first developed for traditional hierarchal churches with clear demarcation between clergy and lay workers. The obvious archetype is the Catholic confessional, with secret confession and absolution in a private booth housing only the priest and the penitent: ""Bless me Father for I have sinned. My last confession was … Since that confession, I have sinned by …" If the communication was in the confessional, by a member of the congregation to a robed priest ordained by the Catholic church, it was protected from compelled testimony. It turns out, of course, that there are a multitude of religious approaches, with varying degrees of formality and confession/absolution models. The constitutional right to freedom of religion means that the clergy privilege applies to religions way outside of the mainstream[5], but if and only if they meet the implied requirements of the statute.

The church involved in the Mackinnon case was called the Missoula Christian Church, an offshoot of a similar church in Denver. Three of the witnesses the State sought to call at trial moved to Montana to form the church, and had on-going responsibilities as group leaders, but were not ordained. In his attempt to use the clergy privilege, the defendant put on specific evidence about the beliefs of the church:

> [T]he Church is headed by an ordained minster who conducts church services and is licensed to perform marriages. As a part of its Bible-based teachings, the Church allows its members to confess their sins to one another, but no church member has the authority to formally forgive sins. Rather, the Church believes forgiveness only comes from God.
>
> *State v. MacKinnon*, 1998 MT 78, 288 Mont. 329, 332, 957 P.2d 23, 25.

Mackinnon's wife became active in this church first, before Mackinnon was charged and pled not guilty to the sexual abuse of her 9-year-old daughter. She divorced Mackinnon in May, and became a member of the church in June. Mackinnon himself became active in the church at some point but did not become a member until October. (These dates matter). The two conversations at issues took place in July and August, both before Mackinnon had formally joined the church.

The allegedly privileged communications involved the defendant, his ex-wife, the child victim, and the church leaders (John and Coleen Contos and Ken Edwards), but not during a church service per se:

> On July 16, 1995, after an evening church service conducted in a Missoula restaurant, which both Monica and MacKinnon had attended, Monica and M.G. encountered MacKinnon in the parking lot. An argument ensued concerning visitation of Monica's and MacKinnon's two boys. Thereafter, MacKinnon began talking to M.G. and apologizing to her[6], apparently to set things right with her so she would not have to testify at court proceedings. Concerned with the nature of this conversation, Monica suggested that they continue the conversation inside the restaurant in the presence of John and Coleen Contos. As a result of

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4 To help the reader account for my editorial biases and errors, I disclose that when I do go to church, it is to the very well-recognized and formally organized Episcopal Church. "We" don't do regular individual confessions, although we do stand as a group and make a general confession acknowledging unspecified errors and omissions (including the "sin of bad taste") and asking for general forgiveness. I believe this is referred to in some circles as "Catholic lite." When congregation members do have individual meetings for the purpose of spiritual counseling, it is easy to tell who is "clergy" and who is not.

5 Otherwise known as "wacko." But, as I often tell my class, they might be right and by the time we figure that out, it will be too late…

6 Montana does have an "apology" privilege, MCA 26-1-814, enacted in 2005, but it applies only in civil actions for medical malpractice. I will spend another column examining apology privileges around the country, to see whether we should improve Montana's emotional climate—and perhaps reduce its litigation load—by extending this privilege to other types of claims. For sure, Mackinnon was not the victim's doctor...

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> Monica's suggestion, the conversation continued in the back of the lobby area of the restaurant with everyone sitting on chairs. Subsequently, on August 21, 1995, a second conversation took place at the home of John Contos involving MacKinnon, Monica, John Contos and Ken Edwards.
>
> 288 Mont. at 332-33, 957 P.2d at 25.

The defendant moved in limine to exclude reference to these conversations, as well as to an associated document. The judge took testimony of the "churchliness" [my word] of the communications, and eventually split the baby, barring the document and the August conversation but allowing four witnesses (the ex-wife, the victim, and the Contos church leader couple) to testify as to Mackinnon's July statements.

On appeal, Mackinnon urged the Supreme Court to hold the July conversation privileged:

> He asserts that testimony given by John and Coleen Contos was inadmissible under § 26-1-804, MCA, because the Contoses, in their professional character as clergy persons, and in the course of discipline enjoined by the Church, heard him confess the crime with which he had been charged two months previously. Additionally, MacKinnon asserts that Monica and M.G. should not have been allowed to testify about his statements because the July conversation was analogous to compromise negotiations and conciliation counseling. Furthermore, MacKinnon contends that because of the religious setting, he trusted that his statements would be kept confidential. Ultimately, MacKinnon claims that Monica coerced and tricked him into confessing.
>
> 288 Mont. at 336, 957 P.2d at 27. The Supreme Court rejected every one of these arguments.

At the same time that the Court endorsed a broad view of the clergy privilege, it found that even under that broad view, Mackinnon's conversation with his ex-wife, stepdaughter, and two church leaders did not qualify. First, the Court seemed dubious but accepted Judge Larson's assumption that the Contoses were "clergy." However, it noted that Mackinnon was not yet a member of the church nor had he ever sought any spiritual guidance from either Contos. Most importantly,

> MacKinnon did not ask to meet with John and Coleen Contos for the purpose of confession or for religious guidance, counseling, admonishment or advice. Rather, Monica requested that John and Coleen Contos be present during the July conversation, but only to serve as facilitators. Moreover, during the July conversation, MacKinnon did not ask for, and the Contoses did not give, any spiritual advice or forgiveness. No prayers were given and nothing was said about forgiveness. Rather, MacKinnon volunteered his statements without apparent encouragement in order to set things right with his stepdaughter, M.G., so that she would not have to testify at court proceedings. In this regard, MacKinnon's statements were directed at Monica and M.G., not the Contoses. Finally, MacKinnon had no reasonable expectation that his statements would be held in confidence. MacKinnon did not seek and the Contoses did not make any representations of confidentiality. Instead, MacKinnon made his statements in a public place to his ex-wife and stepdaughter in the presence of the Contoses.
>
> *State v. MacKinnon*, 1998 MT 78, 288 Mont. 329, 339, 957 P.2d 23, 28-29.

The Montana Supreme Court held that, under these circumstances, the clergy privilege was not implicated, even on a very broad reading. There was no error in admitting any of the testimony about this "confession" made in the presence of church leaders. On the other hand, Judge Larson did exclude evidence of the other conversation, in which the defendant went to the church leaders' home and met with them; the Supreme Court did not criticize this ruling (because the defendant, obviously, did not). I would call this case 50/50: the defendant won half of his motion at trial, and lost half. The Supreme Court's decision affirmed his defeat as to 50% of his claimed privilege.

STATE V. GOODING (1999)

Rocky Brian Gooding was charged with sexual misconduct towards his young stepdaughter, G.T.. The abuse occurred in Libby, Montana, while the mother was at work and the stepfather stayed at home with the victim and three other children. The family moved to Spokane, Washington, in 1990 and began attending the Sunrise Church of Christ.

> In approximately March 1993 Gooding began confiding with two members of the church, Gerald and Tina Glover, about prior acts of sexual molestation with G.T. At the time of these meetings, Gerald Glover was a nonordained deacon in charge of the church's food and clothing bank. Tina Glover, Gerald Glover's wife, did not hold an official church position.
>
> ¶ 7 The first meeting between Gerald Glover and Gooding occurred at the church. Gooding sought the help of a junior minister and Gerald Glover sat in on their meeting. In the following months, Gooding met with Gerald and Tina Glover in their home to discuss his problems associated with his conduct toward his stepdaughter. Gerald and Tina were both present for some of these meetings. However, Gooding would talk to Tina alone when Gerald wasn't available.

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> ¶ 8 In December 1994 Detective D.A. Routt of the Spokane County Sheriff's Department interviewed Gerald and Tina Glover during an investigation into Gooding's relationship with his stepdaughter. The Glovers informed Detective Routt that Gooding had revealed to them that he had sexually molested his stepdaughter while in Montana.
>
> *State v. Gooding*, 1999 MT 249, 296 Mont. 234, 236, 989 P.2d 304, 306.

The Washington detective forwarded this information to Montana authorities, who prosecuted Gooding in Lincoln County.

Prior to trial, the State added the Glovers to its witness list. Because they were in Washington, the State also filed a notice of intent to depose both Gerald and Tina Glover. After the depositions, the defendant moved to exclude the depositions from trial on the basis of the clergy-penitent privilege.

Gooding's affidavit in support of the motion in limine stated that "he considered Gerald Glover to be "a representative of my church and my spiritual adviser" (but did not say anything about Tina Glover). The Glovers' deposition testimony was split: "while Gerald Glover testified in his deposition that Gooding approached him as 'somebody to lean on ... to talk to and confess out [his] sins,' Tina Glover testified that Gooding approached the Glovers because 'he was concerned about his conduct and about going to jail.'

State v. Gooding, 1999 MT 249, 296 Mont. 234, 240, 989 P.2d 304, 308.

The trial judge denied the motion, specifically finding that neither Tina nor Gerald met the standard of the statute.

The court ruled that Gooding's initial statements to Gerald and a junior minister were not privileged under § 26–1–804, MCA, because Gerald was simply "a bystander." The court also ruled that, given the evidence presented, Gooding's statements to Gerald or Tina were not privileged because neither Gerald nor Tina met the requirements of the statute. Lastly, the court noted that Tina was "a bystander" when Gooding first came to her house to talk with Gerald.

State v. Gooding, 1999 MT 249, 296 Mont. 234, 238, 989 P.2d 304, 307.

At trial, the State strategically submitted only the deposition testimony of Tina (not Gerald). Gooding was convicted and appealed.

> Gooding asserts that his statements to Gerald and Tina Glover were inadmissible under § 26–1–804, MCA, because he considered Gerald Glover to be a representative of his church and a spiritual advisor and he believed conversations held at the Glovers' house would be kept confidential.
>
> *State v. Gooding*, 1999 MT 249, 296 Mont. 234, 238, 989 P.2d 304, 307.

The Supreme Court began with its standard statement in privilege cases:

> ¶ 16 Initially, we observe that testimonial privileges must be strictly construed because they contravene the fundamental principle that the public has the right to everyone's evidence. *See MacKinnon*, ¶ 21 (citing *Trammel v. United States* (1980), 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186, 195).
>
> *State v. Gooding*, 1999 MT 249, 296 Mont. 234, 238, 989 P.2d 304, 307. The Court refused to discuss the ruling as to Gerald's deposition because the State chose not to offer that evidence.

With regard to Tina's deposition, the Supreme Court agreed with the trial court that Tina was not a member of the clergy within the meaning of the statute, under any conceivable definition of that term:

> ¶21 Although we have never clarified the definition of "clergy" under § 26–1–804, MCA, nothing in the record suggests that Tina Glover was a clergy person. Tina testified that she was not a minister, clergyman, or deacon of the Sunrise Church of Christ. She stated that the church does not ordain women. She also stated that she did not have any special counseling role within the church. Therefore, the District Court did not abuse its discretion in admitting statements Gooding made to Tina Glover….
>
> Tina was acting as an ordinary confidant rather than as a clergy person.
>
> *State v. Gooding*, 1999 MT 249, 296 Mont. 234, 240, 989 P.2d 304, 308.

The fact that Tina herself was not a member of the clergy of the Sunrise Church of Christ disqualified not only the statements Gooding made to her, but also those statements he made to her husband (even if Gerald were a clergyman) in Tina's presence:

> ¶ 22 Gooding's statements to Gerald in Tina's presence were not privileged as to Tina, even if we were to conclude that Gerald met the definition of clergy. Section 26–1–804, MCA, states that "a clergyman or priest cannot ... be examined as to confessions made to him." The statute clearly creates a testimonial privilege for a "clergyman or priest"; the statute does not expressly create a testimonial privilege for a nonclerical church member for statements made in his or her presence. In interpreting a statute, we cannot add what has been omitted. *See* § 1–2–101, MCA.
>
> State v. Gooding, 1999 MT 249, 296 Mont. 234, 240, 989 P.2d 304, 308.

Confidentiality is key to all the privileges, including this one. Disclosures made between parties to a privilege, in the presence of a person not in the statutorily protected relationship, are not privileged.

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Lastly, the Court found the defendant's evidence on the Sunrise Church and its organization and beliefs to be deficient:

> [T]here is no factual record to support a finding that these statements were made pursuant to the practices and discipline of the Sunrise Church of Christ. Even if we had concluded that either Gerald or Tina Glover was a member of the clergy for purposes of the clergy-penitent privilege, the evidence presented to the District Court did not indicate that these admissions were made "in the course of discipline enjoined by the church." *See* § 26–1–804, MCA.
>
> *State v. Gooding*, 1999 MT 249, 296 Mont. 234, 240-41, 989 P.2d 304, 308.

Thus, the clergy privilege did not cover Tina's testimony.[7] The Gooding jury heard, properly, Tina's testimony both about what Gooding said to her when they were alone, and what he said to her husband when the three of them were together. This case was a complete loss for the defendant.

SCORECARD

Almost 150 years after the Montana legislature first enacted a privilege for confidential communications between a clergy person and a congregant, the two reported Montana Supreme Court cases about it demonstrate only a 25[8]% success rate in seeking its protection. I do not think this means that the clergy privilege is unusable, however. I bet that there are lots of unreported trial court cases in which the privilege was asserted and granted, alleviating any discussion at the appellate level. These probably are easy cases, where the confessing person was a member of a formal church, the person to whom she disclosed her wrongdoing had a formal rank, and the tenet of the religion encouraged spiritual counseling by that priest/minister/rabbi/monk. Even though the Montana Supreme Court has signaled its willingness to extend the privilege to a wide variety of traditions and roles, those at the fringes make it harder to prove that the statutory requisites have been met.

LESSONS FROM THE CASES

A. Start with the big policy arguments.

As with all privileges, it is important to start with the legislative finding that the relationship between the communicants is both socially valuable and dependent on confidentiality. The plain language version of this argument: It is good for a person's spiritual and mental health to be able to obtain religious guidance; that guidance can only occur when the person is absolutely honest with the religious leader; the person will only be absolutely honest when she knows that her statements will be kept secret. Thus, in order for the public to be able to improve the spiritual and mental health of individual members, inuring to the benefit of all, a person must be able to confide in her religious leader.

A person asserting the clergy privilege should make two additional arguments: first, that as a matter of public policy, the Montana Supreme Court has held that the privilege should be broadly construed, citing *Mackinnon*. The second argument is based on the constitutional freedom of religion (also recognized in Mackinnon): "Because most churches do not set aside formal occasions for special private encounters labeled 'confession,' less formal consultation must be privileged if the privilege is not in effect to be limited to Roman Catholics." Mary Harter Mitchell, *Must Clergy Tell?, 71 Minn.L.Rev. 723, 748 (1987)* (footnotes omitted).

B. Present affirmative evidence on all of the requirements of the statute.

The statute's exact wording is crucial. Here it is again: "[1] *A member of the clergy or priest* may not, without the consent of the person making the confession, be examined as to any *confession* made to the individual [2] *in the individual's professional character* in the [4] *course of discipline enjoined by the church* to which [3] *the individual belongs.*"

1. Prove that the person to whom the "confession" was made should, in fact, be considered "a member of the clergy or priest."

This is easy in a formal religion which sets out requirements such as ordination. If a degree from a seminary is involved, enter it into evidence. If there has been an ordination ceremony, have the clergy person discuss that. If there is an employment contract from the church, setting out a job title, introduce that. If the clergy person wears a distinguishing article of clothing, such as a collar, have her wear that to the hearing and explain its significance to the court. Of course, the opponent to the privilege can also seek this information. In Gooding, Tina herself sounded the death knell for application of the privilege for the statements made to her: "Tina testified that she was not a minister, clergyman, or deacon of the Sunrise Church of Christ." Game, set match…

You can still succeed on this leg of your argument if your client made the disclosure to a less traditional cleric, but you have to be more creative, and more persuasive. Mackinnon and Gooding both indicate that the Court is willing to stretch, maybe a lot, but can't/won't do so unless counsel creates a sufficient record. Maybe the simplest way to do this factually is to simply ask the clergy person: "Are you a clergy person? What makes you a clergy person?" The witness' own understanding as to his role is critical.

Another useful route is to adduce evidence from another official of the church, explaining both the appointment and functions of the type of church worker who heard the confession, as well as "the course of discipline" of the church. This is exactly what convinced the Supreme Court of Utah, in Scott v. Hammock, discussed in fn. 2, to extend the privilege to communications made to the non-ordained bishop of the local stake of the LDS Church.

As a legal argument, you should research other states' privilege cases to see and cite any which deal with the same religion and same type of clergy in that religion. If other jurisdictions

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7 It also observed that, if there had been error, it was harmless in light of the overwhelming evidence of guilt apart from Ms. Glover.

8 Mackinnon won ½ of his argument; Gooding won none.

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have extended privilege to this type of disclosure to this type of person, Montana may follow suit. Thus, although Montana has not yet decided a clergy privilege case involving the Mormon Church, the Utah Supreme Court's ruling in the Hammock case should be highly persuasive.

2. Prove that, at the time of the communication, the clergy person was acting "in his professional character." This is what went wrong for Mackinnon. The Court, without specifically ruling that the Contoses were clergy, held that even if they were as a general matter, the circumstances of the disputed conversation showed that that night they were acting more as a protector of Mackinnon's ex-wife: "the other facts surrounding the July conversation indicate that any statements MacKinnon made were not directed at John and Coleen Contos in their 'professional character,' that is, in their capacities as clerics or in their religious roles." Similarly, in the Gooding case, the confidante characterized herself as just that: an ordinary confidante (not privileged) rather than a clergy person (privileged).

In the perfect world, your client would have prefaced any conversation with "I would like to talk to you in your role as a clergy person, to whom I will confess my conduct in order to receive spiritual guidance and perhaps absolution." "Bless me, Father, for I have sinned…" of course will do nicely. In the same ideal universe, the privileged conversation would have occurred in a church, best of all in a confessional booth. Obviously, however, bricks and mortar and a religious symbol such as a cross or altar are not required. In Mackinnon, Judge Larson protected a conversation which occurred at the Condoses' home; it is the substance of the communication, not its location, which fulfills this requirement.

In the world in which we really live, you will have to get both your client and the "clergy" person to testify that they understood something like this to be happening, even if it wasn't articulated per se. Again, I am a big proponent of just asking: "At the time of the conversation with defendant, were you acting in your professional character as a clergy person? What makes you say that? Even though you met in a coffee shop, not a church? Doesn't that matter? Why not?"

3. Prove that the person making the confession "belongs" to the church.

Again, for some religions this is easy. There may be baptismal, confirmation or other membership records. In *Mackinnon*, although the Court did not discuss how it made the distinction, it observed that Mackinnon became "active" in the church after June but did not "join" the church until October (coincidental that this was the same month in which he went to trial and claimed the privilege?); the communication at issue was in July. The timing was better for Gooding: although there was no "membership" date, it appeared that the whole family had been attending the church for about three years before the confession occurred. The Court appeared to accept that Gooding belonged to the church, but was highly skeptical of this for Mackinnon. The simplistic questions here, for both clergy and the person confessing, are: "Do you/does she belong to the church? What makes you say so? Did you/she belong to the church on the date of the confession?"

4. Prove that "the confession … was made in the course of discipline enjoined by [that] church." Defense counsel in Mackinnon did a good job on this point during the argument in limine:

Specifically, the District Court heard testimony concerning the status of John Contos, Coleen Contos and Ken Edwards within the Missoula Christian Church, the structure and discipline of the Church, as well as the circumstances surrounding the July and August conversations.

State v. MacKinnon, 1998 MT 78, 288 Mont. 329, 335, 957 P.2d 23, 27.

By contrast, the Supreme Court faulted counsel in *Gooding* for failing to address this requirement: "[T]here is no factual record to support a finding that these statements were made pursuant to the practices and discipline of the Sunrise Church of Christ." *State v. Gooding*, 1999 MT 249, 296 Mont. 234, 240-41, 989 P.2d 304, 308.

In the Utah case discussed above, the church itself moved to quash the subpoena issued to it, and so had the opportunity to put on its own evidence about its beliefs:

> The LDS Church and Hammock argue that a broader construction is necessary to avoid discriminating against religious denominations that do not require formal confessions, but whose doctrine and practice require their clerics to provide confidential spiritual counseling, guidance, and advice to their parishioners. The LDS Church points out that many religious denominations, including a number of Protestant churches, teach that admission of wrongdoing is an important part of their religious doctrine and practice, but have no formal requirement for making admissions of wrongdoing to a cleric. In addition, the LDS Church argues that whether or not formal penitential confessions are required by a denomination, the role of a cleric in providing spiritual guidance and counseling cannot properly be limited to formal confessions and the law ought to recognize that fact. With respect to its own doctrine and practice, the LDS Church states that its members are required to engage in a process of repentance by which confidential admissions of wrongdoing may be made to a bishop or stake president at the beginning, during, or at the end of the repentance process and that confidential nonpenitential communications between a bishop or stake president and members of the LDS Church are an essential part of that process. Indeed, the LDS Church asserts that according to its course of discipline, it is impossible to separate a specific "penitential confession" from

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> the process of providing religious and spiritual counseling, guidance, and admonishment intended to persuade a church member to forsake and make amends for wrongful conduct.

Scott v. Hammock, 870 P.2d 947, 951 (Utah 1994). The lesson here is to be as specific as possible about the practices of the church at issue, focusing on the spiritual importance of confidential communications and counseling in that religion. The best way to do that is to move in limine, and to call as witnesses at the pretrial hearing not just the church person to whom the disclosure was made but also a higher-ranking church official who can speak generally about church doctrine, practices, and personnel.

CONCLUSION

Confession may be good for the soul, but unless it is done in accordance with the privilege statute, may cost the penitent his physical liberty or worldly possessions. All religious confessions qualify for the privilege, but having a confidant does not. The devil is in the details.

Cynthia Ford *is a professor at the University of Montana School of Law where she teaches civil procedure, evidence, family law, and remedies.*

Lawyer Referral & Information Service

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Stark and anti-kickback law:

Basic contracting tips to protect your health care client from exposure

By Rick Beck

This article is part of a series of writings presented by members of the State Bar's Health Care Law Section. During a Section meeting, we offered to generate articles of interest on health care law "hot topics", especially for the Montana general practice lawyer who, on occasion, provides guidance to local physicians or community health care clinics.

In his informative article entitled "Stark Terror! – What Montana Lawyers Need to Know about the Federal Stark Law" published in the April, 2014 issue of the Montana Lawyer, attorney Tony Patterson outlined some of the exceptions to Stark Law prohibitions, as well as the potential penalties for violations. Given the significant exposure to health care clients for both Stark and Anti-Kickback Law non-compliance, the Section agreed that a brief review of contracting best practices would be worthwhile.

Without a doubt, the method in which your health care clients manage their financial and contractual relationships with physicians warrants investigation and, where needed, education. I therefore offer the following tips and recommendations as a basic guide to protect against exposure:

1. Inventory Physician Contracts

Recommend to your health care clients that they conduct an inventory of their physician and physician-owned entity contracts. Don't be surprised if your local Critical Access Hospital, Rural Health Clinic or doctor's office cannot immediately produce a comprehensive spreadsheet of physician contracts. They simply may not maintain a list. Given Stark Law's extension to arrangements with physicians' immediate family members, services contracts with vendors related to a physician should be included in the inventory. One way to double-check the accuracy of the list is to compare your client's accounts payable report for the previous six months to its contract inventory. If your client has issued payment to an independent physician, physician-owned entity or physician's immediate family member, and cannot tie the payment to a corresponding written agreement, your client may be in trouble!

2. Audit Physician Contracts

Conduct an audit of physician contracts to ensure that they are current in all aspects and that all requisite elements are in place to meet a statutory exception to the referral prohibition.

A. Written Contracts: Although physician employment agreements do not have to be written, both Stark and AKB Law require that professional services agreements with independent contractors be in writing. Educate your client that informal or verbal arrangements with independent contractors are prohibited, and encourage them to consult with you immediately when considering a new arrangement. Too often, physicians agree during an informal telephone conversation or brief, non-specific e-mail exchange to provide professional services for a health care entity. They may believe a written agreement is unnecessary, that a prior agreement for the same services exists (when it has actually expired), or that they may back-date their signature on the new agreement when they get around to drafting it. The physician may even perform professional services and submit an invoice for his or her time before realizing their error. All of these scenarios are problematic and expose both the physician and the other party to severe fines and penalties.

B. Signature Requirement Exceptions: CMS indicated in a 2008 clarification of the Stark Law signature requirement that independent physician contracts not executed prior to their effective date will be deemed compliant as long as they are fully executed within 30 days after the effective date, or 90 days after the effective date if the tardy execution is inadvertent (which may be difficult to establish). However, be aware that this after-the-fact execution exception may only be utilized once every three years with respect to a specific referring physician or physician entity.

C. Specify the Services: In addition to ensuring that contracts are current, confirm that they accurately and specifically detail the services being provided. Health care clients sometimes become too comfortable with one another, tacking on additional services or compensation not specified in the original contract. Failure to update the agreement through a formal addendum -- timely executed by both parties before the services are provided and payment is made -- can lead to trouble!

D. Confirm Compensation: As to compensation, be sure the contracts set forth an independent contractor's compensation in advance, and that the parties are in full agreement on the subject prior to entering into the agreement. In situations where health care clients are new to one another and are testing their relationship, or perhaps have done prior business but have not fully

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considered the specific details of their new arrangement, they may find after a few months performing under a contract that the compensation is inaccurate, or inadequate for the services provided, and wish to make changes. Both Stark and AKB Law generally prohibit modifications to compensation terms during the first year of an independent services contract. Furthermore, should the parties to an independent contract terminate the agreement within the first year, they are also prohibited from entering into a subsequent agreement for the same or similar services until expiration of the one-year period. It is good practice to include language within the term section of the contract that the agreement may not be terminated during the first contract year as a reminder to your health care client regarding this often-forgotten restriction.

E. Do Not Compensate Physician Referrals: Although written employment agreements may provide for the employer to direct the referrals of its employed physicians, contracts with independent physicians should not include referral-based compensation. Payment will ideally be set according to a specific salary, hourly rate, worked Relative Value Unit, service, procedure, or identified CPT code(s).

F. Specify Compensation Methodology: Don't forget when tying physician compensation to a benchmark rate, such as a stated dollar rate per wRVU, that wRVU weights change from year to year, and that your health care client may not incorporate the new changes into its revenue cycle management system at the same time as the other party to the contract. Specify in the contract that the wRVU weights used to calculate compensation are tied to the CMS National Physician Fee Schedule for a specific year, or when both parties to the contract have adopted the newly-published CMS Schedule. The same logic applies to contracts where payment is tied to performance of specific CPT codes, which also change periodically. Specifying the methodology from the beginning will keep your client happy and avoid situations where they feel compensation is suddenly inadequate because the other party has delayed implementation of a new, more favorable fee schedule.

G. Document Fair Market Value: Perhaps the most critical factor in physician contracts is paying the appropriate compensation for the services provided. Whether preparing a premises lease or independent services agreement for your client, the rent paid must represent fair market value for the premises leased, and the compensation paid must represent fair market value for the professional services rendered. Exercise caution here. Fair market value benchmarks vary widely, differing not only by the specific medical specialty and services at issue, but by everything from geographic location to the physician's productivity, clinical hours worked v. administrative (i.e., medical director) hours worked, and the level of difficulty your client experiences in attracting new talent.

When in doubt about the reasonableness of a proposed compensation rate -- especially when it hovers around the 75 percentile for the physician's specialty -- encourage your client to engage the services of an independent health care appraisal service. Although comprehensive MGMA benchmark data is available to its health care members who pay the necessary subscription, additional data, guidance and support is available from Medical Development Specialists at www.MDSconsulting.com , HealthCare Appraisers, Inc. at www.HealthCareAppraisers.com, and ECG Management Consultants, Inc. at www.ecgmc.com . Independent appraisals can be pricey – averaging $3,000 to $5,000 per individual analysis – but go a long way to insure against an unfavorable OIG audit, especially when your rural Montana health care client is forced to pay a premium to recruit new talent from out of state.

One caveat: Confirm with the appraiser the period of time during which it will certify the proposed compensation as within fair market value. Health care, and the technologies supporting it, are rapidly changing. Compensation in one medical specialty may be experiencing rapid increases due to limited physician availability nationwide or, in the alternative, marked decline due to less demand for certain procedures, resulting in lower patient volumes and physician productivity. In those instances of compensation fluctuation, independent appraisers are reluctant to certify proposed compensation models beyond one or two years. The wise health care lawyer will therefore guide his or her client to consider shorter contract terms whenever possible. If the contract does involve a medical specialty experiencing market fluctuation, but a shorter term is not acceptable to the parties, a provision permitting periodic review of the physician's performance against current market benchmark data will help to ensure that overall compensation remains within fair market value over time.

3. Document Physician Performance

Independent physician contracts should require the physician or medical group to submit periodic time sheets, clinical or administrative reports, or progress reports as services are provided. In the event your health care client undergoes an audit by the OIG, the documentation will demonstrate not only that the services were indeed provided, but that they were consistent with fair market value. Again, health care entities that become too comfortable with one another often become lax regarding their reporting obligations, and exchange monies without sufficient, written proof that the services were ever performed, or were worth the amount of compensation paid.

4. Demand a Refund

If your health care client inadvertently overpays an independent physician or physician-owned entity, instruct your client to demand an immediate refund. Under Stark, the non-compliance period is deemed to continue until such time as the independent physician returns the overpayment to your client!

5. Consider Physician Contracting Software

In light of the significant exposure to your health care client

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for Stark and AKB Law non-compliance, it may be worthwhile for them to purchase physician contract management software. Options vary from product to product, but the basic features generally include: immediate access to the client's contract inventory; a contract-building module that imports compensation benchmark data based on the physician's specialty; an electronic approval process requiring review by you or the client's in-house attorney, and your client's financial analyst (as a double-check for fair market value); timely execution tracking prior to uploading of the final, fully-executed document; contract term tracking and e-mail notification to you and your client prior to termination of a services contract or premises lease, ensuring timely renewals and avoiding contract gaps (where exposure for Stark and AKB Law non-compliance is especially high.) Some software also offers tracking of physician non-monetary compensation (which for 2014 is currently capped at $385). Many products are internet based, allowing you and your client direct access to its contracts anytime, anywhere!

6. Self-Disclosure Protocol

If your audit reveals potential or actual non-compliance issues, immediately implement a plan to correct any oversights. A Stark and AKB Law "deep dive" may identify legitimate exceptions or bona fide compliance arguments. Furthermore, both CMS and the OIG offer advisory opinions on whether or not physician financial relationships are prohibited.

Separate from the advisory opinion process, CMS offers a protocol for the voluntary submission of actual or potential Stark Law violations. The protocol grants the Secretary of HHS authority to reduce amounts due and owing for violations based on the nature and extent of a violation, the timeliness of disclosure, and your client's cooperation during the process.

The protocol is outlined at www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/Self_Referral_Disclosure_Protocol.html

Resolving compliance issues is exceedingly complicated and fact-dependent. Assess your client's risks and options carefully and don't hesitate to seek expert guidance from a health care law specialist!

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If you find value in this and other articles in the Health Care Law Section series, and are interested in expanded continuing legal education opportunities specific to health care law, please consider becoming a member of the Section. Your Section membership fee to the State Bar helps fund future CLE programs in your area.

Medicare 101

The basics of Medicare in 2014

By Kimme Evermann

Created in 1965 during the Johnson administration, Medicare is the federal health insurance program available to US citizens who are 65 years and older, as well as to adults with (certain) disabilities of any age who are found to be disabled based on Social Security criteria; Medicare is also available to persons of any age with (ESRD) End Stage Renal Disease. ESRD is permanent kidney failure requiring dialysis or kidney transplant . To be eligible for Medicare, you must have at least (10) years of full-time employment credit on your SSA employment record (equals 40 work credits); citizens with fewer than (40) work credits are also often eligible for Medicare and may pay pro-rated premiums based on the number of work credits earned. Adults under 65 years of age who have been determined to be disabled by Social Security criteria become eligible for Medicare coverage after a (24) month waiting period. The Social Security Administration is responsible for Medicare enrollment and beneficiaries may begin their enrollment procedures as soon as (3) months prior to their 65th birthday, either in person or on the Social Security Administration website at www.ssa.gov .

Medicare is administered by the Centers for Medicare and Medicaid Services (CMS). Medicare coverage is offered to beneficiaries via two models: Traditional or Original Medicare & Medicare Health Plans (also known as Medicare Advantage Plans). Medicare coverage is further broken into (4) PARTS which cover different categories of a beneficiaries' health care needs: Part A, Part B, Part C, & Part D.

Traditional/Original Model: Medicare Parts A, B and D

Medicare Part A — Helps cover your inpatient care in hospitals and skilled nursing facilities, but is not custodial or long term care; it may be also be referred to as "catastrophic coverage" or "major medical". Part A also helps cover hospice care and a limited amount of home health care. Part A coverage is delivered via "benefit periods; a benefit period begins the day of admittance to a hospital or skilled nursing facility, and ends when you haven't received any inpatient hospital or skilled nursing facility care for (60) days in a row.

Most Medicare beneficiaries don't pay a monthly premium for Part A coverage; beneficiaries pay Medicare taxes during their lifelong employment. There is a deductible for each benefit period, however, and is $1,216 in 2014.

Medicare Part B — Medicare Part B helps cover outpatient medical services/outpatient care (ie: doctor's visits, hospital outpatient care, and limited home health care.) Part B also covers some preventive services like exams, lab tests and screening shots, as well as durable medical equipment. Paying for Part B is an 80%/20% split; Medicare pays 80% of the standardized charges while the beneficiary may pay up to 20%. Part B is optional coverage; a beneficiary may refuse Part B without penalty if they have/maintain creditable coverage through an employer and are currently employed prior to enrolling in Part B. When to enroll in Part B has become an ever more important piece of individual retirement planning; many more beneficiaries are remaining employed (and are covered by employer group insurance) for years beyond their 65th birthdays.

Most beneficiaries will pay the standard Part B premium of $104.90/month and a standard annual deductible of $147.00 in 2014. For some beneficiaries, there is Part B financial assistance available through the Medicare Savings Program (QMB/SLMB/QI). These programs are administered through Montana Medicaid and beneficiaries may enroll at the local Office of Public Assistance.

A beneficiary who does not enroll in Part B when they are eligible and/or do not have creditable coverage when they do enroll in Medicare, may be penalized 10% per year and may have to wait until the July following their enrollment for their Medicare benefits to begin. *It is important to note that enrollment in health care benefits from the VA or IHS health care systems ARE NOT considered creditable coverage to Medicare Part B.*

Medicare Part D —This is the newest major Medicare benefit, a result of the Medicare Modernization Act of 2003; Medicare Part D provides prescription drug coverage for all Medicare beneficiaries, including adults with disabilities or beneficiaries with ESRD.

In Montana, Medicare Part D plans range in cost from $12.60 - $140.60/month in 2014. If a beneficiary does not enroll in a Part D when eligible and does not have creditable coverage in place, the beneficiary may be penalized 1% per month until they do enroll in Medicare; in addition to a

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financial penalty, the beneficiary may have to wait to enroll until the annual Medicare open enrollment (October 15th through December 7th) and their benefit would not be available until January 1 of the following year. *It is important to note that pharmacy benefits from the VA and IHS systems ARE considered creditable coverage as related to Medicare Part D.*

Medicare Health Plans: Medicare Advantage

Medicare Part C – These are Medicare Health Plans, also known as Medicare Advantage Plans. Medicare Advantage Plans are health plan options (HMO's, PPO's & PFFS's) that are approved by CMS but are administered by private health care providers. Under this model, the beneficiary pays the private provider their Part B premium of $104.90/month in 2013 and might also pay an additional monthly premium to their Medicare Health Plan. Medicare Health /Advantage Plans provide a CMS authorized standard menu of benefits covering Part A, Part B and (usually) Part D services to enrolled beneficiaries and may sometimes offer extra benefits such as dental, vision and/or hearing services which are not currently covered by Traditional/Original Medicare. Although all medically necessary services provided by Traditional/Original Medicare must also be covered by Medicare Health Plans (MA's), a Medicare health plan may charge different co-pays, co-insurance and deductibles than under Traditional/Original Medicare.

In Montana, the monthly premium of Medicare Health Plans range from $0 to $151.00/month in 2014, plus the Medicare Part B monthly premium of $104.90/month in 2014. If a beneficiary is considering a Medicare Advantage plan, they should look at the plan's premium, co-pay, co-insurance and deductible structures as well as the core benefits being offered and approved provider networks before enrolling.

A Medicare Health Plan/Medicare Advantage is typically seen as a 'one stop shop" for Medicare benefits; Part A, Part B and Part D benefits are provided within one health care "package", usually utilizing a network of providers and facilities.

There is some financial assistance available for eligible beneficiaries; a Medicaid beneficiary who has also become eligible for Medicare is known as "dual eligible" and may get medical and pharmacy benefits from both Medicare and Medicaid; if you are in this status, you MUST enroll in a Medicare Part D (drug plan) or your drug coverage may be interrupted.

Some Medicare beneficiaries are eligible for financial assistance for the Part B benefit; the MSP (Medicare Savings Program) pays the monthly Part B premium and (possibly) deductible and co-pays. This program is administered by the MT Office of Public Assistance.

Some Medicare beneficiaries are eligible for financial assistance for the Part D benefit - LIS (Low Income Subsidy) or "Extra Help". Extra Help can pay for monthly Part D premiums (up to the regional benchmark of $32.20/month in 2014) as well as associated co-pays, deductibles and coverage during the gap. Call SSA at 1-800-772-1213 or visit their website http://www.ssa.gov/ for information and application.

Big Sky RX, Montana's SPAP (State Pharmaceutical Assistance Program) is another Medicare Part D helping program; in 2013, BSRX will pay up to $32.20/month in 2014 for eligible beneficiaries. Big Sky Rx pays the monthly Part D premium for some Medicare beneficiaries. Call 1-800-369-1233 for information and application.

SHIP Information

To contact your local SHIP counselor, call 1-800-551-3191. Remember: SHIP counseling is free of charge and will provide objective information and advocacy to those beneficiaries who request assistance.

Montana Area Agencies on Aging 1(800) 551-3191

Kimme Evermann / Montana SHIP Director
kevermann@mt.gov
(406) 444-7878
Janet Stellmon / SHIP Assistant
jstellmon@mt.gov
(406) 444-7784

If you need help with Medicare, please contact us!
SHIPs are your local assistance for people with Medicare.
1-800-551-3191

Medicare Supplemental Insurance

If you are enrolled in Traditional/Original Medicare Parts A, B and D, you may also want to purchase a Medicare Supplemental Insurance policy. A Medicare Supplemental insurance policy coordinates only with Original Medicare and does the following:

- Picks up "gaps" in Medicare coverage
- A beneficiary may choose any supplement without underwriting during the first (6) months of their Part B enrollment
- A beneficiary should not purchase a Medicare Supplemental policy if the beneficiary is enrolled in a Medicare Health Plan/Medicare Advantage Plan.
- Call the MT Commissioner of Insurance office for more information at 1-800-332-6148

When you are planning retirement, or if you are already a Medicare beneficiary, there are some extremely useful resources available at www.medicare.gov including:

- Prescription Drug Plan finder
  - Compare Part D plans
  - Review plan formularies, premiums and co-pays.
- Medicare Advantage Plans "Health Plan
  - Compare"Compare Medicare Advantage plans

MEDICARE, next page

MEDICARE, from previous page

- Review plan benefits, formularies, premiums, coinsurances and co-pays.

- My Medicare.gov
  - Review your individual drug spend
  - Review your Medicare Summary Notices
  - Research your Medicare benefits, options and rights
  - Receive healthcare updates

STATE HEALTH INSURANCE ASSISTANCE PROGRAM

"Local Help for People with Medicare"

Additionally, there is a resource that all Medicare beneficiaries and their families should be aware of; SHIP (State Health Insurance Assistance Program) is a local counseling, assistance and advocacy resource available (at no charge) to all Medicare beneficiaries, their families, service providers and others who are interested in Medicare rights, options and benefits. The SHIPs were created by Congress in 1992 to assist beneficiaries with the standardization of Medicare Supplements, and to provide expert, objective Medicare information, assistance and advocacy to beneficiaries in a local, one-on-one setting. By 2013, the SHIPs have evolved into the local community's best and most objective resource on Medicare and other health insurance and benefits related to Medicare.

Every state and the territories provide this objective Medicare assistance via their state SHIP. This beneficiary advocacy program has been administered and supported by CMS (Centers for Medicare and Medicaid Services) for the past 21 years.

Kimme Evermann *is the state SHIP director for Montana Department of Public Health & Human Services / Office on Aging*

ship NATIONAL NETWORK state health insurance assistance programs

LOCAL HELP FOR PEOPLE WITH MEDICARE

Board and Commission Appointments

Summarized from April 22 order AF 11-0765

The Honorable Richard Jackson, representing the Montana-Wyoming Tribal Judges Association, has resigned from the Access to Justice Commission. With thanks to Judge Jackson for his service, and with consent of the nominee, IT IS HEREBY ORDERED that Judge Winona Tanner, chief judge of the Confederated Salish and Kootenai Tribes, is appointed to the Access to Justice Commission as a representative of Montana-Wyoming Tribal Judges Association for the remainder of the three-year term ending September 30, 2016.

Summarized from April 15 order AF 06-0090

Pursuant to Section I of the Rules Establishing the Commission on Practice of the Supreme Court of the State of Montana, dated August 24, 1983, an Order was issued February 28, 2014, requesting that the Honorable Ted O. Lympus, District Judge, conduct an election among the resident members of the State Bar in Commission Area A, comprised of Mineral, Missoula, Flathead, Lincoln, Lake, Sanders and Ravalli Counties (Fourth, Eleventh, Nineteenth, Twentieth and Twenty-first Judicial Districts) to certify to this Court the results of the election. In a separate order dated March 3, 2014, this Court requested that the Honorable Mike Salvagni, District Judge, conduct an election among the resident members of the State Bar of Montana in Commission Area E, comprised of Lewis and Clark, Broadwater, Park, Sweet Grass and Gallatin Counties (First, Sixth and Eighteenth Judicial Districts) and to certify to this Court the results of that election. Elections were held and Judges Lympus and Salvagni have certified to this Court the results. By Rule this Court is obligated to appoint from a list of the top three candidates that received votes in each region. The Court expresses our gratitude to all attorneys that expressed an interest in serving on the Commission. Based on the election results, the Court hereby re-appoints to the Commission on Practice of the Supreme Court of the State of Montana the following members for a four-year term to expire on April 1, 2018:

- Area A: Tracy Axelberg, Kalispell, Montana
- Area E: Daniel McLean, Helena, Montana

Summarized from March 25 order AF 06-0216

The terms of Judy Meadows, Beth McLaughlin, and Ed Smith on the Montana Supreme Court Commission on Technology (Commission) expired or are due to expire soon. In addition, with the appointment of the Honorable Brian Morris to the federal bench, his place on the Commission must be filled. The Court thanks Judy Meadows, Beth McLaughlin, Ed Smith, and the Honorable Brian Morris for their dedicated service to the Commission, to this Court and to the people of Montana. IT IS ORDERED that Ed Smith and Beth McLaughlin are hereby reappointed to the Commission on Technology for terms commencing on the date of this Order and expiring on March 31, 2017. IT IS FURTHER ORDERED that the following are hereby appointed to the Commission on Technology for terms commencing on the date of this Order and expiring on March 31, 2017:

- Lisa Mecklenberg-Jackson as State Law Librarian
- The Honorable Mike Wheat as a Justice of the Montana Supreme Court

Discipline

Editor's note: *This shortened version is summarized from April 4 opinion and order of discipline PR 13-0070. Space limits substantially what is printed here. Full version at courts.mt.gov.*

On January 25, 2013, the Office of Disciplinary Counsel (ODC) filed a formal disciplinary complaint under this cause number against Montana attorney Solomon Neuhardt. The complaint involves Neuhardt's concurrent representation of both Tommy Vasquez and Vasquez's then-wife Adrian Christenson during a federal investigation of methamphetamine distribution in the Billings, Montana, area. The disciplinary complaint and all other documents filed in this matter may be reviewed by any interested persons in the office of the Clerk of this Court.

ODC alleged violations of Rules 1.7, 1.9, 8.4(c), 8.4(d), and 8.1(a) of the Montana Rules of Professional Conduct (MRPC), arising out of Neuhardt's joint representation of Vasquez and Christenson. The Commission on Practice held a hearing on the complaint on July 17, 2013, and on October 17, 2013, at which hearing Neuhardt was present with counsel and testimony was presented. On December 5, 2013, the Commission submitted to this Court its findings of fact, conclusions of law, and recommendation for discipline.

Both parties have filed objections to the Commission's decision. We restate the following issues for review:

1. Was the testimony of ODC witness Bryan Norcross properly stricken from the record? *Short answer: yes*
2. Did ODC prove by clear and convincing evidence that Neuhardt violated Rule 1.7, MRPC? *Short answer: yes*
3. Did ODC prove by clear and convincing evidence that Neuhardt violated Rule 1.9, MRPC? *Short answer: yes*
4. What is the appropriate discipline for the established violations?

IT IS HEREBY ORDERED that, with the exceptions discussed above, the Commission on Practice's Findings of Fact, Conclusions of Law, and Recommendation are ACCEPTED and ADOPTED.

IT IS FURTHER ORDERED that Solomon Neuhardt is suspended from the practice of law in Montana for 90 days, from June 2, 2014, through August 31, 2014. Neuhardt is directed to give notice of his suspension to all clients he represents in pending matters, any co-counsel in pending matters, all opposing counsel and self-represented opposing parties in pending matters, and all courts in which he appears as counsel of record in pending matters, as required by Rule 30, MRLDE.

IT IS FURTHER ORDERED that Neuhardt shall appear before this Court in our courtroom in Helena, Montana, at 1:00 p.m. on April 29, 2014, to receive a public censure by this Court.

IT IS FURTHER ORDERED that Neuhardt shall pay the costs of these proceedings subject to the provisions of Rule 9(A)(8), MRLDE, which allow him to file objections to the statement of costs.

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 on **May 1, 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.

Update for May - June ...

- Transcripts mailed May 1.
- Because of some technical issues with the new CLE website/ database the reporting deadline has been extended to June 1.
- Deadline to take and report CLE was **June 1. Please report as soon as possible.**
- These are temporary, fluid dates and will revert to the standard schedule in the 2014-2015 reporting year.

What's Changing (standard schedule)…

- 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 (standard schedule)…

- The reporting year still runs from April 1 to March 31
- 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 *as you earn them* 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.

Recent changes CLE rules for ethics

Recent changes to the Montana Supreme Court Rules for Continuing Legal Education will require that Montana attorneys earn a minimum of two ethics credits each year, beginning with the current reporting cycle that ends March 31, 2014. The amendment replaces the previous requirement of five ethics credits every three years. In addition, the requirement for substance abuse/mental impairment, or SAMI, education has been eliminated. While SAMI credits will no longer be mandatory they will continue to qualify as ethics credits in fulfillment of the yearly requirement.

The amendments came about in response to the confusion surrounding the tracking of ethics credits over staggered three-year reporting cycles. All active Montana attorneys will begin the 2013-2014 reporting year with a clean slate in terms of ethics credits. No ethics credits may be carried over from the previous year. Any ethics credits earned prior to this year were applied to the attorney's previous 3-year ethics cycle.

Ethics credits may be earned from live programs or by self-study methods. Beginning with the 2014-2015 reporting year, excess ethics credits earned from live or "interactive" methods may be carried forward to the next two reporting years. Excess ethics credits earned by self-study methods such as on-demand internet programs or audio or video recordings may not be carried forward.

Other changes to the CLE rules will eliminate the use of the notarized affidavit form to determine individual CLE compliance. Year-round reporting of CLE attendance will establish an up-to-date electronic record of each attorney's CLE compliance which will be verified at the end of each reporting cycle.

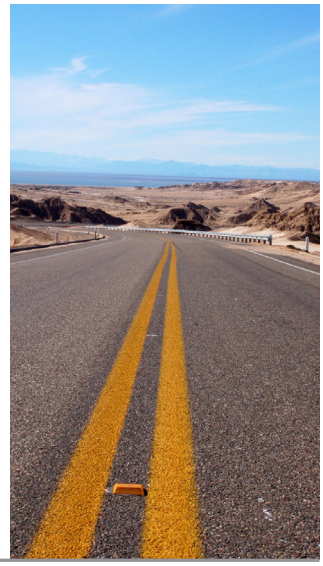
3 Easy Steps to CLE Compliance

1. Always obtain an attendance certificate when participating in CLE programs. These are issued by the program sponsor for both live and online programs.

2. Send copies of all certificates to the Montana Commission of CLE at: cle@montanabar.org.

3. Remember to include your State Bar of Montana

ROADSHOW



Helena
June 13
2-5 p.m.

Best Western Premier Great Northern Hotel

The Road Show qualifies for 3 ethics credits:

Conflicts, waivers & checklists | Technology, confidentiality & fee agreements

This is a free program offered through the State Bar of Montana. Space is limited and spots fill quickly, so please RSVP early if you're interested. Send RSVPs to roadshow@montanabar.org.

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.

June

June 20 - Current Family Law Issues for Today's Changing World: Red Lion, Kalispell. 7.5 CLE, including 1.5 ethics. The morning session will cover cybersecurity and apps for iPad and Android, as well as complex asset distributions.
The afternoon will cover domestic violence issues in settlement conferences, witness and client interviewing techniques, cutting edge parenting issues and premarital/same sex/cohabitation agreements.

June 20 - Cybersleuth's Guide to the Internet: Holiday Inn, 200 S. Pattee, Missoula. 6 CLE, including 2 ethics. 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.

September

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

Sept. 25-26 - Annual Meeting CLE - Huntley Lodge, Big Sky. Revised schedule planned this year. CLE sessions will run from 7 am to 1 p.m., Thursday and Friday, leaving the afternoons open to enjoy all that Big Sky has to offer.

October

Oct. 10 - Annual Construction Law Institute: Hilton Garden, Bozeman
Sponsored by the Construction Law Section. More info to follow. Flier mailed mid-August.

Oct. 16 - Estate Planning CLE: Hilton Garden, Missoula
Sponsored by the BETTR Section. More info to follow. Flier mailed mid-August

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ATTORNEY POSITIONS

ADMINISTRATIVE LAW JUDGE: The Office of Administrative Hearings at the Montana Department of Labor and Industry is seeking an experienced Administrative Law Judge to join its professional staff. Attorneys with experience in employment law litigation are also encouraged to apply. More information about the position may be found under position number 66203131 at https://svc.mt.gov/statejobsearch

ASSOCIATE ATTORNEY: Silverman Law Office, PLLC is seeking a tax attorney with 3+ years experience for a fast paced tax/transactional/estate planning practice. Applicant must have excellent communication and people skills, as well as a desire to be a teamplayer and provide first-rate customer service. Applicant must be admitted in Montana. Starting salary D.O.E. Please send your cover letter, references, resume and writing sample to sandy@mttaxlaw.com.

ATTORNEY -- MINOT, ND: Entrepreneurial Attorney wanted to join a mature, successful practice in the middle of the Bakken oil boom with the following qualifications: at least 5 years experience in estate planning; experience in farm and business transition planning; preference given to those with some tax background. Practice is located in Minot, ND. Send resume to attorney.resume@yahoo.com. Please indicate salary requirements. Salary will be commensurate with experience.

ASSOCIATE: Doney Crowley P.C. is seeking an associate attorney with 0-4 years of experience with strong research and writing skills, and an interest in litigation. Successful applicants must also be licensed in Montana or currently scheduled to take the Montana bar, have a strong academic record, and possess strong legal research and writing proficiencies. Competitive salary and benefits. Please submit your cover letter, resume, transcript and writing sample to Doney Crowley P.C., Attn: Melissa Hanson, P.O. Box 1185, Helena, MT 59624 or via email to mhanson@doneylaw.com . Visit our website at www.doneylaw.com for more information about our firm.

SENIOR LITIGATION ASSOCIATE: Doney Crowley P.C. is seeking a Senior Litigation Associate with 5 or more years of general experience, including 2 or more years of litigation experience with focus on natural resources/environmental and/or insurance coverage issues. Successful applicants must be licensed to practice in Montana and demonstrate solid research and writing capabilities. Competitive salary and benefits. Please submit your cover letter, resume, transcript and writing sample to Doney Crowley P.C., Attn: Melissa Hanson, P.O. Box 1185, Helena, MT 59624 or via email to mhanson@doneylaw.com . Visit our website at www.doneylaw.com for more information about our firm.

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LEGAL SECRETARY: Full-time or Part-time – Missoula – Job #2563.
The Missoula office of the Dorsey & Whitney law firm has a position available for a legal secretary.

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Requirements: High school diploma or G.E.D. equivalent; typing of 50 wpm with a high degree of accuracy; proficiency in Word; strong proofreading and organizational skills; at least 3+ years litigation legal secretary experience preferred; excellent oral and written communications skills; flexibility regarding hours desired (overtime may be requested).

Dorsey & Whitney LLP accepts online applications. Please go to the 'Careers' section of the Dorsey website at www.Dorsey.com and complete Dorsey's online application form. We do not accept application materials by mail or email except as a reasonable accommodation for qualified disabled applicants. Individuals who are unable to use our online process due to a disability should call 612-492-5302.

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PARALEGAL: Law firm looking for a qualified Paralegal with commercial litigation and transactional experience preferred. Full benefit package and competitive wage available. Send cover letter and resume' to: Boone Karlberg, P.O. Box 9199, Missoula MT 59807 or by email to kjenkins@boonekarlberg.com.

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MONTANA LAWYER
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State Bar of Montana
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