MONTANA LAWYER
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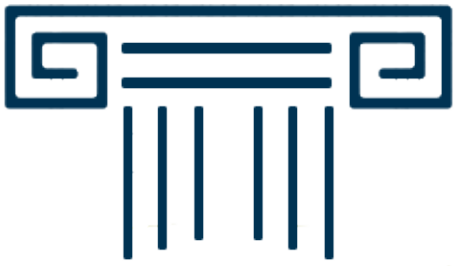

Goodbye to CLE affidavits

Montana Continuing Legal Education (www.mtcle.org) is now maintaining and issuing transcripts. Learn what is changing and what is staying the same. **Page 14**

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MONTANA LAWYER

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A sword with two edges

By James C. Nelson

There is gathering national support acknowledging that lesbian, gay, bisexual and transgender (LGBT) citizens are simply that—citizens—with the same rights, privileges and obligations as other citizens. In response, some States, along with various fundamentalist religious and conservative organizations are fighting for a legally protected right to discriminate. This right to discriminate is grounded in the First Amendment's "Free Exercise" clause. As the theory goes, being able to discriminate against LGBT citizens is necessary to preserve the First Amendment right to the free exercise of religion for these States' fundamentalist religious heterosexuals and conservative organizations.

This stratagem is not only patently specious; it is legally insupportable.

Contrary to the homophobic fear-mongering by religious fundamentalists and conservatives, there is no legal support for the notion that a State which has recognized the equal rights of LGBT citizens can force a religious organization to adopt those same views. If Religion X condemns homosexuality, the State cannot, require Religion X to perform a gay or lesbian marriage or change its doctrinal beliefs against homosexuality under threat of governmental penalty. Indeed, if the State attempted to do that, it would violate the free exercise clause of the First Amendment. And, of course, for that reason, no State has made any such demands on any sectarian organization.

Yet, in Arizona, Idaho, Kansas, Nevada, Oregon, South Dakota, Tennessee, Oklahoma, Mississippi, Ohio, Georgia and Utah religious and conservative organizations and, in some cases, their supporters in the state legislatures are actively promoting the adoption of laws that would permit any individual or group to discriminate in a variety of contexts based on religious beliefs. Such laws would allow business owners, for example, to discriminate against LGBT customers in much the same fashion that businesses run by racists once discriminated with impunity against people of color. A government official could deny same-sex couples basic services and benefits based solely on that official's religious beliefs. Indeed, Arizona has even proposed to allow the denial of equal pay to women and the abrogation of contractual rights in the name of religion. In other words, one's personal religious beliefs trump legal obligations imposed generally upon and for the benefit all.

Aside from the obvious anarchical effect of such laws, this campaign stands the hallowed principle of the separation of church and state on its head. This important principle incorporated in the First Amendment religion clauses, is really just a simple quid pro quo: The State cannot legislate with respect to the belief, doctrines and practices of sectarian organizations; but, on the flip side, the State cannot establish or adopt via legislation any religious belief, doctrine or practice. The "freedom of religion" clause is balanced with the "no establishment" clause; one clause compliments and completes the other.

Related article: The American Bar Association Commission on Sexual Orientation and Gender Identity recently honored Justice Nelson with its Stonewall Award -- *see page 7.*

And, of course, that is precisely why "freedom to discriminate" laws are unconstitutional: these laws purport to adopt, as a matter of law, the doctrines and beliefs of certain fundamentalist sectarian and conservative organizations against homosexuality. However, the government has no more authority to embrace, legislatively, the condemnation of homosexuality on religious grounds, than it did (also, ironically, based on religion) slavery, the denial of voting rights to women or the prohibition against interracial marriage. The State cannot deny a minority of citizens the rights and obligations of generally applicable laws because someone's personal religious beliefs are offended.

The long and short of it is that these fundamentalist religious and conservative organizations cannot have it both ways. If they do not want the State telling them what to believe, then they cannot expect the government to adopt their beliefs as part of the generally applicable body of state law.

No doubt, that may be a tough pill to swallow for those who rush to turn their States into backwaters of bigotry and hate. But the fact is that Religious Freedom is not the sword; it is simply one edge of a two-edged blade. The opposite edge is the establishment prohibition. The First Amendment and the principle of separation of church and state demands that we will not have one without the other. The sword is sharpened on opposing sides; it cuts both ways.

I fully expect that we will see a move to enact some version of these "right to discriminate" laws during Montana's next legislative session. I have little doubt that such laws and the views they represent will ultimately—and deservedly—become part of the detritus of progressive social and moral evolution. Until then, however, one can only hope that the views of those legislators committed to Constitutional principles of equal protection and human dignity will carry the day.

Finally, all that LGBT people rightly demand is that they have the advantage and protection of the same Constitutional rights and laws that other citizens enjoy. Nothing more; nothing less. The equal protection of the law. Equality.

The First Amendment protects nothing less than that.

Justice James C. Nelson *served on the Montana Supreme Court from 1993-2012.*

Conference travel brings worthy dialogue with other ambassadors

Lewis & Clark Journals

(The Corps had just come down off Lolo Pass on their way to the Pacific Ocean, coming into their second winter. They were cold, tired, hungry and looking to rest and regroup before taking the next river down to the ocean. They encounter the Nez Pierce and learn that, hungry as they are, changing from dried buffalo to Salmon and Camas root is not so fun . . . .)

Wednesday 20th Septr 1805

proceeded on through a butifull Countrey for three miles to a Small Plain in which I found maney Indian lodges, at the distance of 1 mile from the lodges I met 3 boys, when they Saw me ran and hid themselves searched found gave them Small pieces of ribin & Sent them forward to the village a man Came out to meet me with ;great Caution & Conducted us to a large Spacious Lodge which he told me (by Signs) was the Lodge of his great Chief. . . .

Saturday 23rd Septr 1805.

We assembled the principal Men as well as the Chiefs and by Signs informed them where we came from where bound our wish to inculcate peace and good understanding between all the red people &c. which appeared to Satisfy them much, we then gave 2 other Medals to other Chefs of bands, a flag to the twisted hare, left a flag & Handkerchief to the grand Chief gave, a Shirt to the Twisted hare & a knife & Handkerchif with a Small pece of Tobacco to each.

Thursday 28th Septr. 1805

Our men nearly all Complaining of ther bowels, a heaviness at the Stomach & Lax, Some of those taken first getting better, a number of Indians about us gazeing &c. &c. This day proved verry worm and Sultery, nothing killed men complaining of their diat of fish & roots. all that is able working at the Canoes, Several Indians leave us to day, the raft continue on down the river, one old man informed us that he had been to the White peoples fort at the falls & got white beeds &c his Story was not beleved as he Could explain nothing.

This is bar conference season. Trips to the big city – hotels that could hire most of Bigfork. Meetings & exchanges with bar leaders. Kind of like the Corps of Discovery coming off Lolo pass, meeting the Nez Pierce. We speak a different language and the food gives you, well, cause for reflection. But as with the explorers, good to meet new folk & stretch our legs into new territory. Could even learn something useful. Lewis & Clark traded for salmon & camas root, built new canoes and got directions down river.

When I tire of taking pictures of fancy-lit buildings that I can't see over or the cabbie's take on Affordable Care Act, I head to the ballroom and listen to the inspired speaker. Sometimes it's sign language, but I frequently hear something worth bringing back. There's smaller "break-out sessions," typically with other bar officers. The most valuable is just visiting other officers. Even the large "metro bars" struggle with pro se litigation, e-discovery & billing. There's fancy-dressed folk from big lodges who work all day on how bar associations can improve themselves and members. In Chicago last month we learned of the ABA Task Force on Legal Education – proposing solutions to the high cost of law school & the 50 percent fall off in applications. To my surprise, they admitted excessive student loans inflated tuition. And as the ABA accredits law schools, they suggested reforms to lower the cost and make law school more practice-based.

So we'll travel and dialogue. In April we visit D.C. and the lodge of the great chief. I'm pretty partial to Montana and our state & local bars' fine work. We've got issues too – pro se problems abound and judges asking to change substitution rules. Lewis & Clark didn't just trade for supplies & directions – they were ambassadors for a growing nation. The deputy badges and red kerchiefs I share may have similar value to ribbons and beads given to Nez Pierce. But I'm proud to represent Montana and share our unique practice, lifestyle and success.

Stay tuned -- I'll share how it goes. Remember, when you come to my lodge the robe will be spread and the pipe lit for you.

Yer Chief Deputy
Randy Snyder

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Mazurek memorial to be dedicated in July

To honor the life and service of former Montana Attorney General, State Senator, Montana Lawyer, Husband, and Father, the late Joseph P. Mazurek, the 63rd Montana Legislature authorized the construction of a memorial garden at the state Justice Building in Helena, and further authorized that the Justice Building be named the "Joseph P. Mazurek Justice Building." Dedication of the garden and the formal naming of the building will be held in a ceremony in July.

To many, Joe Mazurek epitomized the best the legal profession can be. He was a dedicated public servant, always mindful he was doing "the peoples' work"; a trusted and skilled lawyer; a consensus builder able to bring together differing points of view; a contributing member of his community; and a devoted father and husband. He was a tireless advocate of the State of Montana, a place he called "a small town with a long main street." Joe died of Alzheimer's in August of 2012.

The Legislature specified that the garden was to be built with donated funds and services. Initial fund-raising efforts have raised almost 2/3 of the amount needed, but an additional $6000 must be raised by June 1, 2014 for the garden to be completed in time for the dedication. The memorial committee is asking for contributions from members of the State Bar of Montana to help complete the garden. Donations of any size can be made out and sent to: "The Helena Rotary Foundation, Joe Mazurek Memorial Fund", P.O. Box 333, Helena, Montana, 59604. Donations are tax-deductible. If you desire additional information or would be willing to assist in this final fund raising effort, please call Dennis Taylor ((406) 443-3398) or Harley Harris (406) 439-8190).

St. Lawrence Law Office opens doors in downtown Helena

St. Lawrence

Specializing in water rights, natural resources, administrative law, and government relations, St. Lawrence Law Office provides responsive legal solutions for agriculture, development, business, and individuals. Attorney Abigail St. Lawrence and paralegal Shanni K. Barry have over 25 years of combined legal experience. Originally from Great Falls, St. Lawrence earned her B.A. in philosophy and psychology with honors at Whitman College in Walla Walla, Washington and her J.D. with a certificate in natural resources and environmental law at Northwestern School of Law of Lewis and Clark College in Portland, Oregon. Building on her experience clerking with the Office of Counsel in the U.S. Army Corps of Engineers, Walla Walla District and working on Clean Water Act permitting with the Oregon Department of Environmental Quality. St. Lawrence returned to Montana in 2004 as an attorney with Doney Crowley Payne Bloomquist PC in Helena and now in her own practice. In addition, St. Lawrence is a frequent invited lecturer at continuing legal education courses in her areas of expertise.

Barry

A Helena native, Barry has nearly 15 years of legal experience including serving as an investigator for the State of Montana and working in private practice. Barry graduated from the University of Great Falls in 2001 with an Associate of Science in Paralegal Studies and became a Certified Paralegal through the National Association of Legal Assistants in September of 2007. She has a broad legal background including assisting clients with administrative and regulatory matters, litigation, and government relations.

Women's Law Section annual dinner

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

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

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

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

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

Lawlor joins Reely Law Firm

Lawlor

Michael Mahan Lawlor has joined the Reely Law Firm, of Missoula. For the past six years, Michael had been with the Montana Department of Revenue, working primarily with the Liquor Control Division on all aspects of alcoholic beverage law.

Michael is a Helena native, and a 2002 graduate (with honors) of the University of Montana School of Law. He has an LL.M. in Taxation from the University of Washington School of Law. He served as a law clerk for Montana Chief Justice Karla Gray and for United States Tax Court Judge Herbert Chabot.

Michael's practice focuses on alcoholic beverage and gambling licensing, estate planning, probate, and business transactions.

ABA honors LGBT advancements in the legal profession

Stonewall Award honors retired Montana Justice James Nelson

The American Bar Association Commission on Sexual Orientation and Gender Identity honored three lawyers with its second annual Stonewall Award during a ceremony on Feb. 8 at the ABA Midyear Meeting in Chicago.

Named after the New York City Stonewall Inn police raid and riot of June 28, 1969, which was a turning point in the gay rights movement, the award recognizes lawyers who have considerably advanced lesbian, gay, bisexual and transgender individuals in the legal profession and successfully championed LGBT legal causes.

The 2014 award recipients: Elaine D. Kaplan, James C. Nelson, Stephen T. Whittle

Elaine D. Kaplan is the acting director of the U.S. Office of Personnel Management, where she is responsible for recruiting, hiring and setting benefits policies for 1.9 million federal civilian employees. In September, Kaplan was confirmed by the Senate as a judge on the United States Court of Federal Claims.

James C. Nelson served as a justice on the Montana Supreme Court from 1993-2013. In addition to holding numerous civic posts in Montana, he has taught as an adjunct professor at the University of Montana School of Law. Nelson also served as an officer in the United States Army.

Stephen T. Whittle is a professor of equalities law at Manchester Metropolitan University in Manchester, England. Whittle transitioned to living permanently in his preferred gender role in 1975 and was made an officer of the Order of the British Empire in the Queen's New Year's Honours List for his work on transgender people's rights. Despite being diagnosed with multiple sclerosis in 2002, he continues to work full time and is engaged in various volunteer activities.

The ABA Commission on Sexual Orientation and Gender Identity leads the ABA's commitment to diversity, inclusion and full and equal participation by lesbian, gay, bisexual and transgender people in the ABA, the legal profession and society. Created in 2007, the commission seeks to secure equal treatment in the ABA, the legal profession and the justice system without regard to sexual orientation or gender identity.

— http://www.americanbar.org

Cardey-Yates joins Parsons Behle & Latimer

Raymond J. Etcheverry, chairman and CEO of Parsons Behle & Latimer, has announced that Lynn Cardey-Yates has joined the firm's Environmental, Energy & Natural Resources team and will concentrate her practice on mining law and other natural resource matters and transactions.

Cardey-Yates

Prior to joining the firm, Cardey-Yates served as vice president, sustainable development for Rio Tinto Kennecott. In that role, she led Kennecott's health, safety, permitting and environmental teams, oversaw energy programs, and managed water and land resources, including the Daybreak master planned community. She also previously served as vice president – legal of Rio Tinto Kennecott Utah Copper, and as vice president and general counsel of the historic Kennecott group of companies.

Cardey-Yates earned her J.D. degree from the University of Denver, College of Law in 1981. She graduated from Western State College with a B.A. degree in 1977. She began practicing law in Denver in the oil and gas area, before transitioning her practice to mining.

"Lynn's depth of knowledge and experience greatly benefits both our firm and our clients who face challenging natural resource, energy and environmental issues," said Rick Angell, chair of the firm's Environmental, Energy & Natural Resources Department.

Parsons Behle & Latimer's 127 attorneys serve clients in natural resources, manufacturing, technology, real estate, banking, retail, utility and health care industries, as well as practicing mass torts and personal injury law. Founded in 1882, the firm has offices in Boise, Las Vegas, Reno, Salt Lake City, Spokane and Washington D.C.

Harris resuming private practice

Harley R. Harris, of Helena, announces his resumption of the private practice of law as of April 1, 2014. Harris, a former Partner at Luxan & Murfitt PLLP of Helena, offers a diverse and extensive set of legal experiences to assist clients in a number of areas. Prior to his private practice at Luxan & Murfitt, Harris was an Assistant Attorney General emphasizing water rights, complex civil litigation, environmental, and administrative law matters. While at Luxan & Murfitt, Harris served a variety of clients in the areas of water rights, property, environmental, public utility, energy, transactional, administrative, litigation, and appellate matters. Mr. Harris also has served as a Supreme Court Fellow for the National Association of Attorneys General, and more recently was General Counsel for MATL LLP and part of the senior leadership team that successfully completed the Montana portion of the Montana Alberta Tie International Transmission Line. Mr. Harris will be focusing his practice on assisting clients in the areas of water rights, property, public utility, energy, transactional, administrative, litigation, and appellate matters. Mr. Harris will continue to be based in Helena, and can be reached at (406) 439-8190 or harleyharris5@optimum.net.

Bar seeks award nominations

Print nomination forms for the William J. Jameson Award and George L. Bousliman Professionalism Award are on pages 16-17. The Karla M. Gray Equal Justice, and the Neil Haight Pro Bono awards forms will be printed in the April Montana Lawyer. Copies of the nomination forms for all awards are available online at montanabar.org. Information and criteria are listed on the individual awards.

Vacant trustee position

One of the 3 trustees positions for Area F (Lewis & Clark, Broadwater Counties) is vacant with the recent resignation of Tom Keegan. Interested candidates must send a letter of interest by March 28, 2014. The State Bar of Trustees will select the new trustee to serve out the term until September 2015. Selection will be made at their April 11, 2014 meeting in Missoula, at the UM School of Law. Interested candidates must be available for a telephone or in person interview at that time. For any questions about the position, contact Chris Manos, Executive Director, State Bar of Montana, 447-2203, or cmanos@montanabar.org

Dues statements mailed March 1

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

No more CLE affidavits?

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

Member survey available March 1.

The State Bar of Montana is gathering input on the services and benefits that you receive as a member of the bar. We also are interested in hearing about the challenges you face and the ways in which we can better serve you as we chart a course for the State Bar of Montana. Participate, and you could win $100, $75, or $50 gift cards! The survey link will be live March 1 - March 22 and available at www.montanabar.org.

MJF issues call for grant proposals

The Montana Justice Foundation (MJF) announces its call for grant proposals. The MJF works to achieve equal access to justice for all Montanans through effective funding and leadership.The deadline for submission of grant proposals is Monday, March 31, 2014. The MJF recently moved to an electronic, paperless grants process. Organizations interested in applying for a grant will need to contact the MJF by Monday, March 17, 2014 to register for an online account. For further information on the application process, please contact the MJF at 406.523.3920, or visit them online at www.mtjustice.org/grant-programs/.

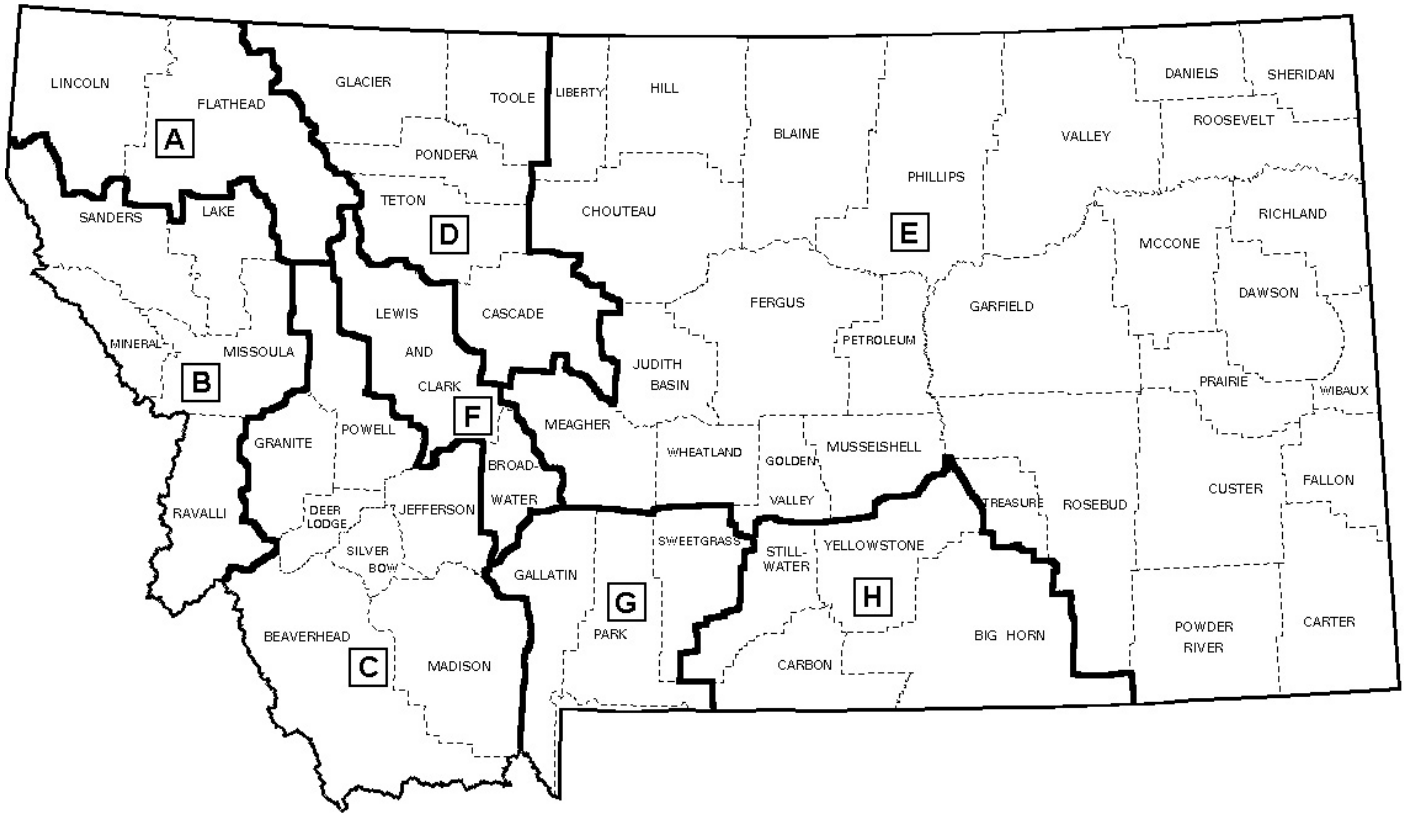
State Bar of Montana elections begin

Election season is under way for State Bar positions. Letters have been sent to those whose terms are expiring. A copy of the nominating petition is on page XX, and at www.montanabar.org. See schedule below for details. The following positions are up for election: Areas A, B, C, D, G; State Bar delegate to ABA, president-elect.

2014 election calendar

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

State Bar Trustee Areas



IN THE MATTER OF THE RULES OF APPELLATE PROCEDURE

Summarized from Feb. 5 order No. AF 07-0016

The Court proposes to adopt changes to the Montana Rules of Appellate Procedure Rules 2, 4, 5, 7, 12, 13, 17, and 20. Mainly, the proposed revisions constitute what could be described as housekeeping matters. Proposed revisions to M. R. App. P. 7, on mandatory appellate alternative dispute resolution, are the most substantive proposed changes.

Those rules, with language proposed to be deleted interlineated and language proposed to be added highlighted, can be found at www.montanabar.org and supremecourtdocket.mt.gov.

...[T]he Court will accept written comments on the above proposed changes to the Montana Rules of Appellate Procedure for a period of 60 days following the date of this Order. All comments shall be filed with the Clerk of this Court.

IN RE RULE ON SUBSTITUTION OF DISTRICT JUDGES

Editor's note: *To read public comments, go to http://supremecourtdocket.mt.gov and search AF 09-2989. Direct URL is http://supremecourtdocket.mt.gov/search/case?case=13192.*

Summarized from Feb. 18 order No. AF 09-0289

The Montana Judges Association (MJA) has filed a request asking this Court to make significant substantive amendments to the rule on substitution of district judges codified at § 3-1-804, MCA, to address what the MJA characterizes as "obvious abuse of the rule." The rule, with the MJA 's proposed deletions interlineated and the proposed additions highlighted can be found at www.montanabar.org and supremecourtdocket.mt.gov.

...[T]he Court will accept written comments to the rule on substitution of district judges codified at § 3-1-804, MCA, for a period of 60 days following the date of this Order. All comments shall be filed in writing with the Clerk of this Court.

STATE OF MONTANA, Petitioner v. MONTANA NINTH JUDICIAL DISTRICT COURT, TETON COUNTY, THE HONORABLE ROBERT OLSON , DISTRICT JUDGE

Summarized from Feb. 20 order OP 14-0096

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

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

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

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

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

IN RE THE APPOINTMENT OF MEMBERS OF THE ACCESS TO JUSTICE COMMISSION

Summarized from Feb. 18 order No. AF 11-0765

Jackie Schara, representing Clerks of Courts of Limited Jurisdiction, has notified the Court of her resignation from the Access to Justice Commission. With thanks to Ms. Schara for her service,

IT IS HEREBY ORDERED that Teri Mazer, Gallatin County Clerk of Justice Court, is appointed to the Access to Justice Commission as a representative of Montana Clerks of Courts of Limited Jurisdiction for the remainder of the three year term ending September 30, 2016.

IN THE MATTER OF REAPPOINTMENTS AND APPOINTMENTS TO THE COMMISSION ON RULES OF EVIDENCE

Summarized from Feb. 18 order No. AF 07-0018

The terms of Margaret A. Tonon, Kirsten H. Pabst and Guy W. Rogers as members of the Montana Supreme Court Commission on Rules of Evidence have expired. The Court expresses its gratitude to Margaret A. Tonon, Kirsten H. Pabst and Guy W. Rogers for their service to the legal profession and the people of Montana.

IT IS HEREBY ORDERED that the following are reappointed to the Commission on Rules of Evidence for four-year terms to expire on January 1, 2018:

- Kirsten H. Pabst
- Guy W. Rogers

IT IS FURTHER ORDERED that Cynthia Ford (Professor, University of Montana School of Law) is appointed as a new member to the Commission to a four-year term to expire on January 1, 2018.

IT IS FURTHER ORDERED that the Honorable Jeffrey M. Sherlock, whose term expires on March 1, 2016, is hereby appointed Chairman of the Commission on Rules of Evidence.

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ATTORNEY DISCIPLINE

Summarized from Dec. 17, 2013, order No. PR 13-0732

On October 31, 2013, the Office of Disciplinary Counsel filed with the Clerk of this Court a petition for reciprocal discipline of Daniel T. McCarthy , an attorney licensed to practice law in the state of Montana. The petition was based on McCarthy's September 18, 2013 disbarment in the state of Arizona for ethical misconduct including misappropriation of client funds.

Pursuant to Rule 27B(2) of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE), this Court issued to McCarthy notice of the petition for reciprocal discipline and invited him to respond within 30 days with any claim he wished to raise that imposition of the identical discipline in the state of Montana would be unwarranted. The notice was sent to McCarthy's current address as required to be maintained on file with the State Bar of Montana, pursuant to MRLDE 18. Itwas returned as undeliverable and "unable to forward." Based on McCarthy's failure to maintain a current address with the State Bar of Montana and his failure to inform the Court of any reason why discipline identical to that imposed in Arizona should not be imposed upon him in Montana,

IT IS HEREBY ORDERED that Daniel T. McCarthy is DISBARRED from the practice of law in Montana, effective as of the date of this Order.

Summarized from Jan. 22 order PR 13-0296

On April 30, 2013, a formal disciplinary complaint was filed against Montana attorney Deborah S. Smith. The disciplinary complaint may be reviewed by any interested persons in the office of the Clerk of this Court.

The Commission on Practice held a hearing on the complaint on October 17, 2013, at which hearing Smith was present with her attorney, Mikel Moore, and testified on her own behalf. On October 30, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. The Commission recommended that Smith be given a public admonition by the Commission and that she should be ordered to pay the costs of these proceedings.

Rule 13 of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE) provides that a recommendation by the Commission that an attorney be disciplined by public or private admonition by the Commission is final unless, within 10 days of that decision, the lawyer subject to sanction, Disciplinary Counsel, or any member of the public files a petition for the Court's review. No such petition was filed within the time allowed.

Therefore, as further provided by Rule 13, MRLDE ,

The decision of the Commission is FINAL and this matter is CLOSED.

Summarized from Jan. 22 orders PR 13-0342 and PR 13-0491

On May 16, 2013, a formal disciplinary complaint was filed against Montana attorney Martin J. Eveland in this Court's Cause No. 13-0342. That complaint was based on Eveland 's failure to comply with a prior discipli nary Order of this Court. On July 25, 2013, a second disciplinary complaint was filed against Eveland, in this Court's Cause No . 13-0491. Both disciplinary complaints may be reviewed by any interested persons in the office of the Clerk of this Court.

The Commission on Practice held a hearing on the two complaints, which matters it consolidated, on October 18, 2013. Eveland failed to appear at the hearing, despite notice. No request was made by Eveland to continue the hearing, and Eveland did not otherwise contact the Office of Disciplinary Counsel (ODC) or the Commission regarding the hearing.

On December 10, 2013, the Commission submitted to this Court its Findings of Fact, Concl usions of Law, and Recommendation for discipline in the consolidated disciplinary matters. Eveland did not file any objections within the time allowed.

The Commission has concluded, based on the allegations of the complaints and the evidence produced at the hearing, that Eveland has failed to comply with the mentoring required by this Court in the prior disciplinary matter, and that his failure to abide by the conditions of his probationary period imposed in that case constitutes a violation of this Court's Order in that matter and provides grounds for discipline pursuant to Rules 8A(5) and 9C of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE). The Commission further concluded that Eveland's failure to appear at a January 18, 2013, show cause hearing in that prior disciplinary matter and at the October 18, 2013, hearing in the present consolidated matters is a violation of Rule 8A(6), MRLDE, and of Rule 8.l(b) of the Montana Rules of Professional Conduct (MRPC). In addition, the Commission concluded that Eveland's failure to respond to ODC's lawful demands concerning the pending complaints against him constitutes a violation of Rule 8.1, MRPC, and of Rule 8A(6), MRLDE.

The Commission recommends that, as a result of these violations of the Montana Rules of Professional Conduct and the Montana Rules for Lawyer Disciplinary Enforcement, Eveland be disbarred from the practice of law in Montana and that he be assessed the costs of these proceedings.

Based upon the Court's review of the record in this matter, IT IS HEREBY ORDERED:

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

ORDERS., next page

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2. Martin J. Eveland is hereby disbarred from the practice oflaw in Montana.

3. Eveland shall pay the costs of these proceedings subject to the provisions of Rule 9(A)(8), MRLDE, allowing objections to be filed to the statement of costs.

Summarized from Feb. 5 order PR 12-0680

On November 9, 2012, a formal disciplinary complaint was filed against Montana attorney F. Ron Newbury . The disciplinary complaint may be reviewed by any interested person in the office of the Clerk of this Court.

Newbury subsequently tendered to the Commission on Practice a conditional admission and affidavit of consent, pursuant to Rule 26 of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE). The Commission held a hearing on the conditional admission and affidavit of consent on October 16, 2013; Newbury and his counsel were present. On December 11, 2013, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation that Newbury's conditional admission be accepted.

We approve the findings, conclusions, and recommendation of the Commission on Practice. In his conditional admission, Newbury has admitted that he failed to act with reasonable diligence and promptness in representing his former clients, Stephen and Debbie Jones; that he failed to respond to their attempts to contact him; that he failed to provide them with periodic invoices for his completed work as set forth in their fee agreement; that he failed to take steps reasonably practicable to protect their interests after they terminated his representation; and that he failed to respond to the Office of Disciplinary Counsel (ODC) concerning the ethical grievance the Joneses' filed against him. Newbury admits to having violated Rules 1.3, 1.4, 1.16, 3.2, and 8.1 of the Montana Rules of Professional Conduct and Rule 8, MRLDE.

Newbury' s admission was tendered in exchange for the following discipline: a 90-day suspension from the practice of law, with any reinstatement subject to his compliance with Rules 29 and 30, MRLDE; a public admonition by the Commission; payment of restitution to the former client in the amount of $2,500 as a complete refund of the retainer; and payment of costs incurred by ODC and the Commission.

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

1. The Commission's Recommendation that we accept F. Ron Newbury's Rule 26 tendered admission is ACCEPTED and ADOPTED.

2. Newbury is suspended from the practice of law in Montana from

April 5, 2014, until July 5, 2014, with any reinstatement subject to his compliance with Rules 29 and 30, MRLDE.

3. Newbury shall be publicly admonished by the Commission on Practice at a time and place to be set by the Commission.

4. Within 30 days of the date of this Order, Newbury shall pay restitution to his former clients, the Joneses, in the amount of $2,500.

5. Newbury shall pay the costs of these proceedings subject to the provisions of Rule 9(A)(8), MRLDE, allowing objections to be filed to the statement of costs.

Pursuant to Rule 26(D), MRLDE, the Clerk of this Court is directed to file copies of Newbury's Conditional Admission and Affidavit of Consent, together with the Commission's findings, conclusions, and recommendation.

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Commission seeks public comment on Supreme Court applicants

In January, the Judicial Nomination Commission began accepting applications for the position of Montana Supreme Court justice to fill the seat vacated by Justice Brian Morris who resigned to accept appointment to the U.S. District Court, District of Montana.

The Commission received applications from the following attorneys:

- Michael G. Black
- Elizabeth Ann Brennan
- Deborah F. Butler
- Carlo John Canty
- Amy Poehling Eddy
- Jon Eric Ellingson
- Randi M. Hood
- Jacqueline T. Lenmark
- Michael Thomas McCabe
- David Michael Ortley
- James Jeremiah Shea
- Edmund F. Sheehy, Jr.
- K. Paul Stahl
- Erik B. Thueson
- Patrick Raymond Watt

The Commission is now soliciting public comment on the applicants. The applications may be viewed through a link available at courts.mt.gov. Comments will be accepted until 5 p.m. on Wednesday, March 19, 2014.

The Commission welcomes public comment, either in writing (e-mail or paper) or via telephone. These comments, which become part of an applicant's file, will be posted on the Commission's web page and forwarded to the Governor. Public comment may be submitted to any commissioner or to:

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

The Commission will forward the names of three to five nominees to the Governor for appointment after reviewing the applications and public comment and interviewing the applicants, if necessary. The person appointed by the Governor is subject to election at the primary and general elections in 2016. The candidate elected in 2016 will serve for the remainder of Justice Morris' term, which expires in January 2021.

Judicial Nomination Commission members are District Judge Richard Simonton of Glendive; Shirley Ball of Nashua; Mona Charles of Kalispell; Patrick Kelly of Miles City; Lane Larson of Billings; Ryan Rusche of Columbia Falls; and Nancy Zadick of Great Falls.

JUDICIAL NOMINATION COMMISSION SUPREME COURT JUDGESHIP APPOINTMENT SCHEDULE

January – April 2014

Receipt of notice of vacancy from Chief Justice	Thurs., January 9, 2014
Public notice of vacancy and solicitation of applications – (Within 10 days of receipt of notice of vacancy – 3-1-1007(1)(b), MCA)	Mon., January 13, 2014
Deadline for receipt of applications (Application period must be at least 30 days – 3-1-1007(1)(c), MCA)	Wed., February 12, 2014
Notice to public and start of public comment period	Mon., February 17, 2014
Public comment period ends (Comment period must be at least 30 days – 3-1-1007(1)(d), MCA)	Wed., March 19, 2014
JNC select interviewees (conference call)	Fri., March 21, 2014
Interviewees notified of interview date (At least 10 days before interview date – JNC Rule 5.2)	Fri., March 21, 2014
JNC conducts interviews in Helena	Tues., April 8, 2014
Deadline for JNC to submit names to Governor (Within 90 days from receipt of notice of vacancy – 3-1-1007(3), MCA)	Wed., April 9, 2014
Deadline for Governor to make appointment (Within 30 days of receipt of nominees from JNC – 3-1-1012, MCA)	Fri., May 9, 2014

No more affidavits? How do I report my CLEs?

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

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

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

What's Changing…

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

What's Staying the Same…

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

What You Should Do Now…

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

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 member number to assure proper credit.

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

When: April 11, 2014, 11:30 a.m. – 4:30 p.m. (Immediately following Montana Supreme Court oral arguments at U of M)

Where: University of Montana School of Law

Lunch Provided?: Yes

CLE Credits Pending: 4.0, including .5 Ethics

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

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

Topics include: Super Glued to Richardson: Writing Answers to Interrogatories and Requests for Production, Blasting Past IRAC: Writing Motions to Compel and Motions for Sanctions,

Turnkey for Tribal Court: What You Need to Know about Jurisdiction and Procedure, C-Clamped to the State Bar: Updates and Opportunities for New Lawyers , Ratcheting Up Your Appellate Practice: The Montana Supreme Court's Pro Bono Program, Duct Tape in Fashion Colors: Legal Research to Make You Look Good Fast, Not Charles Dickens's Steno Machine: Procedural Rules & Pointers for Real Time Reporting

New Lawyers Section's Social & Wine Tasting 101

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

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

Food Provided?: Yes

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

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

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

March

March 21 - Annual St. Patrick's Ethics CLE: Law Practice Managemement. Fairmont Hot Springs. (6 CLE credits.)Topics include: Trust Account Management, Succession Planning, 10 Tips from a Law Firm Administrator, How to Effectively Manage Your Firm Social Media Concerns, Cybersecurity Testing and Breach Prevention Guide, Malpractice Basics: Why Lawyers get Sued and, Understanding Key Features of a Malpractice.

April

April 4 - Diverse Issues & Judges' Panel - Great Falls, Heritage Inn. (6 CLE credits, including 1.5 ethics.) The morning session will cover Ethics, State and Federal Consumer Protection Laws and Law Firm Technology. The afternoon session will cover Indian Law, Top 10 Tips for Law Firm Administration and What Judges Want.

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

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

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

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

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

Other upcoming CLE

The Seventh Annual Red Mass Ethics CLE, with optional Red Mass and dinner, will be held Thursday afternoon, March 27, at Holy Spirit Church Parish Hall , *201 44th St. So., Great Falls. Hon. Greg Pinski, 8th Judicial District will present, "A Rookie Judge's View From the Bench."* Registration fee is $25.00. The CLE is open to both lawyers and paralegals. (1.5 CLE credits.)

The Red Mass immediately follows the CLE with Great Falls-Billings Diocese Bishop Michael Warfel presiding. At approximately 5:00 to 6:00 p.m., following the CLE and Mass, there will be an optional sit down dinner for CLE attendees and guests. Dinner is $15 per person. CLE attendees may register at the door or also register in advance by mailing the registration to Holy Spirit Parish, 201 44th St. So., Great Falls, MT 59405 together with the requisite CLE registration fee, and the payment for dinner if the attendee is opting to attend that, also. REGISTRATIONS FOR DINNER must be in advance of the CLE. The CLE and associated events are sponsored by the Parish and a Committee of Great Falls area attorneys – Mary Matelich, Glenn Tremper, Richard Martin, Karen Reiff, Theresa Diekhans and Dale Schwanke.

William J. Jameson Award

This is the highest honor bestowed by the State Bar of Montana. The Past Presidents Committee will be guided in its selection by the extent to which, in its judgment, the candidate:

1 | *Shows ethical and personal conduct, commitment and activities that exemplify the essence of professionalism.*

2 | *Works in the profession without losing sight of the essential element of public service and the devotion to the public good.*

3 | *Possesses an unwavering regard for the Rules of Professional Conduct, the Creed of Professionalism, the State Bar's Guidelines for Relations Between and Among Lawyers, and the State Bar's Guidelines for Relations Between Lawyers and Clients.*

4 | *Assists other attorneys and judges in facing practical and ethical issues.*

5 | *Participates in programs designed to promote and ensure competence of lawyers and judges.*

6 | *Supports programs designed to improve the discipline process for judges and attorneys.*

7 | *Participates in programs that aid the courts in ensuring that the legal system works properly, and continually strives for improvements in the administration of justice.*

8 | *Is actively involved with public and governmental entities to promote and support activities in the public interest.*

9 | *Actively participates in pro bono activities and other programs to simplify and make less expensive the rendering of legal services.*

10 | *Actively participates in programs designed to educate the public about the legal system.*

On a separate sheet of paper, please describe activities you believe qualify your nominee for the Jameson Award. Please attach additional pages as needed, and other supporting documents. Also, attach the nominee's resume. Note: Awards will not be made posthumously and may be given to more than one person.

Nominee: _____

Address: _____

Your signature:_____ Print your name:_____

Your address:_____ Phone:_____

Nominations must be postmarked no later than May 15. Send them to:

Jameson Award
State Bar Past Presidents Committee
P.O. Box 577
Helena MT 59624
or e-mail *mailbox@montanabar.org*

George L. Bousliman Professionalism Award

The award will recognize lawyers or law firms who have:

1 | Established a reputation for and a tradition of professionalism as defined by Dean Roscoe Pound: pursuit of a learned art as a common calling in the spirit of public service; and

2 | Within two years prior to the nomination, demonstrated extraordinary professionalism in a least one of the following ways:

- Contributing time and resources to public service, public education, charitable or pro bono activities.
- Encouraging respect for the law and our legal system, especially by making the legal system more accessible and responsive, resolving matters expeditiously and without unnecessary expense, and being courteous to the court, clients, opposing counsel, and other parties.
- Maintaining and developing, and encouraging other lawyers to maintain and develop, their knowledge of the law and proficiency in their practice.
- Subordinating business concerns to professional concerns.

Nominee/individual or firm _____

Address _____

On a separate sheet of paper, please describe the nominee's activity in your community or in the state, which you believe brings great credit to the legal profession. Please attach additional pages as needed, and other supporting documents.

Your signature _____Print your name _____

Your address _____Phone _____

Nominations and supporting documents will not be returned. Send them no later than May 15 to:

Bousliman Professionalism Award
P.O. Box 577
Helena MT 59624
or e-mail to *mailbox@montanabar org*

2014 Nomination Petition

State Bar President, ABA Delegate, and Trustee Election

I, _____, residing at _____, am a candidate for the office of ( ) President-Elect; ( ) Area A Trustee; ( ) Area B Trustee; ( ) Area C Trustee; ( ) Area D Trustee; ( ) Area G Trustee; ( ) State Bar Delegate to the ABA; at the election to be held on June 6, 2014. I am a resident of Montana and an active member of the State Bar of Montana. I request my name be placed on the ballot. The term of office of the President-Elect is one year. The term of office of the Secretary/Tresurer and of Trustee is two years.

Signature _____

The following are signatures of active members of the State Bar of Montana supporting my candidacy. Trustee candidates include the area of residence. No fewer than 10 signatures must be provided for a Trustee; and no fewer than 25 signatures for a President-Elect candidate or ABA Delegate candidate.

NAME ADDRESS

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Return this petition to State Bar of Montana, PO Box 577, Helena MT 59624, postmarked no later than April 7, 2014.

Ballots will be mailed to Bar members on May 7, 2014 and must be returned to the Bar by May 27, 2014.

Supreme Court cases briefs - July 2013

Editor's note: *The new format of Beth Brennan's case briefs for print in the Montana Lawyer are abbreviated. Full versions -- including explanation of facts, procedural posture & holding, and reasoning -- are available at the author's website* ***http://brennanlawandmediation.com/mt-supreme-court-summaries****. Direct URLS to each case are provided below.*

ESTATE OF GREENE

Keywords: 5-0 panel, Affirmed, Probate, Substitution of district judge

http://brennanlawandmediation.com/estate-of-greene/

***Estate of Greene,* 2013 MT 174 (July 2, 2013) (5-0) (McGrath, C.J.)**

Issue: Whether the district court properly denied William Greene's motion to substitute the district judge.
Short Answer: Yes. The substitution statute's 30-day deadline does not apply to an informal probate, and is not triggered until a party petitions to covert the proceeding to a court-supervised administration.
Affirmed

STATE V. CRISWELL

Keywords: 7-0 panel, Affirmed, Animal cruelty, Concurrence, Prosecutor's comments

http://brennanlawandmediation.com/state-v-criswell/

***State v. Criswell,* 2013 MT 177 (July 2, 2013) (7-0) (McKinnon; McGrath concurs)**

Issue: (1) Whether the State presented sufficient evidence to convict Criswells of aggravated animal cruelty, and (2) whether the district court abused its discretion in denying Criswells' motion for a mistrial.
Short Answer: (1) Yes, and (2) no.
Affirmed

STATE V. PRINDLE

Keywords: 5-0 panel, Affirmed, Ineffective assistance of counsel, Voluntariness of plea agreement

http://brennanlawandmediation.com/state-v-prindle/

***State v. Prindle,* 2013 MT 173 (July 2, 2013) (5-0) (Rice. J.)**

Issue: Whether the district court erred in denying Prindle's motion to withdraw his guilty plea as involuntarily entered.
Short Answer: No.
Affirmed

HUGHES V. HUGHES

Keywords: 5-0 panel, Affirmed & reversed, Breach of contract, Easement, Partition, Promissory note

http://brennanlawandmediation.com/hughes-v-hughes/

***Hughes v. Hughes,* 2013 MT 176 (July 2, 2013) (5-0) (Morris, J.)**

Issues: (1) Whether Johnny's undesignated payments to his parents, Jack and Shirley, restarted the statute of limitations on the 1989 promissory note; (2) whether Jack and Shirley possess a life estate in the new house or a right to any of the insurance proceeds; (3) whether Jack is entitled to an easement for stock water across Johnny's property; and (4) whether the arbitrator exceeded his authority or miscalculated damages.
Short Answer: (1) Yes; (2) no; (3) yes; (4) no.
Affirmed in part, reversed in part & remanded

STATE DEPT. OF REVENUE V. HEIDECKER

Keywords: 5-0 panel, Affirmed, Tax classification of real property

http://brennanlawandmediation.com/state-dept-of-revenue-v-heidecker/

***State Dept. of Revenue v. Heidecker,* 2013 MT 171 (July 2, 2013) (5-0) (Morris, J.)**

Issue: Whether the district court properly interpreted the "effectively prohibit" language in § 15-7-20295), MCA with respect to the restrictive covenants attached to Heidecker's property.
Short Answer: Yes.

IN RE THE MARRIAGE OF STEYH

Keywords: 5-0 panel, Default judgment, Dissolution - property division, Reversed

http://brennanlawandmediation.com/473/

***In re the Marriage of Steyh,* 2013 MT 175 (July 2, 2013) (5-0) McGrath, C.J.**

Issue: Whether the district court properly denied William's Rule 60(b) motion.
Short Answer: No.
Reversed and remanded

MOTTA V. GRANITE COUNTY COMMISSIONERS

Keywords: 5-0 panel, Affirmed & reversed, Attorneys' fees, Vexatious litigants, Zoning

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http://brennanlawandmediation.com/motta-v-granite-county-commissioners/

***Motta v. Granite County Commissioners,* 2013 MT 172 (July 2, 2013) (5-0) (Baker, J.)**

Issue: (1) Whether Granite County properly enacted the 2011 Georgetown Lake zoning; (2) whether the district court properly determined that Motta was a vexatious litigant; and (3) whether the district court properly awarded attorneys' fees to the commissioners.
Short Answer: (1) Yes; (2) yes; and (3) yes, except for the fees expended to prove the reasonableness of the fees.
Affirmed in part and reversed in part

JOHNSTON V. CENTENNIAL LOG HOMES

Keywords: 6-1 panel, Defective construction, Discovery rule - statute of limitations, Negligence, Reversed, UTPA

http://brennanlawandmediation.com/johnston-v-centennial-log-homes/

***Johnston v. Centennial Log Homes,* 2013 MT 179 (July 8, 2013) (6-1) (Baker, J., for the majority; McKinnon, J., dissenting)**

Issue: (1) Whether the district court properly granted summary judgment to Centennial on the basis that Johnstons' claims were barred by the statute of limitations; (2) whether the release executed by the Leonards is binding on the Johnstons; and (3) whether the district court abused its discretion in granting Johnstons' motion to dismiss Keeko Log Homes, Ltd. as a defendant.
Short Answer: (1) No, because factual issues regarding Johnstons' discovery of the defects are in dispute; (2) no, because Johnstons owned 36% of the house at the time of the release and were not parties to the release; and (3) yes, as it did not allow Centennial to file a brief in opposition pror to dismissing Keeko..
Reversed and remanded

WHITE V. MONTANA STATE FUND

Keywords: 4-1 panel, Affirmed, Common-law bad faith, Emotional distress, Malicious prosecution,

http://brennanlawandmediation.com/white-v-montana-state-fund/

***White v. Montana State Fund,* 2013 MT 187 (July 12, 2013) (4-1) (Baker, J., for the majority; Cotter, J., dissenting on one issue)**

Issue: (1) Whether the district court erred in granting the State Fund's motion to dismiss White's claims under Montana's insurance code; and (2) whether the district court erred in granting the State Fund's motion for summary judgment regarding White's common-law claims of bad faith, malicious prosecution, and emotional distress.
Short Answer: (1) No, as the State Fund is explicitly not covered by Title 33, and (2) no.
Affirmed

IN THE MATTER OF DA AND MA

Keywords: 5-0 panel, Affirmed, Indian Child Welfare Act, Termination of parental rights

http://brennanlawandmediation.com/in-the-matter-of-da-and-ma/

***In the Matter of DA and MA,* 2013 MT 191 (July 16, 2013) (5-0) (Morris, J.)**

Issues: (1) Whether DHHS made sufficient efforts under the Indian Child Welfare Act (ICWA) to reunite mother and the children; (2) whether DHHS provided sufficient evidence that reuniting children with mother would cause serious physical or emotional damage to the children; (3) whether the district court properly determined that mother had stipulated to the treatment plan; and (4) whether all stipulations in ICWA involuntary termination proceedings must be in writing.
Short Answers: (1) Yes; (2) yes; (3) yes, and (4) no.
Affirmed

STATE V. CLINE

Keywords: 5-2 panel, Affirmed, Double jeopardy
http://brennanlawandmediation.com/state-v-cline/

***State v. Cline,* 2013 MT 188 (July 15, 2013) (5-2) (Morris, J., for the majority; Cotter, J. & McKinnon, J. dissenting)**

Issue: Whether the state charge of theft by common scheme was an "equivalent offense" barred by the double jeopardy statute.
Short Answer: No.
Affirmed

STATE V. ADAMS

Keywords: 5-0 panel, Affirmed, Probation revocation
http://brennanlawandmediation.com/state-v-adams/

***State v. Adams,* 2013 MT 189 (July 15, 2013) (5-0) (Rice, J.)**

Issue: Whether the district court properly denied Adams' motion to dismiss the state's petition to revoke Adams' suspended sentence.
Short Answer: Yes.
Affirmed

STATE V. CHAMPAGNE

Keywords: 5-0 panel, Affirmed & reversed, Child sexual assault, Juror challenge for cause, Lay opinion, Prior consistent statements, Restitution, Voir dire

http://brennanlawandmediation.com/state-v-champagne/

***State v. Champagne,* 2013 MT 190 (July 16, 2013) (5-0) (Morris, J.)**

Issue: (1) Whether the district court properly denied Champagne's for-cause challenge of a prospective juror; (2) whether Champagne's counsel provided ineffective assistance; (3) whether the district court properly admitted the forensic interviewer's testimony; (4) whether the district court properly

CASE BRIEFS, next page

CASE BRIEFS, from previous page

admitted JB's prior consistent statements; and (5) whether the district court imposed an illegal sentence.
Short Answer: (1) Yes; (2) the record does not support this claim on direct appeal; it should be brought in a post-conviction proceeding; (3) yes; (4) yes; and (5) no, but future restitution has to be in a specific amount, and is remanded for correction of this issue.
Affirmed in part, reversed in part, and remanded

STATE V. CASE

Keywords: 5-0 panel, Affirmed, Partner-family member assault, Speedy trial
http://brennanlawandmediation.com/state-v-case/

***State v. Case,* 2013 MT 192 (July 16, 2013) (5-0) (Baker, J.)**

Issue: Whether the district court erred when it upheld the denial of Case's motion to dismiss on speedy trial grounds.
Short Answer: No.
Affirmed

METRO AVIATION, INC. V. UNITED STATES

Keywords: 7-0 panel, Certified questions, Contribution, Indemnity, MCA, Oral argument

http://brennanlawandmediation.com/metro-aviation-inc-v-united-states/

***Metro Aviation,* Inc. v. United States, 2013 MT 193 (July 16, 2013) (7-0) (Cotter, J.)**

Issue: The Court answers three certified questions from the U.S. District Court for the District of Utah:
(1) May a person who has settled a claim with a victim bring an action for contribution against a joint tortfeasor under § 27-1-703. MCA, if the victim never filed a court action?
(2) When a defendant in a pending action settled with the plaintiff ahead of trial, does § 27-1-703, MCA, allow the settling defendant to bring a subsequent contribution action against a person who was not a party to the tort action?
(3) Does Montana recognize a common-law right of indemnity where the negligence of the party seeking indemnification was remote, passive, or secondary, compared to that of the party from whom indemnity is sought?
Short Answer: (1) No, (2) no, and (3) no.

IN RE THE MARRIAGE OF PARKER

Keywords: 5-0 panel, Affirmed, Dissolution - property division

http://brennanlawandmediation.com/in-re-the-marriage-of-parker/

***In re the Marriage of Parker,* 2013 MT 194 (July 16, 2013) (5-0) (McKinnon, J.)**

Issue: (1) Whether the district court properly excluded Jim's interest in his mother's trust from the marital estate; (2) whether the parties entered into a post-nuptial agreement; (3) whether the district court equitably distributed the marital estate; and (4) whether Jim is entitled to attorney's fees and costs on appeal.
Short Answer: (1) Yes; (2) no; (3) yes; and (4) no.
Affirmed

STATE V. SULLIVANT

Keywords: 5-0 panel, Absconding, Affirmed & reversed, Probation revocation, Sentencing

http://brennanlawandmediation.com/state-v-sullivant/

***State v. Sullivant,* 2013 MT 200 (July 23, 2013) (5-0) (McGrath, C.J.)**

Issue: (1) Whether the "remainder of the probation sentence" includes the period during which the defendant absconded from probation; (2) whether the district court should hold an evidentiary hearing on the reasons for Sullivant's absconding; and (3) whether the re-imposition of fines and fees varied from the original sentence and should be stricken.
Short Answer: (1) No; (2) this was not raised below, and the Court declines to invoke plain error review; and (3) no.
Affirmed in part, reversed in part, and remanded

IN THE MATTER OF JW

Keywords: 5-0 panel, Affirmed, Termination of parental rights

http://brennanlawandmediation.com/in-the-matter-of-jw/

***In the Matter of JW,* 2012 MT 021 (July 23, 2013) (5-0) (Rice. J.)**

Issue: (1) Whether the district court erred in failing to conduct a stand-alone hearing on whether DHHS should be required to make reasonable efforts to reunite Mother and JW; (2) whether the district court erred in failing to conduct a permanency plan hearing; and (3) whether the district court erred in concluding that the circumstances regarding Mother's prior terminations in Colorado were relevant to her parenting of JW.
Short Answer: (1) No; (2) no; and (3) no.
Affirmed

STATE V. HALLER

Keywords: 5-0 panel, Affirmed, Criminal procedure, DUI,

http://brennanlawandmediation.com/state-v-haller/

***State v. Haller,* 2013 MT 199 (July 23, 2013) (5-0) (McGrath, C.J.)**

Issue: Whether the district court properly denied Haller's motion to vacate his previous DUI convictions.
Short Answer: Yes.
Affirmed

JONAS V. JONAS

Keywords: 5-0 panel, Affirmed, Remanded for attys' fees on appeal, Rule 60, Vexatious litigants

http://brennanlawandmediation.com/jonas-v-jonas/

***Jonas v. Jonas,* 2013 MT 202 (July 23, 2013) (5-0) (Wheat, J.)**

Issue: (1) Whether the district court erred by denying Edwin's motion to set aside the charging order and the appointment of the receiver; and (2) whether Linda is entitled to fees and costs under M.R. App. P. 19(5).
Short Answer: (1) No, and (2) yes.
Affirmed & remanded for attorneys' fees and costs

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

CLE, notable women, new books and more...

By Lisa Mecklenberg Jackson

CLE MATERIALS AVAILABLE

Greetings Montana attorneys! It's that time of year again that we've all come to dread a bit. The annual gathering of the CLEs! Necessary but not really that much fun. However, did you know the State Law Library can make your life a little easier with regard to procuring your CLE credits? Each attorney is allowed a maximum of five credits per year of audio or video material and we have a great selection of these materials you can check out for two weeks or use in the law library. Go to http://courts.mt.gov/library/cle.mcpx to see the catalog of CLEs available for your check-out. If you find something you like, call the law library at 444-3660 or email lawlibcirc@mt.gov to see if it's available. Once the item is determined to be here, you can check it out. We are getting more CLE audio/visual material every day and we strive to make attorney's lives easier. What a great combination!

MARCH IS A SPECIAL MONTH AT LAW LIBRARY

What do Ella Knowles, Edna Hinman, and Karla Gray have in common? They were all firsts in their contributions to being a woman in the law in Montana. Ella was the first female attorney in Montana, Edna was the first female Clerk of the Montana Supreme Court, and Karla was the first woman elected to the Montana Supreme Court as well as the first female Chief Justice of the Montana Supreme Court. Learn more about notable women in the past and present Montana legal scene by going to the State Law Library Webpage at http://courts.mt.gov/library/default.mcpx. March is Women's History Month and we are using this month to highlight Montana's special women in the law via a Website and display in the law library. Also coming up will be a legal timeline of important Montana legislation affecting women. Stay tuned for details on that!

NEW BOOKS

Any lawyer, paralegal, or state employee can check out our materials for free. Simply call 444-3660 and we'll get the materials to you. Notable recent additions to the law library collection include:

- ABA Property Tax Deskbook. Amelia Boss, 2013.
- The ABCs of the UCC: Article 2A, Leases. Amelia Boss, Stephen T. Whelan, 2013.
- A Blackletter Statement of Federal Administrative Law. American Bar Association, 2013.
- Civil Rights Litigation: Representing Plaintiffs Today. Rebecca A. Taylor, 2013.
- Estates, Future Interests, and Powers of Appointment in a Nutshell. Thomas P. Gallanis, 2014.
- The Marble and the Sculpture: From Law School to Law Practice. Keith Lee, 2013.
- Professional Liability to Third Parties. Jay M. Feinman, 2013.
- Understanding the ADA. William D. Goren, 2013.

You can search our catalog for more great books and other resources at http://courts.mt.gov/library/.

RESEARCH TIP OF THE MONTH

Can you find old Montana Administrative Rules online? The MARS (Montana Administrative Register) are available on the Secretary of State's Website from 2000 to current times at http://www.mtrules.org/. Administrative materials earlier than 2000 are not available online. However, the State Law Library has the MARS in paper from 1975 to current. And the actual ARMs themselves from the early 80s to current times.

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

Montana Justice Foundation celebrates 35th anniversary

Celebrating 35 wonderful years by honoring 35 inspiring Champions of Justice

2014 marks the 35th year of the Montana Justice Foundation (MJF), Montana's bar foundation and administrator of the Montana Interest on Lawyers Trust Accounts (IOLTA) Program. The organization is celebrating by honoring 35 men and women as Champions of Justice.

The MJF was founded in 1979 by Montana attorneys to serve as the charitable arm of Montana's legal community. Over the past 35 years the MJF has transformed from its humble "charitable arm" beginnings to become the heart of the legal community and its many partners. Through its programs and outreach, the MJF brings together diverse stakeholders to tackle barriers to equal justice in Montana and nationally.

"Over the past 35 years the MJF has been privileged to lead and support critical efforts in the fight for equal justice. We would not have been able to do so without the significant contributions of individuals from all sectors of the community, including lawyers, bankers, elected officials, medical providers, teachers, and others," said MJF Executive Director, Amy Sings In The Timber, "We're excited to have this opportunity to celebrate a few of the individuals who work tirelessly each day to ensure that our civil justice system is accessible to all Montanans – not just those who can afford to hire an attorney."

After careful deliberation, the MJF's Anniversary Committee elected to mark the organization's 35th Anniversary with a Non-Gala celebration.

A non-gala is a celebratory event for non-profits and supporters on a budget. The event allows guests to stay in and donate the money they would have spent on a fancy night out to a worthy cause instead. The theme of the MJF's 35th anniversary event - Celebrating 35 Wonderful Years by Honoring 35 Inspiring Champions of Justice – highlights the outstanding works of 35 men and women in furthering equal justice for all Montanans.

Supporters are asked to attend by visiting a special website designed specifically for the event, (www.Non-Gala.MtJustice.org), on or before March 29, 2014 to meet the Champions of Justice honorees, share their own personal stories of justice on a guest forum, and make a gift in support of the MJF.

The MJF has set a goal to raise $10,000 through the event. Gifts will benefit legal aid programs and access to justice initiatives statewide through the MJF's Legal Aid Grants Program.

We the People state finals recap; Glacier to represent MT at nationals

On January 21, 2014, high school students from across Montana gathered in our state's Capitol to demonstrate their outstanding knowledge of the U.S. government and the Constitution at Montana Justice Foundation's We the People: The Citizen and the Constitution state finals. The competition was fierce, with eight teams from six schools gathering to give prepared statements and answer probing questions about hot topics in today's government. Each of the 139 competing students spoke before a corps of judges made up of attorneys, teachers, librarians, legislators, and other community volunteers who generously gave their time, attention, and expertise to helping today's youth become tomorrow's informed, engaged leaders.

For three hours, judges put students through their paces in a simulated congressional hearing format to answer questions that ranged from the historical-philosophical foundations of the U.S. Constitution to a 21st Century application of constitutional principles. By the end of the morning, the team from Glacier High School emerged as the state winner, edging out Anaconda High School by only twenty points.

Glacier now prepares to answer eighteen new constitutional questions as the team prepares to represent Montana at the National Finals for the second year in a row. For three days in April, 2014, Glacier's We the People students will test their knowledge against teams from each state in the Union before some of the best constitutional scholars in the United States. When not competing, the students will have the opportunity to visit the monuments and museums of our nation's Capitol.

The Montana Justice Foundation (MJF) commends all of the We the People students and teachers for their hard work, attention to detail, and creativity in responding to some of the tough questions our public servants are wrestling with today. Students from Stillwater, Laurel, Polson, and Lewistown competed along with Glacier and Anaconda.

Finally, the MJF recognizes the volunteers who made this exciting event such a resounding success. The positive feedback from judges, students, and teachers about We the People shows what an important impact civics education has in our communities. Successfully igniting an interest among Montana's youth in civic life requires the time and attention of community leaders. This year, Montana's legal community had a significant volunteer presence, and the results were outstanding. Thank you for your support!

Succession planning really isn't optional

(Particularly for the solo attorney)

By Mark Bassingthwaighte

At ALPS, be it from RISC visits, on applications for insurance, or at CLE events we continue to find that a significant number of solo practitioners have yet to take the step of creating a succession plan. When working with these attorneys our message is always the same, if no plan is in place, now is the time. You really don't want to leave the headache of having to deal with stacks of closed files to an unsuspecting non-lawyer spouse, and yes, such calls continue to come in.

Always remember that someone paid for the production of every file you have in your possession and that someone has an interest in their file. We all know that client property cannot be destroyed whenever an attorney feels like doing so; but of course, non-lawyer spouses aren't bound by our rules, and it happens because they don't know what else to do. Heaven forbid that post attorney death and after a grieving spouse has had all the old files destroyed, a certain file is needed to properly defend against a claim of malpractice. Making matters worse, it turns out that there is no insurance in place to cover the fallout of the claim because no one knew they had to timely contact the malpractice carrier in order to purchase tail coverage after the attorney passed. The end result is that the deceased attorney's estate may now not be what everyone was counting on it being. The failure to plan can end badly; but wait, there's even more.

Rule 1.3 of the ABA Model Rules of Professional Conduct addresses diligence. The Rule reads, *"A lawyer shall act with reasonable diligence and promptness in representing a client."* Most attorneys, if not all, are well aware of this rule. As lawyers, we are to act with commitment, dedication, and where appropriate even zealous advocacy. Our workloads are to be reasonable so that all matters can be resolved competently. Procrastination is an enemy to be avoided at all costs; for it has and will continue to lead to malpractice claims if and when clients are ever harmed as a result. In the end we are all to strive to deliver our services in a professional, competent and timely fashion. Yet our obligations do not end here. There is an obligation to prevent neglect of a client matter post attorney death or disability.

In 2002 the comments to ABA Model Rule 1.3 were amended with the following language. Comment 5 now states, *"To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine if there is a need for immediate protective action."* Given all that I have seen and experienced over my years with ALPS, I personally have trouble coming up with a set of circumstances where I would feel comfortable saying no such plan would be required for a solo. The only question for me is how to get there.

The most important aspect of planning for your death or disability is in the designation of an attorney who will be responsible for administering the winding down of your practice. This attorney should be competent, experienced, and someone who displays the utmost professionalism. This person should have the time, or the ability to make the time, to come into the practice. She must be able to make rapid decisions and assume, at least for a period of time, something of an additional practice. Now remember that the purpose of the designated attorney is not to come in and take over the practice but rather to take the lead in winding down the practice. It's about being expeditious with file review, client notification, protective action, and transitioning files to other attorneys. Perhaps these responsibilities could even be shared among a select group if time constraints are a concern. Obviously, the designated attorney ought to be someone quite familiar with your practice areas and also not likely to have a significant number of conflict concerns arise as a result of ever having to step in. Finally don't overlook the importance of making certain that appropriate employees are aware of who the designated attorney is and how to contact this individual in an emergency. One added benefit of choosing a designated attorney

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(and often this is a reciprocal designation) is that this individual can also act as your backup attorney thereby allowing you to take extended absences from your office for work, pleasure, or health reasons.

Beyond designating an attorney, there are a number of other things that should be done with your practice if they are not already taken care of. Consider providing notice of the existence of and reason for a designated attorney in your fee agreements so that clients are aware of the steps you have taken to protect their interests in the event of an emergency. Maintain a current office procedures manual that discusses the calendaring system, conflict system, active file list, open and closed file systems, accounting system, and any other key system as this can be valuable in expeditiously bringing the designated attorney up to speed on how your practice is run. It is imperative that critical systems such as the calendar and conflict systems be kept current at all times and make certain that all files are thoroughly documented. The designated attorney will need to review all client files as quickly as possible in order to make a determination as to whether any immediate protective action is necessary. Mistakes can and will be made with poorly documented files. Finally, write a letter for the designated attorney that details duties for all employees; includes passwords for and instructions on the use of the computer system; provides financial details such as location and account numbers for all bank accounts, particularly client trust accounts; and contact information for all staff and principal vendors such as banks, insurance companies, utility companies, and the landlord. In short think about what you would need to know if you were the person coming in to wind down your practice and capture that intellectual capital in a way that will be useful to the designated attorney.

If you feel that you need assistance in developing a plan for your death or disability, the Oregon State Bar Professional Liability Fund has published a handbook with related forms that can be of real help. This handbook, available to out-of-state lawyers at a reasonable price, will also provide significant help to the designated attorney should his or her services ever be needed. In this book entitled ***Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death***, you will find items such as a checklist for closing another attorney's office, a sample notice of designated assisting attorney, sample letters to clients, a sample authorization for the transfer of a client file, and much more. Also be aware that a few useful resources based upon the materials in this Oregon guide are available on the websites of a number of state bars. Finally, the ABA has published a similar resource entitled ***Being Prepared: A Lawyer's Guide for Dealing with Disability or Unexpected Events*** that might be of use as well.

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

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Questions?

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

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PUBLIC NOTICE FOR APPOINTMENT OF NEW MAGISTRATE JUDGE

The Judicial Conference of the United States has authorized the appointment of a full-time United States magistrate judge sitting in the Great Falls Division of the District of Montana.

The duties of the position are demanding and wide-ranging and include (1) conduct of most preliminary proceedings in criminal cases; (2) trial and disposition of misdemeanor cases;
(3) conduct of various pretrial matters and evidentiary proceedings on delegation from a district judge; and (4) trial and disposition of civil cases upon consent of the litigants. The basic authority of a United States magistrate judge is specified in 28 U.S.C. § 636.

To be qualified for appointment an applicant must

(1) Be, and have been for at least five years, a member in good standing of the bar of the highest court of a state, the District of Columbia, the Commonwealth of Puerto Rico, the Territory of Guam, the Commonwealth of the Northern Mariana Islands, or the Virgin Islands of the United States, and have been engaged in the active practice of law for a period of at least five years (with some substitutes authorized);

(2) Be competent to perform all the duties of the office; be of good moral character; be committed to equal justice under the law; be patient and courteous; and be capable of deliberation and decisiveness;

(3) Be less than seventy years old; and

(4) Not be related to a judge of the district court.

A merit selection panel composed of attorneys and other members of the community will review all applicants and recommend to the district judges in confidence the five persons it considers best qualified. The court will make the appointment following an FBI full-field investigation and an IRS tax check of the applicant selected by the court for appointment. An affirmative effort will be made to give due consideration to all qualified applicants without regard to race, color, age (40 and over), gender, religion, national origin, or disability. The current annual salary of the position is $183,172. The term of office is eight years. For more information on the magistrate judge position, contact the clerk of court, Tyler P. Gilman, at (406) 829-7154, or at the address listed below.

Application forms are available at the clerk's office in each of the five divisions of the district court, or online at www.mtd.uscourts.gov. Applications must be submitted by the applicant (not by another person on the applicant's behalf) and **must be received by April 7, 2014.** Applicants shall submit an original and ten copies of the application. Completed applications must be submitted to the clerk of court at the following address:

Merit Selection Panel
c/o Tyler P. Gilman, Clerk United States District
Court Russell Smith Courthouse 201 East
Broadway
Missoula, MT 59801

All applications will be kept confidential, unless the applicant consents to disclosure, and all applications will be examined only by members of the merit selection panel and the judges of the district court. The panel's deliberations will remain confidential.

Special Needs Trusts – peace of mind for loved ones and family members

By Grant S. Snell

Special Needs Trusts ("SNTs") are trusts designed to provide assets for the care and comfort of beneficiaries who are disabled without jeopardizing their access to various means-tested government programs and benefits. The cost of care for disabled individuals can be prohibitive, and most families cannot afford such costs privately. In many cases, government-funded programs are the only available programs for persons with disabilities, making access to these services critical. However, the requirements for qualifying for these benefits often prevent families from providing additional support to their disabled loved ones to increase their quality of life.

GOVERNMENT BENEFIT PROGRAMS - BASICS

Planning using SNTs for beneficiaries who are disabled requires a basic understanding of how government benefits systems work and the eligibility requirements for the various programs. While SNTs are used primarily to assist disabled individuals achieve and maintain eligibility for "means-based" programs, it is important to understand how other government programs interrelate and in some cases complement the means-based programs.

To qualify for government benefits, an individual must be considered "disabled" according to Social Security Administration ("SSA") criteria. SSA defines a "disabled" person as one who is over the age of 65, blind, or unable to do any substantial gainful activity due to physical or mental impairments that will result in death or will continue for not less than one year.[1] "Substantial gainful activity" is the ability to do work that produces earnings.[2] "Physical or mental impairments" are disabilities that appear on the Social Security Administration Listing of Impairments.[3]

Once a disability is established, the types of benefits available will depend on additional criteria. Some benefits, such as Social Security Disability Income (SSDI), are based on the earnings record of the worker prior to disability or retirement.[4] Some benefits are entitlements, such as Medicare, which is available to all people who have attained age 65 or those with specific disabilities.[5] The "means-based" programs, such as Supplemental Security Income (SSI) and Medicaid, evaluate the current income and resources of the disabled person to establish eligibility. In order to access these means-based benefits, the recipient must not only be aged, sick, and/or unable to work, but also have limited income and resources.

Government benefits for persons who are disabled include both cash payments and health care. SSI and SSDI provide cash for those who are eligible. For many disabled people, this is the only income that they receive because they are too sick, too weak, or too old to have another source of income. The major government health care programs are Medicare and Medicaid. Medicare provides coverage for acute care, such as doctors visits, hospitalization, and some rehabilitation, but it does not cover the cost of long-term custodial care. Medicare recipients may also have access to private health insurance, which supplement Medicare to provide coverage of medical services not provided by Medicare. However, most health insurance policies will not cover long-term custodial care. Long-term care insurance will pay for custodial care, but it is not available for someone who is already disabled. Medicaid is the only government program in the United States that provides for long-term skilled nursing care for persons with disabilities other than the Veterans Administration. Medicaid, a joint federal and state government program, pays for prescriptions, therapy, and doctor visits as well as custodial care for those meeting the medical and financial eligibility requirements.

MEANS-TESTED PROGRAMS – ELIGIBILITY REQUIREMENTS

In most states, including Montana, eligibility for SSI categorically results in Medicaid eligibility, even though the benefits provided under the two programs are quite distinct. Briefly, in order to maintain eligibility for SSI, a recipient cannot receive income in excess of $710.00 per month (some

1 42 U.S.C. § 423(d)(1)(A).
2 42 U.S.C. § 423(d)(4)(A).
3 http://www.ssa.gov/disability/professionals/bluebook/AdultListings.htm
4 http://www.ssa.gov/dibplan/index.htm
5 http://www.medicare.gov

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exceptions apply).[6] SSI rules consider an individual's earned income, unearned income, in-kind income, and deemed income (with some exceptions explained below) during a particular month as "income" in applying the eligibility test. At the end of the month, income that is not otherwise spent converts to a resource. Thus, a resource is any accumulated income, bank accounts, retirement accounts, or basically any asset that could be converted to cash (with some exceptions explained below). An SSI recipient may not own resources that are available to be spent on food and shelter in excess of $2,000.00.[7] Income and resources are measured independently.

It is important to note that debts and liabilities do not offset resources unless the debt is legally secured by the specific asset, such as a home mortgage or secured vehicle loan. Even if an individual has thousands of dollars in medical debt outstanding, if he or she has more than $2,000 in countable resources, he or she will not qualify for SSI or Medicaid. This is a common misconception and can result in unnecessary periods of ineligibly for applicants for benefits while their applications are processed and they are unaware they are over-resourced. Eligibility will not be applied retroactively even though the individual could have easily been eligible by paying down outstanding debts with resources over the eligibility limits.

Some income and some resources are exempt from the eligibility calculations. Exempt income includes other means-based payments such as food stamps, medical care and services, income tax refunds, loans, and any item that if retained would not be a countable resource.[8] Exempt resources include: the personal residence of the recipient (there may be an equity limitation depending on the circumstances); one vehicle, if it is needed to provide transportation; personal property; life insurance with a face value of less than $1,500; irrevocable burial plans; and SNTs.[9]

The eligibility criteria referenced above apply to all individuals applying for SSI and single persons applying only for Medicaid (without SSI). Married persons applying for Medicaid to pay for skilled in-home or custodial nursing care (the "Institutionalized Spouse") have a different set of eligibility rules designed to prevent impoverishment of the spouse who is not applying for Medicaid (the "Community Spouse"). Medicaid evaluates the income and resources of both spouses to determine eligibility.

The Community Spouse may be able to retain some or all of the Institutionalized Spouse's income depending upon the Community Spouse's own income and basic shelter expenses.[10] The rest of the Institutionalized Spouse's income will be used to pay the skilled-nursing care facility, less a personal needs allowance of $50.[11] The Community Spouse retains all of their individual income.[12]

6 http://www.ssa.gov/ssi/text-income-ussi.htm
7 http://www.ssa.gov/ssi/text-resources-ussi.htm
8 http://www.ssa.gov/ssi/text-eligibility-ussi.htm
9 Ibid.
10 Montana ABD Medicaid Manual ("MA") – 904-1, 2, 3
11 Ibid.
12 Ibid.

Instead of the $2,000 resource limit that applies to single persons, married couples may retain half of their combined countable resources (excluding the same exempt resources listed above), subject to a maximum of $117,240 and a minimum of $23,448.[13] Once the Institutionalized Spouse starts receiving skilled-nursing care, the couple must generally "spend down" resources to reach the resource level that Medicaid determines before Medicaid will start providing benefits. A full discussion of the various spend down strategies and asset transfer rules is beyond the scope of this article, but the transfer of assets to a specific type of SNT, a Pooled Trust (discussed below), is now an available option for those over 64 years old seeking Medicaid eligibility to pay for skilled-nursing care.

SPECIAL NEEDS TRUSTS

SNTs are considered exempt resources for means-based government programs. A properly drafted SNT will preserve assets for the benefit of a disabled person, allowing that person to experience a better quality of life than that afforded by government benefits alone. SNT funds can be used to supplement, but not supplant, government benefits by providing recreation and entertainment, rehabilitative and vocation training, transportation, personal care, personal supplies, and dental and medical care not otherwise provided by government programs for the disabled individual.

The SNT document will be reviewed by the Social Security Administration and/or Medicaid for compliance with all the government benefit and state laws and regulations.[14] In order to be compliant, a SNT must meet the following basic criteria: a SNT must be written and its terms express; the SNT must be irrevocable; the beneficiary cannot be the trustee or have any type of control over distributions; all distributions of income and/or principal must be in the discretion of the trustee; the Trustee should expressly be prohibited from making any distribution that would jeopardize the recipient's government benefits (with some special exceptions).

Even though a SNT must be irrevocable, careful drafting can provide flexibility within the trust document to allow for changed circumstances or changes in the law. The terms of the trust should always allow the trustee to reform the trust to protect eligibility for benefits.

The individual who is disabled must be the sole beneficiary of the trust during his or her lifetime. However, the SNT can provide compensation for caregivers and pay for the cost of travel for a caregiver to accompany the individual with disabilities, even if the caregiver is a family member.

There are two basic types of SNTs. Self Settled, or first-party, SNTs are established with the disabled individual's own assets. Third Party SNTs are established with assets of other persons for the benefit of the disabled individual. Each trust functions identically with the same distribution restrictions, but there are some key differences.

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13 MA 005
14 42 U.S.C. § 1396p; POMS (https://secure.ssa.gov/apps10/poms.nsf/partlist) – SI 01120.200, .201, and .203; §72-38-101, et. seq. (Montana Uniform Trust Code); and MA 402-3

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Self-Settled SNTs

Assets held in a typical inter-vivos trust for the benefit of a disabled individual are countable assets for means based public benefits.[15] Also, disabled individuals may be assessed a "penalty period" for transfers of assets to other persons or to certain irrevocable trusts unless the transfers occurred more than five (5) years before the individual was otherwise eligible for public benefits.[16] This "penalty period" can put the applicant in the worst possible situation, i.e., not having the assets to pay for care, but being penalized as if the applicant has the assets, and therefore being unable to obtain needed benefits. Transferring one's own assets to a trust as a planning method five (5) years in advance of need is feasible only in very limited situations.

However, by enacting 42 U.S.C. § l396p (d)(4), Congress created two types of safe harbor trusts that can resolve this dilemma for Medicaid eligibility. Thus, not only are these First Party SNTs treated as exempt resources, the transfer of the disabled person's assets to these statutory self-settled trusts are exempt from the penalty period.

The first type of trust is provided for is found in 42 U.S.C. § l396p (d)(4)(A) and is commonly called a "d4A" trust or "First Party SNT". Because the d4A trust is funded with the beneficiary's own assets, the statute requires that at the death of the beneficiary or termination of the trust, the remaining assets in the trust must be used initially to reimburse any state government that provided Medicaid to the beneficiary during his or her lifetime. Therefore, this trust can also be called a "payback trust." In addition to the payback requirement, the d4A trust may be created only by a parent, grandparent, court, or guardian; and the disabled beneficiary must be younger than age 65. Further, funds cannot be put into the trust after age 65. The trust must provide that Medicaid will receive all amounts remaining in the trust upon the death of the disabled individual up to the total amount of medical assistance paid on behalf of the individual during his or her lifetime. Remaining trust assets after the Medicaid payback can be distributed to the chosen remainder beneficiaries, but only very large trusts will likely have remaining assets after Medicaid payback.

The second type of safe harbor for a self-settled trust is found in 42 U.S.C. § l396p (d)(4)(C) and is commonly called a "Pooled Trust". A Pooled Trust is established and managed by a nonprofit association (in Montana, the "Self Sufficiency Trust" established and managed by PLUK – "Parents, Let's Unite for Kids," in Billings, Montana is the only certified Pooled Trust in Montana). The Pooled Trust can contain assets of the beneficiary or third parties and must require Medicaid payback upon the beneficiary's death similar to a First Party SNT. In addition to the Medicaid payback, 10% of any remaining funds on the beneficiary's death must be donated to a charitable trust to be used by the Montana Department of Public Health and Human Services for the purpose of providing for the care and treatment of low-income persons with disabilities. Pooled trusts are administered by a "trust advisor," chosen by the trust's donor, in accordance with a Life Care Plan for the beneficiary, which is prepared and reviewed in connection with an advisory board consisting of state employees, persons associated with the non-profit, and persons in the community familiar with issues facing disabled individuals. Pooled trusts can be more efficient to establish and administer than a First Party SNT because the funds are pooled and managed collectively with those of other Pooled Trust beneficiaries and because the Life Care Plan and trust advisory board act as a guide to the trust advisor. However, the process of accessing funds in a Pooled Trust can be cumbersome making Pooled Trusts less flexible than a First Party or Third Party SNT.

Pooled Trusts can be created for disabled individuals of any age. Montana has just recently lifted the former rule, which assessed an asset transfer penalty for transfers to Pooled Trusts for disabled individuals aged 65 and older.[17] Pooled Trusts have now become a viable planning option for those needing Medicaid to pay for long-term custodial care. Persons can accomplish the required "spend down" by establishing a Pooled Trust and transferring the required amount of assets to the trust. Trust assets can be used to pay for the single room differential in a skilled nursing facility (Medicaid only pays for a double room), for entertainment, such as cable TV, for clothing, for additional therapy, for beautician services, etc.

Third Party Trusts

Third Party SNTs are typically established by a disabled individual's family members. This can be done in either a living (or "inter-vivos") trust or a testamentary trust, which is established in a will. Third Party SNTs do not require a Medicaid payback, so the trust can provide that the remaining trust assets be distributed to the chosen remainder beneficiaries of the grantor at the death of the primary disabled beneficiary.

It is vitally important that family members of disabled individuals understand that by receiving an inheritance the disabled individual will likely become disqualified from means-tested government benefits until the inheritance is spent on that person's care. To avoid this problem, families have historically either disinherited the disabled individual, which leaves an already vulnerable individual even more dependent upon uncertain government benefits, or left the inheritance to another family member with an "understanding" that the funds are to be used for the disabled individual's benefit. The "understanding" option leaves those funds exposed to several risks as the funds may never be used as intended and the funds will be subject to the other family member's creditors, divorces, etc. The disabled individual receiving the inheritance could always establish a Self Settled SNT to hold those funds and allow them to re-qualify for benefits; however, Self-Settled

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15 POMS – SI 01120.200; MA 402-3

16 POMS – SI 01150.110; MA 404-5

17 Montana DPHHS will not apply the penalty period even though MA404-1 still contemplates the penalty.

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SNTs require Medicaid payback. A better option is for family members to establish either an inter-vivos or testamentary Third Party SNT, so they may direct where any remaining funds will go upon the death of the disabled beneficiary.

The Trustee

Trustees of SNTs have the same duties as trustees of other trusts. These duties include the duty of loyalty, the duty of care of a prudent person, the duty to observe the terms of the trust agreement, and the duty not to waste or squander the trust assets.[18] However, trustees of a SNT have added responsibilities.

A trustee of a SNT must develop a working knowledge of the government benefits for which the beneficiary is qualified, because the trustee must understand which distributions are appropriate and which are not. This can mean not making certain distributions, such as cash, food or shelter expenses to an SSI beneficiary. A SNT trustee must know the long-term care plan for the beneficiary, his or her life expectancy, and what activities are possible or are reasonable for the beneficiary. A trustee of a SNT should be creative in anticipating activities or items that will enhance the beneficiary's life. For example, a beneficiary who is totally physically disabled, and who requires 24-hour care in a nursing home, but who is not totally mentally disabled, might enjoy a vacation or an outing to a movie or play. The cost of such a trip may include the cost of a personal companion.

A SNT trustee must understand which distributions would jeopardize means-tested benefits . For example, if an SSI beneficiary receives cash payments that are deemed to be for the recipient's food and shelter, such payment is treated as "in-kind support and maintenance," andreduces SSI benefits. Therefore, the trustee should not pay the beneficiary's rent or buy groceries for the beneficiary, because those are in kind payments for shelter and food. Under some circumstances, it is in the beneficiary's best interests for distributions to be made that will reduce SSI, but this must be done with careful consideration and in accordance with the terms of the SNT.

The SSI and Medicaid programs require periodic reporting for all recipients. Eligibility will be denied if the reports are not complete. The existence of the SNT must be reported. Additionally, if the beneficiary changes address, gets married, obtains more resources or more income, or improves in medical condition, these changes must be reported. The report is due within ten (10) days of the end of the month in which the change occurred.

The trustee must respond promptly to any notices received from the SSA or from Medicaid. If notice is given of a change in benefits that is detrimental to the beneficiary, the beneficiary has sixty (60) days in which to file a written notice of an appeal in order to keep the benefits in place during the appeal process. The trustee cannot ignore or postpone dealing with any government agency.

As with many types of trusts, a co-trustee of a SNT may be advisable if the trust holds significant assets, a corporate trustee may be beneficial for long-term investment expertise. However, an appropriate family member can be a co-trustee in order to monitor the day-to-day needs of the beneficiary. Trustees of SNTs often need ongoing legal representation. To the extent possible, the trustee should stay abreast of changes in the law. Generally, an annual review meeting with the trustee and counsel is recommended.

18 §72-38-801, et. seq.

PROFESSIONALS MUST RECOGNIZE NEED FOR SPECIAL NEEDS TRUSTS

Special needs planning is a dynamic area of law that should be undertaken only by those with specialized training. However, just having the ability to recognize the need in a given situation to preserve someone's public benefits and referring them to an appropriate advisor can prevent some devastating professional consequences. Personal injury attorneys, estate planners, and general practitioners should take heed to the following malpractice cases resulting from the professional's failure to preserve public benefits.

Personal Injury Cases

1. *Christina Grillo settled a personal injury case in 1991 for a lump sum upon the advice of her personal injury attorney. She later sued the attorney and guardian ad litem for malpractice. She alleged that the defendants: (1) failed to consult competent experts concerning a structured settlement and (2) failed to plan to preserve her SSI and Medicaid eligibility. Ms. Grillo alleged that structured settlement with a d(4)(A) SNT would have protected her personal injury settlement from dissipation, provided tax benefits, and protected her SSI and Medicaid benefits. The case was settled by all defendants for a combined sum of $4.1 million.*[19]

2. *Edith Saunders, the conservator for James A. Saunders III (Jamie), settled a personal injury action on Jamie's behalf. As a part of the application to compromise and settle the claim, the conservator requested that the net settlement amount be placed in a d(4)(A) SNT for Jamie to preserve his Medicaid eligibility. The State of Connecticut objected. The Supreme Court of Connecticut rejected the attorney general's argument that the*

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conservator should spend down all of Jamie's

19 *Grillo v. Petiete et al.,* 96-145090-92, 96th Dist. Ct., Tarrant Cty., Texas, and *Grillo v. Henry Cause,* 96-167943-96, 96th Dist. Ct., Tarrant Cty., Texas. See also *French v. Glorioso,* 94 S.W.3d 739 (Tex. T. App. 2002) which demonstrates the potential for malpractice liability for failure to advise clients about the impact of a settlement on public benefits eligibility.

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assets and then re-apply for Medicaid assistance. The court ruled: "By contrast, with the creation of the trust, Jamie will retain his Medicaid eligibility and Saunders (the conservatrix) can provide for his supplemental needs from the trust assets, while Medicaid provides for his basic medical care. Therefore, not only is the latter course of action clearly better for Jamie, it may be fairly stated by failing to follow it, the probate court, and Saunders could be deemed to be in dereliction of their duties to James (italics added)."[20] *This duty requires the fiduciary of an estate and indirectly, the trial lawyer, to protect the client's settlement.*

A trial attorney has the duty to ensure his client is informed about the options of structured settlements, trusts and the effect of the judgment of settlement on the client's public benefits eligibility.[21]

Estate Planning Case

1. *In 2000, an attorney was retained to draft a will that left a significant sum to the testatrix's' sister who resided in a nursing home. The Medicaid program was paying for the sister's care. After the testatrix's death, the sister was disqualified for Medicaid assistance, had to spend down the inheritance and reapply for Medicaid assistance. The Supreme Judicial Court of Maine held that the attorney "… could and should have drafted a 'Supplemental Needs Trust' [Third Party SNT] for… [the testatrix's sister], thereby avoiding the Medicaid spend down…" On October 25, 2002, the court suspended the drafting attorney's license to practice law because of his failure to create the special needs trust and for other reasons.*[22]

CONCLUSION

People with disabilities rely heavily, and sometimes exclusively, on means-tested government benefits for their basic needs. With the average yearly cost of skilled-nursing care in Montana exceeding $73,000[23], Medicaid is often the only option to provide this needed care for aging family members. Maintaining eligibility for means-tested government programs often contradicts the efforts of family members to provide for a quality of life greater than that afforded by means-tested government benefits. Planning for a disabled individual using SNTs provides an opportunity for a better lifestyle for the disabled individual while maintaining eligibility for the critical government benefits upon which they rely. In addition, SNTs give family members peace of mind knowing that funds will be set aside and protected to care for their disabled loved one after they themselves have passed away.

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20 *Dept. of Social Services v. Saunders*, 724 A.2d 1093, 247 Conn. 686 (1999).

21 See After the Judgment, Ellen S. Pryor, 88 Va. L. Rev. 1757 (December 2002) and How to Protect Aged Injury Victims: Implications for Trial Lawyers, Jason D. Lazarus, NAELA Journal, Vol. 4, 2008, Number 2

22 *Board of Overseers of the Bar v. Ralph W. Brown, Esq.,* Me. Sup. Jud. Ct. Docket No.BAR -01-6 (October 25, 2002).

23 MA 404-2

TEACHING TRIAL ADVOCACY SKILLS IN MONTANA

This story by the Hon. Karen S. Townsend ran in the fall 2013 edition of ACTL's *The Bulletin*

In 1985, a newly minted Fellow of the College, (now the Honorable Sam E. Haddon), then a partner in the Missoula, Montana law firm of Boone, Karlberg and Haddon, was determined to improve the trial bar in the state. He knew that skills could be improved by watching competent attorneys demonstrate a trial skill and then having the students get on their feet and practice the skill before more-experienced practitioners who could provide feedback on these performances.

He rounded up a handful of the most-skilled trial lawyers and trial judges he knew and practiced with from across Montana, persuaded them to donate a week of their time and come to Missoula for this trial advocacy program, added a communications specialist to the mix, found a NITA problem for use, secured community volunteers who served as prospective jurors or witnesses, and convinced the Dean of the University of Montana School of Law to donate facilities, provide logistical support, and underwrite the program financially so that tuition for the program could be modest. That first program attracted a small group of students, and from these modest beginnings, the Advanced Trial Advocacy Program has grown and evolved and has just completed its 25th version.

Montana Fellows of the College often serve as faculty members of the Advanced Trial Advocacy Program. Of the current thirty-nine Montana Fellows, thirteen have served as faculty members for the program. Judge Haddon served as Director of the Program and faculty member from the original program until he was elevated to the federal bench in 2001. Fellow Karen S. Townsend (now Judicial Fellow) assumed the directorship at that time. Other outstanding trial lawyers also participate as faculty members. The faculty is augmented by experienced trial judges from Montana, including federal judges, and almost every year, a justice of the Montana Supreme Court attends and presents, usually, the ethics lecture. As director of the program, Judge Townsend frequently receives telephone calls or e-mails from Montana lawyers or judges wishing to volunteer their services to the program. The faculty is rounded out by the participation of two distinguished law professors who assist with the program, one from the University of Montana School of Law and the other from Seattle University Law School. Both professors have extensive trial advocacy teaching experience.

Students attending the program are primarily practicing lawyers with less than five years' practice experience, although any practicing lawyer is welcome to attend. The program is open to law students who have completed their second year of study so that they have had the Evidence course. The law students who have been chosen to participate in the National Trial Competition are strongly encouraged to take the class. Law students earn one academic credit for successful completion of the course. Until this year, the program attracted only Montana lawyers and law students, but for the first time, in 2013, a lawyer from St. Louis, after learning about the program on the University of Montana School of Law's website, enrolled. Thirty-six students is the maximum enrollment to ensure that each student has an opportunity to try each exercise.

With the assistance of the Foundation of the American College of Trial Lawyers, the program has offered scholarship assistance to public interest lawyers wishing to attend the program. The Foundation's assistance allows public defenders, prosecutors, legal services attorneys, and state government lawyers to attend and improve their trial skills at a reduced cost. The Montana Fellows believe that this cooperative effort is a way in which they can meet their obligation as Fellows assisting public interest lawyers as they sharpen their trial advocacy skills.

The current curriculum consists of three segments: lectures on aspects of trial advocacy, ethics, and communication; faculty demonstrations of different trial skills; and student participation in workshops where students get on their feet and attempt trial skill exercises. A factual scenario is used as the "case" for the course. For many years, the program used NITA problems, but three years ago, the course used a past problem from the National Trial Competition, which was co-sponsored by the

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College and the Texas Young Lawyers. The administrators of the program determined that the National Trial Competition scenarios are less factually complicated, and students spend less time learning the "facts" and more time focusing on trial skills. An additional advantage is that there is no charge for use of the National Trial Competition scenarios. Each student "tries" the case during the week, beginning with a jury selection exercise, giving an opening statement, directing or crossing several witnesses, including an expert witness, and presenting a closing argument. Students and faculty members earn twenty-nine CLE credits for their participation, including one Ethics credit.

Each student exercise is videoed and each exercise is followed by an immediate critique of the performance in the workshop room by the faculty team. A one-on-one session with a faculty member is then conducted, using the recorded video. Each workshop room has a communications expert as part of the faculty and the communication specialist adds his or her pointers on how effective the student's communication has been. Students are pre-assigned the exercises and sometimes represent the plaintiff and sometimes the defendant. Students rotate among the workshop rooms so that each student has an opportunity to hear from each faculty member during the week.

The program is evaluated by the students each year. Students are asked to evaluate the strengths and weaknesses of the program, offer suggestions for change and rate each segment of the course as well as the course as a whole on a nine-point scale. Return of the evaluation forms has been unusually high, with the most-recent year's return rate of more than 80%.

Over the years, the program has been tweaked based on the evaluations. Included on the evaluation is the question of whether they would recommend the program to others, and the responses are usually "Yes!" Often to this question we are told that the program far exceeded the student's expectations.

The participating faculty has always profited from the experience. Many return year after year. The faculty enjoys seeing the progress made by the students over the course of the week, and it is not uncommon to pick up ideas for use in our future trials. A particular source of pride for the faculty members that have had a long association with the program is that two former graduates of the program have now returned as faculty.

Could this program serve as a model for your particular state or province fellows? Certainly it could. The Montana Fellows are happy to share what they have developed and learned. A similar program needs a core group of faculty willing to participate, probably a law school willing to assist with space and logistics, and some financial underpinning until the program becomes self-supporting.

Karen S. Townsend *was inducted into the College in 2000. In 2011, her status changed to Judicial Fellow when she assumed the bench of the 4th Judicial District of the State of Montana. She has served the College as Chair of the Montana State Committee, the Admission to Fellowship Committee and the National College of District Attorneys Committee.*

He loves me? He loves me not?

He wants to keep me from testifying?

By Cynthia Ford

Valentine's Day having just passed, I thought I would devote this month to the Spousal Privilege as it exists in Montana. They don't show this on any of the jewelry store ads in early February, but under some circumstances, buying a wedding ring might also buy you freedom. You don't have to return the ring, but you should at least be aware of the legal implications of the nuptials.

PRIVILEGES IN GENERAL

A privilege protects a confidential communication between two qualifying persons from disclosure in discovery[1] and at trial, even if the communication is both relevant and extremely important to the determination of a fact at issue in the litigation. Every privilege necessarily impedes the search for truth, and consequently, justice. I think of privilege as a gag in the mouth of someone who KNOWS, having gotten the information from "the horse's mouth," but who is prevented from saying what he was told, even though in some circumstances he affirmatively may want to disclose the contents of the communication.

The justification for the privileges which are recognized by the law is uniform: the relationship between the persons to the communication itself serves the public good, and the ability of the parties to speak freely and without fear of later disclosure is essential to that beneficial relationship. Thus, if the communication is made in confidence and kept in confidence, the law will honor that confidence. The relationship in effect trumps the interest in the complete truth. M.C.A. 26-1-801 expresses this:

> **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 MONTANA V. FEDERAL APPROACHES TO PRIVILEGE

The state and federal privilege regimes are very different procedurally. Under the FRE, in non-diversity cases[2], federal evidentiary privileges are expressly judge-made. FRE 501 states:

> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.[3]

FRE 501 is a Congressional revision to the version of FRE Article V submitted by the Supreme Court, which actually contained several specific rules, each setting forth the terms of a particular privilege. Congress morphed these into a single rule, 501, conferring the development of federal evidentiary privilege law on the federal courts, case-by-case. For more explanation of this remarkable sleight-of-hand, see *Trammel v. U.S.* Montana's privilege law is exactly the opposite. Montana's privileges are found solely in legislation. MRE 501 provides:

> **Rule 501. Privileges recognized only as provided.** Except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state, no person has a privilege to:
>
> (1) refuse to be a witness;
>
> (2) refuse to disclose any matter;
>
> (3) refuse to produce any object or writing; or
>
> (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

In addition to MRE 501, Article V contains one specific

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1 Both the state and federal versions of Civil Procedure Rule 26 state that a party may discover any matter which is relevant (and this term is construed more broadly than at trial) AND "non-privileged."

2 FRE 501's last sentence provides that in diversity cases, privilege is to be determined by state law. This clear statement obviates the need for that sticky Erie determination of whether evidentiary privileges are substantive (state law) or procedural (federal).

3 The Constitutional reference is to the privilege against self-incrimination. Congress has not enacted any privilege statutes itself, and the only other "rule prescribed by the Supreme Court" is FRE 502 (effective 12/1/2011), which deals not with a privilege per se but treatment of disclosures of attorney-client and work-product material.

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privilege (Rule 502, privilege of government to refuse to disclose the identity of a confidential informant, which became effective in 1990). The rest of Montana's privileges are located primarily[4] in Title 26, Chapter 1, Part 8 of the MCA, entitled "Privileges." The Commission Comment to MRE 501 makes it very clear that Montana intends its privilege law to come from the legislature, rather than the judicial approach adopted by the FRE:

> The rule provides that only the privileges incorporated by reference shall be recognized and so has the effect of cutting off any further case law recognition of privileges. The final four clauses in this rule represent a delineation of the elements of a testimonial privilege and are intended to clarify privileges generally. This rule represents a new approach to the use of privileges in Montana courts.

Notwithstanding the procedural differences in the creation of privileges, both the Montana and the U.S. Supreme Courts hold that privileges are and to be narrowly construed precisely because they abrogate the search for truth.

> 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." *Trammel v. United States* (1980), 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186, 195 (citations omitted).
>
> *State v. MacKinnon*, 1998 MT 78, 288 Mont. 329, 336, 957 P.2d 23, 27. See also, *State v. Gooding*, 1999 MT 249, 296 Mont. 234, 238, 989 P.2d 304, 307.

SPOUSAL TESTIMONIAL V. COMMUNICATIONS PRIVILEGES

States and the federal government differ about which relationships to privilege, but some sort of spousal privilege (communication, testimonial, or both: see below) is common. The marital privileges all stem from the public policy in favor of marriage. "[T]he purpose behind spousal privilege is to preserve the sanctity of the marriage and home." *In re Marriage of Sarsfield*, 206 Mont. 397, 406, 671 P.2d 595 (1983).

There are two types of spousal privilege, each aimed at the public policy in favor of marriage but differing in terms of the way in which the privilege protects marriage. Jurisdictions recognize one or both. The spousal testimonial privilege prevents a person married at the time of trial from testifying, in order to preserve the then-existing marriage. My visual is the witness and defendant leaving the courtroom hand-in-hand, which would presumably not occur if she just testified against him. (Some of my students report that their marriages are strong enough that he would forgive her for her adverse testimony, but I have lived longer). The spousal communications privilege, on the other hand, depends on the marital status of the parties at the time the communication between the spouses occurred, even if they are no longer married at the time of the testimony. The theory is that free communication without fear of compelled disclosure is good for marriage, and marriage is good for society. My nickname for this privilege is "the pillow talk privilege," but I wouldn't use that in court and of course it covers all confidential communications between spouses, whether in the bedroom, kitchen, car, or chairlift.

The spousal testimonial privilege operates to keep a spouse off the stand altogether in a case involving the other spouse. In its most traditional, Olde Englande, form, this privilege was a logical extension of the privilege against self-incrimination. The wife was seen as the property of the husband, so if she testified against her husband, it was as if he was testifying against himself. Although this property view of marriage no longer exists, the privilege is extant in many jurisdictions. In fact, the U.S. Supreme Court recently acknowledged the privilege even as it narrowed it in *Trammel v. U.S.*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (holding that the privilege belongs solely to the witness-spouse, who is the best judge of whether there is a marriage worth preserving[5]):

> [The testimonial] privilege is invoked, not to exclude private marital communications, but rather to exclude evidence of criminal acts and of communications made in the presence of third persons.

Trammel v. United States, 445 U.S. 40, 51, 100 S. Ct. 906, 913, 63 L. Ed. 2d 186 (1980). The Supreme Court elected to maintain only a limited form of the privilege, vesting the decision about whether to testify in the witness-spouse whether than the defendant-spouse:

> The contemporary justification for affording an accused such a privilege is also unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding-whatever the motivation-their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace
>
> 445 U.S. at 52, 100 S. Ct. at 913, 63 L. Ed. 2d 186 (1980).

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4 Primarily is not the same as exclusively. As always, a wise practitioner should search the rest of the M.C.A. for scattered exceptions. Spousal privilege is a good example: there are applicable statutes in both Title 26 and Title 46.

5 Mrs. Trammel wanted to testify for the government in her husband's drug case. The defendant argued that her testimony was not truly voluntary, induced as it was by an offer of immunity from her own prosecution. The Supreme Court ruled in favor of the government, holding that the reason Mrs. Trammel agreed to take the stand was irrelevant:

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The federal system, then, recognizes both the spousal communications privilege and a limited form of the spousal testimonial privilege. These federal spousal privileges apply to cases in federal court arising from federal questions, but not to diversity cases (see F.R.E. 501). Montana's privilege law determines the extent of the spousal privilege in both Montana state courts and in diversity actions in federal court where Montana law is the rule of decision.

MONTANA'S SPOUSAL PRIVILEGE LAW: COMMUNICATIONS BUT NOT TESTIMONIAL MARITAL PRIVILEGE

Montana, like the federal courts, does include a privilege for spouses. In fact, it is the first of the twelve specific privileges established by the Montana legislature. In its current form, the spousal privilege statute reads:

> **26-1-802. Spousal privilege.** Neither spouse may, without the consent of the other, testify during or after the marriage **concerning any communication made by one to the other during their marriage**. The privilege is restricted to communications made during the existence of the marriage relationship and does not extend to communications made prior to the marriage or to communications made after the marriage is dissolved. The privilege does not apply to a civil action or proceeding by one spouse against the other or to a criminal action or proceeding for a crime committed by one spouse against the other or against a child of either spouse. (Emphasis added)

Another, not inconsistent, statute appears in Title 46, Criminal Procedure:

> 46-16-212. Competency of spouses
>
> (1) Neither spouse may testify to the communications or conversations between spouses that occur during their marriage unless:
>
> (a) consent of the defendant-spouse is obtained;
>
> (b) the defendant-spouse has been charged with an act of criminal violence against the other; or
>
> (c) the defendant-spouse has been charged with abuse, abandonment, or neglect of the other spouse or either spouse's children.
>
> (2) Except as provided in subsection (1), a spouse is a competent witness for or against the other spouse.

The Montana Supreme Court has characterized this statute as dealing with the competency of a witness-spouse, while Title 26 provides the privilege for communications made during the marriage when a spouse is a witness: "both the heading and subsection (2) of § 46-16-212, MCA, are clear that the statute relates to the competency of spouses to testify, not spousal privilege." *State v. Baldwin*, 2003 MT 346, 318 Mont. 489, 495, 81 P.3d 488, 493.

In *State v. Moore*, 254 Mont. 241, 836 P.2d 604 (1992), the Court addressed MCA 46-16-212, making it clear that it destroys any argument based on the spousal testimonial privilege (which would make a spouse incompetent as a witness):

> We conclude that testimony by the wife Michelle Moore, if it meets other rules of evidence, is not to be excluded on the grounds of her competency as a witness, unless it is testimony of communications and conversation between the spouses during their marriage.
>
> 254 Mont. at 247, 836 P.2d at 608.

Neither of the above statutes privileges spousal testimony in general. As *Baldwin* recognized, MCA 46-16-212(2) expressly disallows a "spousal testimonial privilege" in criminal cases, and the Commission Comment to its 1991 amendment explicitly states: "Subsection (2) emphasizes that the privilege applies only to communications or conversations." This conforms to the current language of MCA 26-1-802. The prior version of the same statute contained an additional provision: "A husband cannot be examined for or against his wife without her consent or a wife for or against her husband without his consent." The removal of this language in the 2005 legislative session effectively abolished the spousal testimonial privilege. Thus, in Montana civil and criminal cases since 2005, there is a spousal communication privilege but not a general spousal testimonial privilege.

The privilege applies to communications made between spouses during their marriage, made and kept in confidence, at least by the spouse asserting the privilege. The witness spouse can be compelled to testify as to what she observed, even during the marriage, but not as to what her husband told her during the marriage, if he didn't tell anyone else about their communication. Because this privilege, like all others, is construed narrowly, it does not protect communications between unmarried people, no matter how long or how committed their relationship.[6] It does apply to couples who are married either through the statutory process or through common law.[7] Any communication made after that date of the marriage, until the end of the marriage, is privileged. Communications made before or after the marriage are not privileged.

If a couple follows the statutory route to marriage, it is

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6 Because Montana explicitly forbids same-sex marriage, the privilege is unavailable to same-sex couples, even where they have participated in a "commitment" or other marriage-like ceremony, and even where they have registered with a city government (Missoula has such a registry) as life partners.

7 MCA 40-1-403 expressly provides: **"Validity of common-law marriage.** Common-law marriages are not invalidated by this chapter…" Montana is commonly viewed as having the most liberal common-law marriage law in the country.

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easy to tell when the marriage, and thus the communication privilege, begins and ends: the privilege covers all confidential communications after the date of the wedding, reflected by the state-issued marriage certificate. When does the marriage end, and thus the privilege for communications between the former spouses? That, too, is an easy question in most circumstances: the marital communications privilege does not cover any communications between the ex-spouses after the entry of the decree of dissolution of the marriage. This applies to both statutory and common-law marriages: the only ways out of either are death and formal dissolution. You can get married through common-law, but you can't get unmarried that way.

These limits make sense in view of the public policy in favor of marriage. One of the incentives to marry is the privilege, and if the State extended the reach of the privilege, that incentive is removed. On the other end of the timeline, the purpose of the privilege is to strengthen the marriage by encouraging full and frank conversation between spouses; if they have divorced, there is no marriage to strengthen and it is clear that the privilege was not sufficient incentive to keep them married. In both circumstances, the need for information to determine the facts and administer justice regains its supremacy and the spousal communications privilege disappears.

By its very nature, common law marriage is a much messier can of worms than a statutory marriage for purposes of assessing the privilege. Couples, or a member of a couple, usually assert that there was a common law marriage only in retrospect, when it has become clear that marital status confers some advantage. Most of those cases involve a claim to the dissolution procedure for ending the relationship, or an inheritance or governmental financial benefit such as Social Security. The spousal communications privilege is another such advantage. The Montana Supreme Court has decided a couple of relatively recent marital privilege cases where the defendant claimed he had married the witness at common law.

STATE V. NETTLETON (1988)

The Montana Supreme Court had the opportunity to elucidate both forms of spousal privilege in 1988, when it decided *State v. Nettleton*, 233 Mont. 308, 760 P.2d 733. Nettleton was convicted of deliberate homicide for a 1977 murder. Two important witnesses for the State were women who had lived with Nettleton, and who had information about both what he said to them and what they observed relevant to the murder. The defendant moved in limine to exclude their testimony, claiming that he had been married to each (in series) and that the spousal privilege prevented both from testifying.

The trial court held a pretrial hearing, taking evidence on the issue of whether defendant had been married to either witness. The judge found that one of the women, Candace Semenze, had been Nettleton's common law wife from 1975 to 1982 (and thus at the time of the crime), and that the other woman, Magdelina DuMontier, had been statutorily married to Nettleton from July 1983 until June 1986. Before the Supreme Court, the State argued that there had been no common law marriage, but the Court affirmed the findings of the trial judge:

> The State's argument to the District Court and its brief on appeal emphasize that Nettleton and Semenze were never married. According to the State, the alleged common-law marriage between the two did not have the four elements necessary under Montana common law: capability, agreement, cohabitation and reputation (citing *Matter of Estate of Murnion* (Mont.1984), 686 P.2d 893, 41 St.Rep. 1627, and other cases). Whether the relationship between Nettleton and Semenze fit the legal definition of common-law marriage was a question of fact for the District Court to decide. That decision must be upheld if there is substantial, credible evidence in the record to support it. *Griffel v. Cove Ditch Co.* (1984), 207 Mont. 348, 675 P.2d 90, 41 St.Rep. 1.
>
> The record shows that while Semenze denied the existence of the marriage in her testimony, she and Nettleton lived together, had a child, opened and used a joint checking account, and filed joint income tax returns for two consecutive years. The record also shows the filing of a joint petition for divorce signed by Semenze and Nettleton. This evidence provides a sufficient basis for the District Court's decision that Nettleton and Semenze considered themselves married. *State v. Nettleton*, 233 Mont. 308, 311-12, 760 P.2d 733, 736 (1988).

The Court then went on to apply Montana's spousal privilege to the various pieces of testimony from the ex-wives. It held that the privilege did not apply to:

- Testimony by DuMontier concerning Nettleton's actions and statements after the two were divorced … because those statements were not made during marriage.
- Testimony involving statements or actions by persons other than Nettleton … because those were not communications by one spouse to the other.
- Testimony about observations of Nettleton's actions; physical evidence such as Brisson's body, her scarf or Nettleton's knife; and feelings such as the fear induced by Nettleton's threats and other behavior.
- Testimony about statements made during the marriage, but in the presence of third persons; "The presence of third parties indicates that Nettleton did not intend those statements to be confidential."
- Testimony about threats by Nettleton to induce the wife's cooperation and silence, "do not merit spousal privilege."

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The Court did find that one part of the testimony should have been protected by spousal privilege, so that the judge erred in admitting it, but held that the error was harmless:

> The one clear instance of testimony that should have been protected by the privilege-Nettleton's admission to DuMontier in response to her question while they were married-simply restates the same information contained in the far greater number of non-privileged statements. The failure of the District Court to exclude this testimony was therefore harmless error.
>
> *State v. Nettleton*, 233 Mont. 308, 317-18, 760 P.2d 733, 739 (1988).

STATE V. BALDWIN (2003)

In *State v. Baldwin*, 2003 MT 346, 318 Mont. 489, 495, 81 P.3d 488, 493, the defendant objected to testimony from Karin Baldwin, whom the government had called as a hostile witness. The defendant objected to her testimony at trial, claiming that Karin was his common-law spouse and that he was entitled to a spousal communications privilege. Karin and Baldwin solemnized their marriage on October 16, 2001, after Baldwin had been charged, but before his trial on December 3, 2001. (Baldwin also argued that he and Karin had been in a common-law marriage for six years prior to the ceremony, so that the privilege extended to the communications between them from 1995.) The trial court overruled the objection and allowed the testimony. The Supreme Court found error[8]:

> We conclude that because Baldwin and Karin were married at the time of Baldwin's trial, Karin's testimony should have been excluded based upon spousal privilege, pursuant to § 26-1-802, MCA.
>
> *State v. Baldwin*, 2003 MT 346, 318 Mont. 489, 495, 81 P.3d 488, 493.

The majority opinion went no further on its analysis of the application of the marital communications privilege, for which Justice Rice took them to task in his concurrence, joined by Justices Gray and Leaphart. He correctly observed:

> ¶ 33 The Court concludes in ¶ 26 that because Baldwin and Karin were married *at the time of trial,* Karin's testimony in regard to a statement made *prior* to the solemnization of their marriage was inadmissible under the spousal privilege statute. However, this is an incorrect conclusion under Montana law. **The spousal privilege does not bar admission of a statement made between two persons who were not married at the time the statement was made.** (Emphasis added)
>
> *State v. Baldwin*, 2003 MT 346, 318 Mont. 489, 497, 81 P.3d 488, 494.

Justice Rice did a more thorough analysis and concluded that:

> ¶ 36 Karin›s testimony was not made inadmissible by virtue of the fact that she and Baldwin were married at the time of trial. To the contrary, the inquiry centers on **their status at the time the contested statement was made**. If they were not married at that time, then the statement could not "convey a message from one *spouse* to the other" and could not have been "conveyed *in reliance* on the confidence of the *marital relationship.*" *Nettleton,* 233 Mont. at 317, 760 P.2d at 739 (original emphasis). Because the solemnization of the marriage had not occurred at the time the statement was made, Karin's testimony about the statement was not barred thereby.
>
> 318 Mont. at 497.

In support of his objection at trial, the defendant also claimed a pre-existing common-law marriage. The judge excused the jury and held a brief evidentiary hearing on the question of the common-law marriage:

> The direct and cross-examination produced testimony that Baldwin and Karin had not shared finances or income tax returns during their relationship, had been separated for a year prior to the solemnization, that Baldwin had an intervening relationship with another woman, and that the parties decided to marry by solemnization because, according to Karin, "I wanted to get married. We've been wanting to get married a long time."
>
> *State v. Baldwin*, 2003 MT 346, 318 Mont. 489, 498, 81 P.3d 488, 495.

Justice Rice concluded that the "District Court's evidentiary ruling that no common law marriage existed was founded upon substantial evidence, and therefore, Karin's testimony concerning the statement was not barred by the spousal privilege." *State v. Baldwin*, 2003 MT 346, 318 Mont. 489, 498, 81 P.3d 488, 495.

The proof of a common-law marriage is beyond the scope of this article, but I can suggest that this issue requires extensive fact-finding, and would be better dealt with in a motion and hearing in limine than by excusing the jury in the middle of a trial.

WAIVING THE PRIVILEGE

Clearly privileged confidential spousal communications may be admissible if the spouse who claims the privilege waives it. Waiver can occur by voluntary disclosure of the contents of the communication by the person who now claims the privilege or by failure of counsel to object in discovery or at trial. Additionally, some Montana cases have refused to allow the privilege when sexual abuse has occurred, reasoning that the

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8 As with so many evidentiary error cases, the Court further found the error to be harmless, discussing the strength of other evidence on the same issue, and affirmed the conviction.

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"home" which the privilege is designed to support no longer exists.

Voluntary Disclosure Outside Judicial Proceedings

One way waiver can occur is if the spouse him/herself "shares" the communication with someone outside the marriage before trial. An essential element of a privileged communication is that it was made in confidence and afterwards kept confidential. Thus, a husband who tells his wife something during their marriage, but then describes that conversation to his hunting buddy[9] has waived the privilege and should lose his objection at trial. M.R.E. 503 covers this:

> (a) A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor while the holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.
>
> (b) Joint holders. Where two or more persons are joint holders of a privilege, a waiver of the right of a particular joint holder to claim the privilege does not affect the right of another joint holder to claim the privilege.

In re Marriage of Sarsfield seemed to use this waiver theory when it affirmed admission of an ex-wife's testimony about things her husband told her while they were married. The Sarsfields were involved in a custody dispute which arose when the former Mrs. Sarsfield agreed to marry a man ("M.M.") with a history of child sexual abuse. Mr. Sarsfield sought a change in custody for the Sarsfield children, and called the ex-wife of the prospective new husband to testify at trial.

> M.M.'s former wife was called as a witness. She testified that her daughter had been removed from the family home because she had been sexually abused by M.M. She had never witnessed any incidents of abuse, but her husband had admitted the incidents to her. M.M. indicated to his wife that, for at least six years prior to his admission, he had "used various items, his hands, pokers, various instruments of that sort to induce her [the daughter] in various ways" on several occasions. No criminal charges were filed against M.M., but the daughter was removed by authorities and underwent treatment for emotional problems connected with the abuse.
>
> After her return from therapy, M.M. admitted to his wife that he had sexually molested the girl again. The daughter was removed to a childrens' [sic] home where she continues to undergo therapy. According to the former wife, M.M. is not allowed to see the girl without others present. He admitted his problem to counselors, but has apparently not committed any deviant acts since the last incident with his daughter.
>
> *In re Marriage of Sarsfield*, 206 Mont. 397, 405, 671 P.2d 595, 600 (1983).

Although the ex-wife's observations during the marriage to M.M. would not now be covered by a spousal testimonial privilege, it did exist back then, and her entire testimony should have been barred under it. Even under the more limited extant spousal communications privilege, the ex-wife's testimony about what M.M. told her in confidence during their marriage should have been privileged and the objection sustained.

The custodial mother's attorney did object at trial on the basis of the spousal privilege, to no avail. The trial judge allowed the testimony, and the Supreme Court affirmed that decision in a very murky paragraph:

> Clearly, the subject of the supposedly privileged communications had been revealed to welfare authorities and, as it turned out later, to M.M.'s "counselor," Paster [sic] Miller. We agree with the trial court that the testimony of M.M.'s wife was not protected by the spousal privilege under these facts.
>
> *In re Marriage of Sarsfield*, 206 Mont. 397, 407, 671 P.2d 595, 601 (1983).

This reasoning is wrong, at least under the current version of M.R.E. 503. The discloser of the communication to welfare authorities was not M.M. himself, but his wife. She cannot waive the privilege unilaterally, per M.R.E. 503(b), or if he does not have an opportunity to invoke the privilege. M.R.E. 504 provides:

> **Rule 504. Privileged matter disclosed under compulsion or without opportunity to claim the privilege.** A claim of privilege is not defeated by a disclosure which was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

Thus, the then-wife's revelation to "welfare authorities" should not operate as a waiver of the husband's spousal privilege. Further, M.M.'s own disclosure to his "counselor" or "paster"? might itself be privileged[10], and thus fit M.R.E. 503's clear provision that waiver by voluntary disclosure: "does not

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9 It is ok to disclose the communication to another person with whom the spouse has a privileged relationship, such as his attorney or minister. See the last sentence of Rule 503(a).

10 Montana recognizes privileges for communications with members of the clergy, M.C.A. 26-1-804, and psychologists, M.C.A. 26-1-807. The *Sarsfield* opinion does not discuss either of these in detail, but it does evince skepticism about the status of the "counselor."

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apply if the disclosure itself is privileged."[11]

Child Abuse

Sarsfield did offer another basis for its refusal to apply the spousal privilege, which seems to have been the real reason M.M.'s ex-wife could testify:

> This privilege, however, is subject to the maxim that, when the reason for a rule ceases to exist, so then should the rule. See Section 1-3-201, MCA. Thus, in *Matter of J.H.,* we held that once a family member has been sexually abused, the sanctity of the home and therefore the reason for the rule are simultaneously destroyed, 640 P.2d at 447, 39 St.Rep. at 269, and that a mother could testify about her husband's sexual abuse of their son in a child neglect proceeding, where the father was a party to the action. In the immediate case, the sexual abuse of M.M.'s daughter decidedly contributed to the destruction of the family home and M.M.'s marriage. Under the circumstances, we believe the privilege concerning communications about this abuse died with the marriage, and we are disinclined to invoke the privilege even though M.M. and his former wife are not parties to this custody battle.
>
> *In re Marriage of Sarsfield*, 206 Mont. 397, 406-07, 671 P.2d 595, 600-01 (1983).

Five years later, the Montana Supreme Court left the Sarsfield holding, and rationale in child abuse cases, standing, but acknowledged the difficulty it presents:

> In this case, we are concerned only with spouses. Rather than muddying the waters by attempting to apply the rule from *Sarsfield* and J.H. to the present situation, we will evaluate the District Court's ruling in light of the threshold characteristics outlined above.
>
> *State v. Nettleton*, 233 Mont. 308, 315-16, 760 P.2d 733, 738 (1988).

This judge-made "child abuse" exception is a possible avenue to invading the marital privilege, and you might as well try it if it fits your situation, but I wouldn't bet on it.

Failure to Object

The other avenue to waiver is failure to object in discovery or at trial. A recent example occurred in a poaching case, where the estranged wife went to Fish and Game and turned in her husband for several instances of hunting out of season and for possession of illegal golden eagle feathers and parts. At trial, the then-divorced wife testified about a written communication from her husband during the marriage. On appeal, the husband claimed error. The Supreme Court held:

> ¶ 30 Torgerson contends on appeal that the District Court violated § 26–1–802, MCA, in admitting the above testimony by Doane. He claims the court had granted him a continuing objection on grounds of spousal immunity.
>
> ¶ 31 As indicated above, the record reflects that the court told defense counsel prior to trial "[i]f [spousal immunity] does come up, raise your objections, if you want a continuing objection to some of those things." Torgerson did not follow the District Court's directive; nor did he object to the testimony he now argues was improperly admitted. As a result, we conclude he may not now argue trial court error in this regard. *See* § 46–20–104(2), MCA; *State v. Clausell,* 2001 MT 62, ¶ 25, 305 Mont. 1, ¶ 25, 22 P.3d 1111, ¶ 25 (citation omitted).
>
> *State v. Torgerson*, 2008 MT 303, 345 Mont. 532, 539, 192 P.3d 695, 700.

Ouch! Not only must you object, you must keep objecting. I myself am not a fan of the "continuing objection" precisely because it is unclear when you are objecting, what you are objecting to, and what the judge's ruling is. If you are going to use that route (for the strategic purpose of not irritating the jury with a constant stream of objections), be sure to articulate exactly what your "continuing objection" covers. In the perfect world, try to get the court to state on the record both that you have constructively objected to all questions and answer about what one spouse told the other during the marriage, and that the judge has overruled your objection on each and every such piece of testimony.

PREVENTING WAIVER

Client Instruction

A sad fact of lawyering is that our clients do not check with us before they go for coffee with friends. The corollary is that we often come to the party too late, and the client may already have shared his conversation with his wife with an outsider, destroying the spousal communications privilege. However, once the client does cross your threshold, it is imperative to instruct her about privileges in general, and if she is or has been married, the spousal communications privilege in general. Tell her that she can tell you things you must and can keep confidential, and that the same is true of her conversations with her husband, but that if she tells anyone else (friend, mother, neighbor etc.) about the contents of those privileged conversations, she loses the privilege. She is the owner of the privilege, and only she can protect it.

11 The spousal privilege statute now does address this issue, but its waiver is much narrower and would not have affected the privilege of M.M. in the *Sarsfield* situation: The privilege does not apply to a civil action or proceeding by one spouse against the other or to a criminal action or proceeding for a crime committed by one spouse against the other or against a child of either spouse. M.C.A. 26-1-802.

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Objection

Once you, the lawyer, have come on board in the case, you share the burden of maintaining the privilege during discovery and at trial. You can invoke the privilege, and you can lose it by failure to do so.

M.R.Civ.P. 26b specifically permits an objection to any discovery question calling for privileged information: "Parties may obtain discovery regarding any non-privileged matter…" The form of the objection itself is simple: "Objection, spousal privilege." However, Montana now echoes the F.R.Civ.P. and requires the objector to provide information to back up the claim of privilege:

> (6) Claiming Privilege or Protecting Trial-Preparation Materials.
>
> A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:
>
> (i) expressly make the claim; and
>
> (ii) describe the nature of the documents, communications, or things not produced or disclosed -- and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

M.R.Civ.P. 26(b)(6). To fulfill this requirement, you should indicate that the information involves an oral or written communication between spouses during the marriage, being as specific as you can about the form and dates of the communications without divulging the contents of the communications.

This advice is fairly easy to follow during written discovery, when you have time to reflect and craft responses. It is more difficult, but equally important, to guard the privilege during oral testimony at deposition or in trial. You must object and instruct the witness not to answer (until a judge has ruled on the objection). In depositions, you don't have the luxury of a ruling in limine, and a waiver of the privilege there may lead to a ruling that the privilege has been waived at trial. I once had a case against a former student whom I liked very much (luckily, I had taught the student Civil Procedure but not Evidence; still…) In the defendant's deposition, I asked him: "Have you talked to anyone else about this?" He said: "Yes, my wife." There was no reaction from his lawyer, and so on I went for about 5 minutes, with no objection: "What did you tell her?" "What did she say?" The defendant eventually told me that his wife had objected strenuously to his plan, and had told him both that it was immoral, illegal, and stupid. (She wasn't wrong). I was conflicted the whole time this was going on, wanting my former student to jump up and stop me, but that never happened and of course my paramount duty was to my client. (The case settled, so we never got to the admissibility of those answers at trial.)

The obvious cue is a question like:

> "What did your wife tell you about…?"
>
> OBJECTION! PRIVILEGE!

It is much more likely that the question will be less obvious, or that the conversation will come out in response to another type of question altogether. The trick is to recognize and object as soon as the privilege becomes apparent:

> "And then what happened?"
>
> "Well, I was so shook up that I went straight home and told my wife …"
>
> OBJECTION! PRIVILEGE!
>
> [… "that I had hit a bicyclist and left him on the side of the road"]

Remember that "communication" does not have to be verbal. Obviously, written communications like letters (remember those?), notes, and emails are all communications which are privileged if sent by one spouse to another during the marriage.

> "I am handing you a document premarked as Exhibit A."
>
> "Can you identify Exhibit A?"
>
> "Yes."
>
> "How can you identify Exhibit A?"
>
> "It is in my ex-wife's handwriting"
>
> OBJECTION! PRIVILEGE! MAY I VOIR DIRE outside the presence of the jury?
>
> "Sir, is Exhibit A a letter sent by your ex-wife?"
>
> "Yes."
>
> "Was it sent to you?"
>
> "Yes."
>
> "At the time she sent you this letter, you were still married, weren't you?"
>
> "Yes."
>
> I RENEW MY OBJECTION. EXHIBIT A IS A PRIVILEGED SPOUSAL COMMUNICATION.

You should file a motion in limine to assert the privilege and get a pretrial ruling if you anticipate that a spouse will be called as a witness at trial. Even if you do this, remember *State v. Torgerson* (discussed above) and object to every piece of testimony at trial which invades the spousal privilege. Watch out for opponents who might try to sneak around a pretrial ruling by indirect language, and for witnesses who testify, wittingly or not, about what their spouses told them. You may have already won a ruling that spousal privilege applies, but it is up to you to get the benefit of the ruling.

Rescuing the Privilege

The recently-revised M.R.Civ.P provide a mechanism for

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"clawing back" privileged material produced during discovery:

> (B) Information Produced. If information produced in discovery is subject to a claim of privilege, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

M.R.Civ.P. 26(b)(6)(B). I have not found any cases applying this provision to production of marital privileged information, but I would use this if I inadvertently sent in my discovery responses a letter or email between spouses. It might also be useful in the deposition scenario I described above, if the opposing lawyer had gone back to the office and realized that a breach of the privilege had just occurred. Note that this rule does not set any standard for when disclosure amounts to waiver, but it does freeze the use of the information once a notification and request is made and provides a process for a court determination of the effect of the disclosure.

DEVELOPING PROOF OF WAIVER

If the party-spouse objects to questions (in discovery or at trial) about conversations with spouse, the opponent should investigate (through discovery and otherwise) whether the objector discussed the spousal conversation with anyone else. Example:

> Q. Did you talk to anyone else about this transaction?
>
> A. Yes.
>
> Q. With whom?
>
> A. My wife.
>
> Q. What did you say to her about the transaction?
>
> Counsel: OBJECTION. PRIVILEGED. DO NO ANSWER.
>
> Q. Don't tell me what you said to your wife, or she to you. But I do want to know whether you have told anyone else about the conversation with your wife. Did you tell any other person about what you said to your wife, or what she said to you?
>
> A. My lawyer.
>
> Counsel: OBJECTION. PRIVILEGED. DO NOT ANSWER.
>
> Q. Don't tell me what you told your lawyer, either. Was there anyone else besides your lawyer to whom you described your conversation with your wife?
>
> A. Yes, I told my mother about that conversation. I told Mom what I told my wife, and what my wife said back to me.
>
> Q. Aha! What did you tell your mother[12]?
>
> Q. Now let's go back: what did you tell your wife about the transaction?

Because the party himself disclosed the content of the spousal communication, he waived the protection of the privilege and must divulge the communication with his wife.

CAVEAT: PRIVILEGE ONLY PROTECTS THE COMMUNICATION, NOT THE FACT

Obviously, a privilege does not prevent the discovery of the underlying fact itself. The prosecutor can still investigate and present evidence as to the identity of that guy who ran down Arthur Avenue in Missoula carrying a semi-automatic handgun and a paper bag (presumably containing the loot from his robbery of the Taco Bell at 9:30 a.m. on a recent snowy morning), resulting in a 3 hour extremely inconvenient (just sayin') lockdown of the University of Montana. The state just can't do it by putting a wife on the stand to say "my husband told me[13] he was the masked man."

MORAL OF THE STORY

One of the benefits of marriage is the ability to confide in your spouse without fear that she will be compelled to testify against you about what you told her. (You no longer get the ability to prevent her from being called to the stand to recount that she saw you with the bloody knife, burning your bloody clothes, on the night of the stabbing). Only the communications you make during the marriage are protected; it is your marital status at the time of the communication, not at the time of trial, which counts. Although it is possible to obtain the privilege by proving to the court at trial that you were married by common law at the time of the conversation, it is much easier and clearer to go to the courthouse, get a license, and go through a formal ceremony. You can freely divulge your most intimate secrets to your husband and know that he can't testify about them, even if you do end up getting divorced. So, put a ring on it!

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

12 Neither the FRE nor the MRE recognize any parent-child privilege, so disclosure to the mother amounts to disclosure of the contents of a privileged conversation just as if the husband described the privileged conversation to a bartender.

13 Of course, this would not be hearsay, per M.R.E. 801d2a: "A statement is not hearsay if… The statement is offered against a party and is (A) the party's own statement…"

Loren James O'Toole

Loren James O'Toole died early Monday morning, December 9, at Sheridan Memorial Hospital after a battle with cancer. He will be missed but never forgotten.

In our corner of the world, all knew him as a man who had a giant heart and a never give-in attitude. He was a true inspiration to his family and the town he called hon1e for 83 years. He will be fondly remembered by all those who came to know in him in his 50+ years of practicing law - especially those who loved Montana and the oil industry as much as he did. Many will remember his hospitality, generosity, and gift of conversational, typical of an Irishman.

Born in 1930 to George and Grace O'Toole, he was struck by polio at the age of 16. He never complained - or let that slow him down, only missing one year of school due to the illness. H e graduated from Plentywood H igh School with the class of 1949, but both the classes of '48 and '49 claimed him as their own. After high school he went to Gonzaga University. At Gonzaga he was the Secretary of the Student

Body his junior year and Vice President of the Student Body his senior year. He was also President of the Montana Club while at Gonzaga University.

Most important, while at Gonzaga Loren met Joanne Slavin, the daughter of a Yakima hop farmer - and his future wife. After college Loren applied for and was accepted to Georgetown Law School in Washington D.C. Off to Georgetown Law he went while Joanne finished her u ndergraduate degree at Gonzaga. At law school Loren lived near downtown D.C. and learned from some of the finest law school instructors in the country, observing many of their arguments before the United States Supreme Court. Upon graduation, he returned to the Northwest where Joanne waited. They were married at St. Joseph Catholic Church in Yakima on November

26, 1955. He brought his bride back to the corner of the world he always called home, believing there was opportunity here for a you ng lawyer and a great quality of life for raising a family.

Loren founded the O'Toole Law firm in 1956. I n addition to his local clients, he worked with oil companies from all over the country including Texas, Oklahoma and North Dakota. He testified before the Finance Committee of the U.S. Senate, met with senators and lobbyists, and worked on numerous Supreme Court cases. He specialized in the practice of oil and gas law and became an industry leader in the Rocky Mountain Region. He was named to the Board of Di rectors of Northern Oil and Gas Inc. in 2007. Not sure if he would ever see another oil boom, he was thrilled with the discovery of the Bakken, always believing one of the largest oil resources on earth existed below his feet.

Loren was very proud to be a part of the Plentywood community. He served as City Attorney, on the Hospital Board and the School Boa rd. He was one of the founding members of the Plentywood Manor. He was also instrumental in getting the Plentywood Pool and Sherwood Park built. A lifelong member of St. Joseph Catholic Church, Loren's commitment to his faith was unwavering.

Throughout the years Loren followed his favorite sports teams. He loved watching his children and grandchildren represent the Plentywood Wildcats. He never missed a Gonzaga Basketball game. He was excited when Georgetown basketball won the National Championship. And what Irish man doesn't follow Notre Da me football.

Loren is preceded in death by his parents Grace and George O'Toole and his sister Sally Ann Carpenter. He is survived by his wife of 58 years, Joanne and sons Larry O'Toole and wife Carol; Kevin O'Toole and wife Marcy of Denver, Michael O'Toole and wife Nadine, Patrick O'Toole and wife Darcy of Portland; Scott O'Toole and wife J ill of Denver, and daughters Catherine and husband Darin Shedd of Tacoma; and Mary and husband Bryan Hunt of Dallas. He was extremely proud of his grandchildren - Thomas and Caitlin O'Toole; Tessa O'Toole; Kristen (Brandon Millican), Kelly and Cad e O'Toole; Grace, Kellen and Finn O'Toole; Olivia, Kiera and Nathan Shedd; and An na and Bennett Hunt. He is also survived by his sister-in-law, Joanne Slavin of Spokane, and by many nieces and nephews including Paul Carpenter and Jennifer Anderson and husband Wayne and their children Sarah, Mary Catherine, Erin, Mark and Rachael who always made sure the 4th of July fireworks were the best show in town for their Uncle Loren.

Mary Burke Flax

Mary Burke Flax, 89, formerly of Helena, passed away Jan. 15, 2014, in Norfolk, Va., after a brief illness.

Mary was preceded in death by her parents, George F. and Catherine G. Burke of Helena, and her husband, Louis Flax of Washington, D.C.

She is survived by her sister, Molly B. Herrin of Missoula; her sons, Samuel (Meg) of Chevy Chase, Md., Stephen of Sarasota, Fla., and George (Gale) of Norfolk; and three grandchildren.

She attended Helena High School and graduated from the University of Montana and, in 1950, from the University of Montana School of Law.

Memorial contributions may be made to the Prickly Pear Land Trust.

— From www.helenair.com

Ryan Hyslop

Ryan Hyslop, attorney and graduate of University of Montana School of Law, Class of 2001, passed away shortly before the new year. Ryan was dearly loved by his many Montana friends and will be profoundly missed.

This is thy hour O' Soul,
Thy flight into the wordless,
Away from books, away from art, the day erased,
the lesson done,
Thee fully forth emerging,
Silent, gazing, pondering the themes thou lovest
best.
Night, sleep and the stars!

— Walt Whitman 1881

C.W. Leaphart Jr.

"Bill" died peacefully at his home on Dec. 18th at the age of 92. Bill and his twin sister Betty were born in Missoula in 1921 and grew up on their parents' apple orchard. After graduating from high school in Wash. D.C., he attended Univ. of Montana where he was the quarterback for the Grizzlies back when they played in the Pacific Coast League against Washington, USC and UCLA in the L.A. Coliseum. He was offered a chance to try out for the NY Giants, but enlisted in the Army Aircorps where he was a 2nd Lt- pilot on the European front. He was awarded an air medal for flying troops and supplies for the Battle of the Bulge, Dec. 1944 and flying a glider across the German line in Operation Varsity.

After the war and graduating from Harvard Law School, he brought his competitive edge back to Montana as a trial attorney where he thrived on representing the underdog and challenging public utilities. He was one of the founders of the Montana Trial Lawyers Assoc. Pres. of MTLA 1976-77 and was awarded the 1999 Life Time Achievement Award. Bill's father was the Dean of the University of Montana Law School. Bill practiced law in Helena for 60+ years; 20 of those years with his son, Bill.

He was an enthusiastic skier, golfer and outdoorsman, with epic stories of fishing on Seeley Lake with Rev. McLean of "A River Runs Through it" fame.

Bill met his match in confidence and wit in Corne' Murphy- his wife of 56 years. He and Corne' made their home in Helena where they raised their three children, Bill, Karen and Susan.

Bill was preceded in death by his wife Corne' in 2006 and his son-in-law Mike Mikota. He is survived by his sisters Betty Dratz, and Mary Carter both of Missoula; children: Bill Leaphart (Babs), Karen Mikota and Susan Leaphart; grandchildren, Abe & Brigit Mikota, Rebecca Leaphart (Ben Brouwer), Retta Leaphart (Jeremy Osborn), Ada Leaphart; great grandchild Charlie, and his faithful golden doodle, Guillaume, and Timer, the Great Pyrennes.

Lawyer Referral & Information Service

How does the LRIS work? Calls coming into the LRIS represent every segment of society with every type of legal issue imaginable. Many of the calls we receive are from out of State or even out of the country, looking for a Montana attorney. When a call comes into the LRIS line, the caller is asked about the nature of the problem or issue. Many callers "just have a question" or "don't have any money to pay an attorney". As often as possible, we try to help people find the answers to their questions or direct them to another resource for assistance. If an attorney is needed, they are provided with the name and phone number of an attorney based on location and area of practice. It is then up to the caller to contact the attorney referred to schedule an initial consultation.

It's inexpensive: The yearly cost to join the LRIS is minimal: free to attorneys their first year in practice, $125 for attorneys in practice for less than five years, and $200 for those in practice longer than five years. Best of all, unlike most referral programs, Montana LRIS doesn't require that you share a percentage of your fees generated from the referrals!

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

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