

MONTANA LAWYER

State Bar
— of —
Montana

February 2014 | Vol. 39, No. 4

ACA UPDATE

Where are we now?

Also inside:

Admissions: a year of changes | CLE reporting FAQ | Supreme Court vacancy | Law Library highlights
New ethics opinion | Premises Liability | Mental illness and incarceration: a counterpoint

The official magazine of the State Bar of Montana published every month except January and July by the State Bar of Montana, 7 W. Sixth Ave., Suite 2B, P.O. Box 577, Helena MT 59624. (406) 442-7660; Fax (406) 442-7763.
E-mail: pnowakowski@montanabar.org

State Bar Officers

President
Randall Snyder, Bigfork

President-Elect
Mark Parker, Billings

Secretary-Treasurer
Bruce M. Spencer, Helena

Immediate Past President
Pamela Bailey, Billings

Chair of the Board
Matthew Thiel, Missoula

Board of Trustees

Marybeth Sampsel, Kalispell
Leslie Halligan, Missoula
Matthew Thiel, Missoula
Tammy Wyatt-Shaw, Missoula
Ellen Donohue, Anaconda
Jason Holden, Great Falls
Mike Talia, Great Falls
Kent Sipe, Roundup
Luke Berger, Helena
Tom Keegan, Helena
Kate Ellis, Helena
Jane Mersen, Bozeman
Lynda White, Bozeman
Juli Pierce, Billings
Ross McLinden, Billings
Monique Voigt, Billings

ABA Delegates

Damon L. Gannett, Billings
Shane Vannatta, Missoula

Montana Lawyer Staff

Publisher | *Christopher L. Manos*
Editor | *Peter Nowakowski*
(406) 447-2200; fax: 442-7763
e-mail: pnowakowski@montanabar.org

Subscriptions are a benefit of State Bar membership.

Advertising rates are available upon request. Statements and expressions of opinion appearing herein are those of the advertisers or authors and do not necessarily reflect the views of the State Bar of Montana.

Postmaster: Send address changes to Montana Lawyer, P.O. Box 577, Helena MT 59624.

INDEX

February 2013

Feature Stories

CLE FAQ	9
2013: A year of changes for admissions	19
Premises liability	23
Mental illness and incarceration: A counterpoint	26
ACA update	28

Regular Features

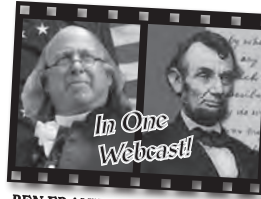
President's Message/Trial Notes	4
Member News	6
CLE	9
Court orders	12
Ethics opinion	15
Obituaries	37
Job postings/classifieds	38

Nearing Your CLE Deadline in 2014?

Try Our ENTERTAINING and EDUCATIONAL CLE Movies as Live Webcasts or Video on Demand for Self-Study!

All Webcasts begin at 10:00 a.m. MT, VOD at Your Convenience

DOUBLE FEATURE CLE



February 12, April 9,
June 30 & August 27
Each \$65-85/Both \$129-149
Ben Franklin on Ethics
(1 Hr Ethics) and/or
Lincoln on Professionalism
(1.25 Hrs Ethics)

THURGOOD MARSHALL'S COMING!



Featuring T. Mychal Rambo
Winner of the ABA 2005 Silver
Gavel Honorable Mention Award
in Theatre!

February 19, June 4 & July 16
\$149-169
2.25 Hours Ethics

THE ART OF ADVOCACY



Featuring Alan Blumenfeld
and Katherine James,
Produced by ACT of Communication®

March 26, May 28 & July 9
\$149-169
3 Hours General

What Can Lawyers Learn from Actors? SM Series

Clarence Darrow: Crimes, Causes and the Courtroom



Featuring Graham Thatcher
as Clarence Darrow

February 26, April 30 & June 25
\$149-169
3 Hours Ethics

Maxims, Monarchy and Sir Thomas More



Featuring Graham Thatcher
as Sir Thomas More

May 14
\$129-149
2.25 Hours Ethics

Impeach Justice Douglas!



Featuring Graham Thatcher
as Justice William O. Douglas

March 12 & June 18
\$149-169
3 Hours Ethics

MAKE YOUR WITNESS A STAR!



Facilitated by Katherine James
Produced by ACT of Communication®

June 11 & September 10
\$129-149
2.25 Hours General

What Can Lawyers Learn from Actors? SM Series

Periakto Productions is an Accredited CLE Provider
in Montana and all programs are approved for
CLE credit.

Brought to you by ...

PERIAKTOS
PRODUCTIONS, LLC

... the **Dramatic** difference in CLE®

3213 West Main Street #272 • Rapid City, SD 57702
605-787-7099 • productions@periaktos.com

For program details, all 2014 dates, accreditation in other states
and registration go to <http://periaktos.bizvision.com> or contact
Anna Marie Thatcher, J.D. Managing Producer, 605-787-7099,
productions@periaktos.com.

More people should go to lunch

Food and the table: A recipe for communication

September 25, 1804 at Teton-Sioux villages, opposite present-day Pierre, South Dakota

[William Clark] at a fair morning the wind from the S. E. all well, raised a Flag Staff & made a orning [awning] or Shade on a Sand bar in the mouth of Teton River for the purpose of Speaking with the Indians under, the Boat Crew on board at 70 yards Distance from the bar The 5 Indians which we met last night Continued, about 11 oClock the 1s & 2d Chief Came we gave them Some of our Provsions to eat, they gave us great quantites of meet Some of which was Spoiled we feel much at a loss for the want of an interpreter the one we have can Speak but little.

[Following this was the confrontation which nearly erupted into a firefight. Diplomacy prevailed and the expedition continued up-river. The following day . . .]

The great Chief then rose in great State and Spoke to the Same purpos and with Solemnity took up the pipe of peace and pointed it to the heavens, the 4 quartrs and the earth, he made Some divistation [dissertation?], & presented the Sten [stem] to us to Smoke, after Smokeing & a Short Harrang to his people we were requested to take the meat, and the Flesh of the Dog gavin us to eat— We Smoked untill Dark, at which time all was cleared away & a large fire made in the Center, Several men with Tamborens highly Decorated with Der & Cabra Hoofs to make them rattle, assembled and began to Sing & Beat—

Most of us get along with staff, the court and counsel just fine. Maybe a bump now and then. The issues in 1804 were complex. Territory & trade rights amongst warring tribes, rights of passage up river, cultural extremes and near-complete inability to communicate. Sounds like some of my cases. At my worst, I can really dent a relationship with (fill in: A: opposing counsel; B: my own client; C: staff or anyone else). No history here. Lewis & Clark & the Native American solution wasn't perfect, but its principal holds today: Find a neutral ground (maybe skip the teepee & tambourines), spread the robe, smoke the pipe and share a meal. While eating, avoid territory and trade rights. Try enjoying lunch, instead of it being a break from the brief and the phone. Talk about the food, the superbowl or the ski hill.

Dick Foth, an Assembly of God Pastor who once mixed with our Congressmen, observed that what we need, more than the gospel, is for more people to go to lunch. Let's add that to last month's checklist for relating to colleagues. But don't limit it to counsel. Take your staff to lunch. Meet a client for breakfast. Food and the table has a powerful, nonverbal setting that says "peace." A memorable mediation included fried chicken & lemonade at the fork of a disputed road. (Don't remember the settlement, but the chicken was outstanding.)

We're such great technicians and advocates. Sometimes we need help just making nice. So this February, pick up the phone, make the reservation and take someone to lunch you'd rather not. To give it a fair shot, here's a couple rules:

1. Leave the bitterness & agenda at your desk. It'll be there when you get back.

2. You can only discuss food, your personal life, recreation & nothing about the case. What's your favorite craft beer or wine? Still have health insurance?
3. If you're real daring, explore the last conversation that went south.
4. And if it works, schedule a time and meet again. Next time you might tackle some goals and solutions for the case.

It needn't be a hard case or difficult relationship – may be just someone you haven't seen for a piece or a reason to celebrate. Call someone you never see at the bar meeting. Heck, call the judge. If the invitation's declined, ask someone else. Put it on your agenda to once a month, take someone to lunch. Do that, and I'll venture this year you'll have folks counted as friends or at least "friendly" that you didn't before.

Doubtful? Here's my offer. Try this once or twice and call or write. If you wasted your time, send me the ticket and I'll buy your lunch. Or call me and I'll take you to lunch. We might just get the right idea: reconciliation has no cost.

David says: Dump the anger, steer clear of revenge; you'll find a clear path & solution.

— Randy Snyder, chief deputy
(406) 837-4383 rsnyder@rsnyderlaw.us



PRESENTED BY THE:

**ABA LAW
PRACTICE
DIVISION**
The Business of Practicing Law

Conference: March 27-29, 2014 • EXPO: March 27-28, 2014 • Hilton Chicago • Chicago, IL

Bringing Lawyers & Technology Together

Discount for Bar Association Members

Get the best legal technology with a discount on registration to ABA TECHSHOW for the members of

Register for ABA TECHSHOW under the Event Promoter rate and
enter your Association's unique code **EP1409**

James I. Keane Award

50+
CLE
Sessions

#ABATECHSHOW

100+
Technology
Vendors

Vendor
Track

Expert Faculty

Register now at www.techshow.com
@ABATECHSHOW #ABATECHSHOW

Lundberg Law Office celebrates one-year anniversary and launch of statewide Montana Consumer Law Center

Lundberg Law Office recently celebrated its first year of helping Montanans with financial legal problems. The Missoula-based firm specializes in consumer finance law, including debt collection defense, bankruptcy, credit report errors, unfair business and lending practices, and tenant rights. The firm also provides consumer law consulting and co-counsel services.



Lundberg

In conjunction with its first anniversary, Lundberg Law is pleased to announce the launch of the Montana Consumer Law Center, an initiative aimed at assisting consumers statewide. The Center looks forward to adding attorneys and staff around the state in 2014, to meet a growing need for these services.

Jessie Lundberg, founder of Lundberg Law and the Montana Consumer Law Center, began working in the area of consumer protection over ten years ago, including as a foreclosure prevention specialist and financial educator, a Stieger Fellow with the Montana Attorney General's consumer protection bureau, and Montana Legal Services. Following law school, Jessie served as law clerk to Hon. James R. Browning and Hon. Sidney R. Thomas, Ninth Circuit Court of Appeals. Jessie is a member of the National Association of Consumer Advocates and is admitted to practice in state, federal, and bankruptcy courts in Montana, and the Ninth Circuit Court of Appeals.

Jessie can be contacted at Jessie@LundbergLawyer.com or (406) 721-3000. To learn more about the Montana Consumer Law Center, Lundberg Law, or consumer law, please visit MontanaConsumerLawyer.com, or its blog at MoolahLaw.com.

Bloomquist Law Firm announces opening



Bloomquist

Bloomquist Law Firm, P.C., is pleased to announce its recent opening. Established by John Bloomquist, the firm has offices in Helena and Dillon. John Bloomquist, formerly a Water Master at the Montana Water Court and a shareholder in Doney Crowley Payne Bloomquist, P.C., for 18 years, has experience handling water rights adjudication, permitting, and litigation; easement and access issues; and natural resource issues for clients throughout Montana. His extensive knowledge has earned top ranking in the field of Natural Resources & Environment by Chambers and Partners.



Rowland

Patti Rowland manages the firm's Dillon office. Rowland, also a former Water Master, has provided water right, real estate, natural resource, access/easement, and business services to the firm's agricultural clients throughout southwest Montana since 1998. Ms. Rowland represents several irrigation districts and grazing associations across Montana. The firm's Dillon office was



Kinkie

established in 1991.

Rachel Kinkie, originally from Paradise Valley and a 2010 graduate of the University of Montana School of Law, is in the firm's Helena office. She has focused her legal practice on water law, agriculture, private property issues, and governmental relations. Kinkie has handled a variety of important natural resource and water right issues and will continue working with the firm's agricultural clients.

Bloomquist and Kinkie can be contacted at the Diamond Block Building, 44 West 6th Avenue Suite 100, PO Box 799, Helena, MT 59624, (406) 502-1244. Rowland can be contacted at 220 South Pacific Street, PO Box 1418, Dillon, MT 59725, (406) 683-8795. Email: jbloomquist@helenalaw.com, rkinkie@helenalaw.com, and prowland@helenalaw.com.

DONEY CROWLEY P.C. (formerly Doney Crowley Payne Bloomquist, P.C.) announces several changes effective January 1.



Crowley

Frank C. Crowley M.S. joined the firm in 1990, following a successful career as Chief Legal Counsel with Montana Department of Health and Environmental Sciences, being named by the Missoulian as one of the 100 most influential Montanans of the past century for his Superfund work in that position. Mr. Crowley has stepped down as Chief Executive Officer and has accepted a new role with the firm as Corporate Treasurer and Senior Counsel. Mr. Crowley provides business succession, administrative law, estate planning, trust, and probate administration services, as well as nationally regarded work in environmental regulation and natural resource development.

R. Allan Payne RGP, M.S., a Montana native, has been a shareholder with the firm since 2001 and has been promoted to Chief Executive Office. Mr. Payne is rated AV Preeminent by Martindale Hubbell—the highest rating possible. Mr. Payne's law practice continues to focus on environmental and natural resource law, insurance coverage for policyholders and commercial litigation.



Payne



Hanson

Melissa Hanson has been promoted to Firm Administrator and will provide all aspects of the firm management and accounting. Ms. Hanson was born in Kalispell, raised in Helena, and has been with the firm since 2009. Before coming to the firm, she was Accounting Technician at Grimes Honda-Buick-GMC, Inc. In her spare time, Ms. Hanson is pursuing a Bachelor of Science degree in Business Administration with an emphasis in Accounting at MSU-Billings.

Jacqueline R. Papez is a native of Belfry and joined the firm in 2010. In addition to being a member of the Montana State Bar, she was recently admitted to practice in Idaho. Ms. Papez



Papez

MEMBER NEWS, next page

MEMBER NEWS, from previous page

has been promoted to Senior Associate and Vice President of the firm. Her practice focuses on environmental and natural resource law, insurance coverage for policyholders, property and land use law, water law and commercial litigation.



Buyske

Marc G. Buyske LL.M., Senior Counsel, joined the firm in 2007 after serving as the Judge of the 9th Judicial District for 12-1/2 years. Mr. Buyske has been promoted to Corporate Secretary and continues to focus on estate planning, probate, real estate, tax and commercial litigation in his practice.

Jeri L. Hoffman, Advanced Certified Paralegal, obtained her national paralegal certification in 1991 and her advanced certification in trial practice in 2008. She has worked as a litigation paralegal for the firm since 2001 and has been promoted to Chief of Legal Support Services.



Hoffman

Doney Crowley P.C. has been in its historic downtown location at 44 West Sixth Avenue, Suite 200, in the Diamond Block since 1998. The firm was founded in 1987 by the late Ted J. Doney.

Rausch to join CLM Alliance

Smith, Walsh, Clarke, & Gregoire, PLLP, is pleased to announce that Michael Rausch has been invited to join the prestigious Claims and Litigation Management Alliance. The CLM is a nonpartisan alliance comprised of thousands of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals and attorneys. Through education and collaboration the organization's goals are to create a common interest in the representation by firms of companies, and to promote and further the highest standards of litigation

management in pursuit of client defense. Selected attorneys and law firms are extended membership by invitation only based on nominations from CLM Fellows.

Michael Rausch has a defense litigation practice focused on representing individuals and businesses in cases involving personal injury and property damage. Mike also provides insurers representation related to bad faith, coverage, and indemnity disputes. Through Mike's legal analysis and counsel, Mike has successfully resolved hundreds of cases in his 19 year career through trial, arbitration, and mediation. Mike can be contacted at 406-727-4100 or at www.swcgfirm.com.

Cushman elected to ABA Solo, Small Firm, General Practice Division Council

Great Falls attorney Travis Cushman was recently elected as council-member-at-large for the American Bar Association Solo, Small Firm and General Practice Division. The Division is the national voice for solo, small firm and general practice lawyers. It also provides a platform of programs and collaborations that support and advance its members in their practice and helps in improving the legal profession. The Division's Council is the governing board of the Division and its 20,000 plus members. The voluntary position is for a four year term during which Travis will vote on Division policies that affect a wide variety of substantive law areas.

Updated contact info for Sarah "Chase" Rosario

Attorney and bar member Sarah "Chase" Rosario has updated contact info that is different than what's listed in the State Bar Deskbook.

Phone number is 406.403.8709. Business address is P.O.Box 7201, Great Falls 59406. Physical location is Columbus Center, 1601 2nd Ave North, Suite 126.

Continuing Legal Education

MMLP Revisited: History, New Rules & Relevance

The Montana Bar's Health Care Law Section is pleased to present a one-hour CLE session at St. Patrick Hospital's Broadway Building Conference Center located at 500 West Broadway in Missoula at 7:30 a.m. Friday, Feb. 28. The Friday Medical Conference session is open to both attorneys and health care professionals, and will focus on the Montana Medical Legal Panel rules, history, the new update and ethical questions, including conflict of interest concerns. The free session is pending approval of 1 CLE credit, to include .5 Ethics credit. Kelton Olney, MMLP counsel with Luxan & Murfitt in Helena, will moderate the session with presenters Steve Harman of Steve Harman Law in Billings and Peter J. Stokstad

of Garlington, Lohn & Robinson in Missoula.

Pre-Registration is required no later than Feb. 14, by e-mailing Gino at the State Bar: ggunfee@montanabar.org

The session will also be available by webinar -- attendance limited -- for those attorneys who so notify Anna Buckner via e-mail no later than Wednesday, February 26th at anna.buckner@mso.umt.edu

This is the first State Bar CLE that will be offered to both attorneys and health care providers for continuing education credits. It will be recorded and offered on the State Bar website for a nominal fee. For more information, please contact Rick Beck at William.Beck2@providence.org or 406/329-2628

Mediating Cases Touched by Domestic Violence

The State Bar of Montana Family Law Section is presenting a two part live training series on Mediating Cases Touched by Domestic Violence, Part I and II. This training will assist both facilitative and evaluative mediators in fulfilling the Montana Law practice requirements of mediating cases where there has been, or there is reason to suspect, issues of domestic violence. Any trained mediator who wishes to be considered for appointment by District Court judges in the State of Montana to mediate in a case where there has been allegations of or reason to suspect domestic violence, should attend this two-part training.

These training webinars will be broadcast in real time to your

internet streaming capable device such as your desktop computer, laptop, tablet, and smartphone.

PART I: February 20, 2014; 8:30 a.m. to 12 Noon

PART II: February 27, 2014; 8:30 a.m. to 12 Noon

CLE credit pending. For more information and to view the agenda visit the Family Law Section webpage at:

<http://www.montanabar.org/>

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

February

Feb. 14 - Whose Land is it Anyway? Controversy and Conflict over Condemnation Rights in Montana (Annual Real Estate CLE) — At Fairmont Hot Springs. 6 credits. Special guest speaker: Professor Alexandra B. Klass, University of Minnesota Law School, Minneapolis. Professor Klass will be joined by Montana attorneys John Alke, Dennis Lopach and Hertha Lund for a lively discussion of condemnation, takings, transmission lines, easements and eminent domain.

Feb. 20 - **Domestic Violence Mediation Training** - Part 1 (3.5 hour Webinar, 8:30 am - noon), sponsored by **Family Law Section** See above.

Feb. 25 - Parental Alienation Webinar, sponsored by the Family Law Section. Presented by Kellie Voyich, Esq. and Kathleen Cullen, MA, MHC, ACLC Noon webinar. 1 credit.

Feb. 27 - Domestic Violence Mediation Training - Part 2 (3.5 hour Webinar, 8:30 am - noon), sponsored by **Family Law Section**. See above.

March

March 7 - Helping Your Clients Prepare for the Future: Healthcare and Estate Planning - Helena. 6 credits. The morning session will cover Tax Issues in Estate Planning and Probate; and an update on the Affordable Care Act. The afternoon session will cover Medicare and Medicaid in Estate Planning, as well as the ADA and FMLA as it pertains to medical issues.

March 21 - Annual St. Patrick's Ethics CLE - Fairmont Hot Springs. Details pending.

April

April 4 - Diverse Issues & Judges' Panel - Great Falls. Details pending.

April 11 - Bench-Bar Conference - Missoula. Details pending.

April 25 - Diverse Issues & Judges' Panel - Kalispell. Details pending.

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, Great Falls, the Honorable Greg Pinski, Eighth Judicial District Court Judge, presenting. The nature of his presentation is to be announced. The charge for the CLE is \$25.00.

The Red Mass is a custom that originated in Europe in the 13th Century, which is celebrated in many cities in America and Europe. It is offered to invoke divine guidance and strength to judges, lawyers and public officials. It will be offered immediately following the CLE with Great Falls-Billings Diocese Bishop Michael Warfel presiding.

The CLE is open to both lawyers and paralegals. CLE credit of 1.5 Ethics credits is pending.

At approximately 5:00 to 6:00 p.m. following the CLE and the abbreviated Mass there will be an optional sit down dinner for CLE attendees and their spouses or guests. The charge has usually run \$15.00 or less per person.

CLE attendees may register at the door or also register in advance by mailing the registration to Holy Spirit Parish, 200 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.

Understanding and Litigating Childhood Sexual Abuse. The Virginia Guardian ad Litem Association (VGALA) has been teaching this class throughout Virginia over the past 5 years, and this will be the first class outside of Virginia. Approval by the Montana Bar Association is pending, but in Virginia the class has been approved for 6 hours of CLE Credit and 1.5 hours of Ethics Credit. The class will be held on February 27, 2014 from 8:30 to 4:30. Continental breakfast will be provided, lunch will not be provided. The location of the class is the Billings Public Library, 510 North 28th Street, Billings, Montana 95101. The class is taught by J. Michael Sharman. Details at <http://www.virginiaguardianadlitem.com>.

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 going out March 1

The State Bar of Montana will mail annual dues statements to attorneys on March 1. Payments for all fees are due April 1st 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.

Court orders & other deadlines

- Comments accepted for 60 days from the date of the order. Proposed Rule 3.15 of the 2008 Montana Code of Judicial Conduct requiring members of and candidates for the Court to comply with the same statutory financial disclosure requirements that apply to other state officials. - January 2 order date.

- Comments accepted for 90 days from the date of the Order. The Commission recommends an alternative to a rule requiring pro bono service by all applicants for admission to the Bar, calling for a reporting requirement and an ongoing project to develop pro bono opportunities at the University of Montana Law School. Once comment period has expired the Montana Supreme Court will schedule a public meeting on the subject. - December 3 order date.

Read the orders online at the Montana Supreme Court's website at www.courts.mt.gov/supreme/default.mcp

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

Frequently Asked Questions about CLE reporting

What is the new ethics requirement?

On April 3, 2013, the Montana Supreme Court issued an order amending the CLE Rules to eliminate the 3-year ethics reporting cycle and requiring that all Montana attorneys report 2.0 hours of instruction in legal ethics/professionalism every year.

The change is effective beginning with the reporting year that runs April 1, 2013, through March 31, 2014.

What about the Substance Abuse/Mental Impairment (SAMI) requirement?

The SAMI requirement has been eliminated. Although SAMI credits will no longer be mandatory, they will continue to qualify as ethics credits in fulfillment of the yearly ethics requirement. Attorneys may earn ethics credits, including SAMI, through live or self-study programs.

Can ethics credits be carried-over from last year?

No. All attorneys will begin the 2013-2014 reporting year with a balance of 0.00 ethics credits. Any ethics credits earned before this year were already applied to meet the previous 3-year ethics reporting cycle.

How many total CLE credits do I need each year?

All active attorneys must complete at least 15 credits of continuing legal education every reporting year. Of these 15, a minimum of two credits must be earned from programs on the topic of ethics or professionalism.

Do all 15 credits have to come from attending live seminars?

No. You must earn a minimum 10.0 credits per year from participating in "live" or "interactive" seminars. A maximum of 5.0 "other" credits may be earned by self-study programs or methods.

Can I carry-over excess credits to future reporting years?

Yes. A maximum of 30 credits earned from "live" or "interactive" programs may be carried-over to the next two reporting years. "Other" credits may not be carried-over.

What about carrying-over excess ethics credits?

You may carry over ethics credits from "live" or

FAQ, next page

FAQ, from previous page

“interactive” programs to the next two reporting years once you meet the 15-credit yearly requirement. A total of 4 “live” ethics credits may be carried over.

For example, if you report 9 general credits and 6 live ethics credits for a total of 15 credits for the year, there would be no carry-over of general or ethics credits. But if you attend an additional seminar worth 4 “live” ethics credits, those would carry over to the next year.

What types of programs qualify as “live” or “interactive” credit?

In-person seminars, telephone conferences and some internet-based programs qualify as live credit.

How can I tell if an online program is considered “live” or “other”?

Online programs qualify for “live” credit if the participants are required to log-on at a specific time and date and have the ability to communicate with the presenter. The programs must be broadcast in real time. These activities are sometimes referred to as “live webcasts” or “live webinars”.

Online programs are considered as “other” credit if they have been recorded and are accessible “on-demand.” This means that an attorney can view the program at his or her convenience. There is no ability for interaction when viewing this type program. Credits earned by this method are limited to 5.0 per year.

What types of activities qualify as “other” credit?

“Other” credit usually refers to some type of self-study program. These include; audio- or videotape recordings; CD or DVD recordings; on-line programs that are available “on-demand”; preparing to teach at approved CLE programs; or writing an article that appears in any law review published by an ABA-accredited law school.

Why are “Other” credits limited to 5.0 per year?

It is a strongly held precept of the Montana Supreme Court Commission of Continuing Legal Education that interaction with presenters and fellow attorneys significantly contributes to the learning process. For this reason the majority of CLE credits required each year must be earned through attendance at live seminars or by methods that allow for interaction by telephone or electronic means.

Will CLE credits earned in other states be accepted in Montana?

Yes. We will honor the approval given by other CLE jurisdictions.

If a Montana attorney attends a seminar that has been approved for CLE credit in the state in which it is held, there is no need for him or her to apply for accreditation in Montana. However, if a program sponsor intends to advertise course approval by the Montana Commission of CLE for the purpose of increasing enrollment, the sponsor must first submit an application for CLE credit and pay the \$60.00 application fee.

To claim credit, attorneys should submit documentation of the other state’s approval to the Montana Commission of CLE at cle@montanabar.org. Examples of acceptable forms of

documentation include attendance certificates, program flyers, print-outs from the sponsor’s website, etc.

What is the schedule for CLE compliance?

The reporting year runs from April 1 to March 31 every year. In addition, there is a 6-week grace period during which you may earn and report CLE credits without penalty.

This means you may attend CLE programs up until May 15 to meet the requirement for the year ending March 31 without being assessed a late fee.

Will I receive a CLE affidavit form on which to report my CLE?

Montana attorneys will no longer be required to use a notarized form to report CLE activities. After the reporting year ends on March 31 each year, you will receive a transcript of all CLE credits that have been posted to your record over the past reporting year.

The transcript is a means of confirming the attendance information that has been reported to the CLE Commission both by you and by program sponsors. You can use the form to correct any inaccurate information or to add credits to your record. It is not necessary to return the transcript to the CLE Commission unless you wish to make changes.

How do I report my CLE credits throughout the year?

The easiest way to report CLE credits is by sending copies of your certificates of attendance or participation to cle@montanabar.org. You should keep all original attendance certificates for your own records.

Please make sure to include your State Bar member number to assure proper credit.

What if I don’t have an attendance certificate?

Check the list of approved CLE programs for the current year to determine if the program has been accredited. If the program appears on the list, send an email to cle@montanabar.org, requesting that the course be posted to your record. Please provide the date, location, sponsor, and course number along with your name and State Bar member number.

If the course doesn’t appear on the list, other types of documentation of CLE accreditation may be submitted. These include program brochures, flyers, or course information downloaded from sponsors’ websites. For recorded programs, please submit the written documentation that was provided to you by the sponsoring agency or library.

Don’t the program sponsors report attendance for lawyers who participate in their programs?

Most sponsors report program attendance. However, although we request that program sponsors provide us with a list of attorneys who attend their programs, we don’t always receive the attendance information in a timely manner.

How do I apply for CLE credit?

1. First, check the list of approved CLE courses for the current year on this website.
2. If the course does not appear on the list, or if you do

FAQ, next page

not have an attendance certificate that indicates CLE credits have been assigned to the program, download the Accreditation Application Form.

3. When your application form is complete, print it and attach an agenda with a time breakdown. A timed agenda is required because credits are determined based on the number of minutes of actual instruction excluding introductory remarks, luncheon speeches and breaks. For shorter programs a brief description is sufficient.

4. Send the completed form and attachments by regular mail to:

Montana Commission of CLE

PO Box 577

Helena, MT 59624.

Please do not FAX or email applications

Please do not send print-outs of PowerPoint programs.

5. Program sponsors must submit a \$60.00 application fee per program with their applications. There is no application fee for members of the State Bar of Montana.

How long does it take to process CLE applications?

Processing time is usually 3-4 weeks.

Do I have to submit applications for credit before the program takes place?

No. You may apply for CLE credit after the program is held and report your attendance at the same time. However, you should apply for credit as soon as possible after the program takes place. The increase in the number of applications for CLE accreditation at the end of the reporting year (March - April) often results in long delays in the processing time.

Can I get CLE credit for teaching?

The Montana CLE rules allow attorneys to claim a maximum of 5.0 "other" credits per year for preparing to teach at an approved CLE program. Presentations given to the general public do not qualify for CLE credit, therefore the preparation for these events may not be claimed for teaching credit.

How do I claim credits for teaching?

Attach a request for teaching credit to your attendance certificate when you send it to the Montana Commission of CLE. Your request may be submitted by email or regular mail.

When do new attorneys report CLE?

New attorneys are not required to complete any CLE for the duration the reporting year (not the calendar year) during which they are admitted to the State Bar of Montana. The reporting year begins on April 1 and ends on March 31 each year. Your admission date is the date on which you were sworn-in to the Bar – not the date on which you passed the bar exam.

For example: An attorney admitted to the Bar in October 2013, does not have a requirement for the year that ends on March 31, 2014. The first full reporting year for which that attorney has a CLE requirement will begin April 1, 2014 and end March 31, 2015.

Can I get credit for programs I attend during my first year of admission, before I actually have a requirement?

Yes. You can claim CLE credit for any approved program that you attend after your date of admission to the State Bar of Montana. Your date of admission is the date on which you were sworn in, not the date on which you passed the bar exam.

You may submit attendance certificates to the CLE Commission any time after you have been sworn in to the State Bar. These credits will be applied to the first year for which you have a CLE requirement.

Is Montana a "50- minute" or a "60-minute" state?

Montana is 60-minute state. This means that in Montana one CLE credit is earned for every 60 minutes of instruction time. Introductory remarks, breaks and luncheon speeches do not qualify for CLE credit.

What happens if I don't have enough credits at the end of the reporting year?

Montana attorneys have a 6-week grace period during which CLE credits may be earned and reported. If you have not completed and reported the minimum number of CLE credits (15.0 total credits including 2.0 ethics) by May 15th, a \$50.00 penalty fee will be assessed.

Attorneys who have not complied with CLE requirements and paid the \$50.00 late fee by July 1 will be immediately transferred to inactive status as required by the Montana Supreme Court.

The names of these attorneys will be furnished to all Montana District Courts, the Montana Supreme Court, the Federal District Court of the District of Montana, and the Ninth Circuit Court of Appeals.

Inactive attorneys may not engage in the practice of law.

How do I reactivate my license if I am transferred to inactive status for noncompliance with the CLE requirement.

1. You must first come into compliance with the CLE requirement for the previous year by reporting a minimum of 15.0 total credits including 2.0 ethics credits. The Montana Commission of CLE will confirm that the hours you have reported have been accepted and applied to your record.

2. You may then petition the Montana Supreme Court to return you to active status, attaching the written confirmation of your compliance with CLE.

3. Once the Court accepts your petition, an order will be issued reinstating you to active status upon payment of all fees. The fee for reinstatement due to noncompliance with CLE is \$200.00.

Is it possible to get an exemption from MCLE requirements?

Exemptions or extensions of time in which to complete CLE requirements may be issued in special circumstances that include severe illness or injury. They may not be granted in successive years for the same hardship. Call the MCLE Administrator at (406) 442-7660 to get the required form.

Neither exemptions nor extensions will be granted for heavy caseloads or upcoming court dates.

IN THE MATTER OF THE CIVIL JURY INSTRUCTIONS GUIDELINES COMMISSION

Summarized from Jan. 7 Order No. AF 09-0413

With the departures of United States District Judge Richard F. Cebull and Montana Eighth Judicial District Court Judge Thomas M. McKittrick from the bench, the Court thanks them both for their contributions as members of the Civil Jury Instructions Guidelines Commission, and releases them from further service on the Commission.

IN THE MATTER OF THE CODE OF JUDICIAL CONDUCT

Summarized from Jan. 2 Order No. AF 08-0203

In 2008, this Court adopted a version of the American Bar Association Model Code of Judicial Conduct that had been adapted and refined to reflect the realities of the operation of the judicial system and judicial elections in Montana. The Court now wishes to add to the 2008 Montana Code of Judicial Conduct a rule requiring members of and candidates for the

Court to comply with the same statutory financial disclosure requirements that apply to other state officials. With that purpose, proposed Rule 3.15 of the rules of Judicial Conduct would provide as follows:

Rule 3.15. Financial disclosure

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

COMMENT

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

IT IS ORDERED that the Court will accept written comments on the above proposed Rule 3.15 for a period of sixty (60) days following the date of this Order. All comments shall be submitted in writing to the Clerk of this Court.

IN THE MATTER OF APPOINTMENTS TO THE UNIFORM DISTRICT COURT RULES COMMISSION

Summarized from Dec. 3 Order No. AF 06-0652

The terms of John H. Grant, the Honorable Katherine M. Bidegaray, and Cathy Lewis as members of the Uniform District Court Rules Commission expired on November 17, 2013.

The Court thanks John H. Grant and Judge Bidegaray for their service on the Commission. Current Commission member the Honorable Mike Salvagni has agreed to take John H. Grant's place as Chair of the Commission, and Cathy Lewis has agreed to be reappointed as a member of the Commission.

IT IS ORDERED that Cathy Lewis is reappointed to the Uniform District Court Rules Commission as a civil trial attorney representing the defense, for a term ending November 17, 2017.

IT IS FURTHER ORDERED that the Honorable Greg Pinski is appointed as a District Court Judge member of the

Commission, for a term ending November 17, 2017.

IT IS FURTHER ORDERED that John Maynard of Helena is appointed to the Commission as a civil trial attorney representing the defense, for a term ending November 17, 2017.

IN THE MATTER OF APPOINTMENTS TO THE COMMISSION OF CONTINUING LEGAL EDUCATION

Summarized from Dec. 3 Order No. AF 06-0651

The terms of Shelley A. Hopkins, Judy Meadows, and Nickolas C. Murnion on the Commission of Continuing Legal Education expired on September 30, 2013. The Court thanks all three of those individuals for their service on the Commission.

IT IS ORDERED that Courtney Jenkins of Helena, State Law Librarian Lisa Mecklenberg Jackson, and Cindy Thiel of Missoula, are appointed to the Commission of Continuing Legal Education for terms which will expire on September 30, 2016.

The image shows a business card for Branch Engineering L.L.C. The card has a dark grey background with a red curved border at the top and bottom. At the top center is a logo consisting of a red diamond with a white 'B' and 'E' inside. Below the logo, the text 'BRANCHENGINEERING L.L.C.' is written in red and black. Underneath that, 'Forensic Engineer' is written in white on a black background. Below this, 'Lead, South Dakota' is written in a smaller font. The card lists credentials: 'Board Certified Forensic Engineer and Member of NAFE' and 'Board Certified Safety Professional'. It then states 'Providing Expert Services in:' followed by a list of services with red square bullet points: Product Liability, Process Facility Accidents, Occupational Accidents, Fire Cause, Human Factors, and Agricultural Accidents. To the right of the list is a graphic of three interlocking grey gears. At the bottom, it says 'Visit us at www.branchengr.com or call us at (605) 584-9953'.

Judicial Nomination Commission solicits applications for Supreme Court Justice

Jan. 13, 2014 — Chief Justice Mike McGrath has notified the Judicial Nomination Commission that the Hon. Brian Morris has accepted appointment to the U.S. District Court, District of Montana and resigned his position as Supreme Court justice. The Commission is now accepting applications from any lawyer in good standing who has the qualifications set forth by law for holding the position of Supreme Court justice. The application form is available electronically at <http://courts.mt.gov> or by contacting Lois Menzies, Office of Court Administrator at lmenzies@mt.gov or (406) 841-2957. Applications must be submitted electronically as well as in hard copy. The deadline for submitting applications is **5:00 p.m., Wednesday, February 12, 2014**. The Commission will announce the names of the candidates thereafter.

The public is encouraged to contact Commission members regarding the applicants during the public comment period, which will begin Monday, February 17, 2014 and close Wednesday, March 19, 2014.

The Commission will forward the names of three to five nominees to the Governor for appointment after reviewing the applications, receiving 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.

The 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

The future is here, embrace it

By Lisa Mecklenberg Jackson

Have you ever heard the phrase “Be a part of the future or get out of the way”? I have always loved that phrase. To me, it reinforces the notion that there will always be change—it’s part of life—and we need to learn to embrace that change—or be prepared to be mowed over by it. Being resistant to change is not going to make that change go away—nor will it deter those individuals who want the changes. So, we can choose to be a part of that change or have the world just move on without us—because it’s not waiting. I happen to like change and choose to be a part of the future.

Looking forward to that future, we’ve been making some changes at the State Law Library in Helena. We’re sprucing up the physical library space, we’re going to start offering CLE trainings for local attorneys and electronic CLE trainings for those attorneys who live throughout the state. We’re getting some great new resources and have begun offering eBooks of the legal variety. Soon we’ll have a copy machine that will connect directly to a flash drive or e-mail for your research convenience. And there’s so much more to come! You’ll want to pay attention as we move forward because you don’t want to miss all the neat free things the state law library is going to be offering to attorneys, clerks, judges, and members of the public.

That being said, there are a number of nifty current awareness tools that we are already utilizing. For example, are you aware that you can receive an e-mail containing Montana Supreme Court opinions the minute they are posted on the court’s Website? Simply subscribe to the State Law Library’s RSS feed at <http://courts.mt.gov/library/default.mcp>.

Or perhaps even better. Subscribe to the Montana Judicial Branch Twitter account at <https://twitter.com/MTJUDICIAL> and get notices on Supreme Court Opinions, orders, job openings, and much more all in real time right on your mobile device. Just follow us!

And in the law, never forget the books. We are getting in useful and interesting books every day. Any lawyer in Montana can check out our materials for free. Simply call 444-3660 and we’ll get the materials to you. Recent additions to the law library collection include:

- *The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals*, Jill D. Rhodes and Vincent I. Polley, 2013.
- *Attacking and Defending Marital Agreements*, Brett R. Turner and Laura W. Morgan, 2013.

- *Becoming the Tech-Savvy Family Lawyer*, Melissa Kucinski, 2013.
- *Beyond the Fracking Wars: A Guide for Lawyers, Public Officials, Planners, and Citizens*, Erica Levine Powers, 2013.
- *A Brief Guide to Brief Writing: Demystifying the Memorandum of Law*, Janet S. Kole, 2013.
- *Election Law in a Nutshell*, Daniel P. Tokaji, 2013.
- *The Federal Information Manual: How the Government Collects, Manages, and Discloses Information Under FOIA and other Statutes*, P. Stephen Gidieri, III, 2013.
- *Humor in the Salt Mines: A Master Lawyer’s Guide to Associate Success*, Asa Rountree, 2013.
- *Ipad Apps in One Hour for Lawyers*, Tom Mighell, 2013.

Are you aware that you can receive an e-mail containing Montana Supreme Court opinions the minute they are posted on the court’s Website?

- *The Irving Younger Collection: Wisdom & Wit from the Master of Trial Advocacy*, 2013.
- *McElhaney’s Litigation*, James W. McElhaney, 2013.
- *Patently Persuasive: Strategies for Influencing Judge and Jury*, Karen Lisko and Kevin Bouilly, 2013.
- *Personal Branding in One Hour for Lawyers*, Katy Goshtabi, 2013.
- *Social Media as Evidence: Cases, Practice Pointers, and Techniques*, Joshua Briones and Ana Tagvoryan, 2013.
- *Spoilation of Evidence: Sanctions and Remedies for Destruction of Evidence in Civil Litigation*, Margaret Koesel., 2013.

- *Technology Solutions for Today’s Lawyer*, Jeffrey Allen and Ashley Hallene, 2013.
- *Toxic Tort Litigation*, Arthur F. Foerster, 2013.
- *Transgender Persons and the Law*, Ally Windsor Howell, 2013.
- *Trying Cases to Win*, Herbert J. Stern, 2013.
- *Veterans Appeals Guidebook: Representing Veterans in the U.S. Court of Appeals for Veterans Claims*, Ron Smith, 2013.

You can search our catalog for more great books and other resources at <http://courts.mt.gov/library/>. If there are resources or trainings you need, please contact me. I would love to hear from you and would very much like to accommodate your legal needs. You can reach me at lmecklenberg-jackson@mt.gov. Let’s be a part of the Montana’s legal future together!

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

ETHICS OPINION 131224

A lawyer should not agree to personally indemnify the releasee from any lien claims

FACTS

A previously disabled plaintiff is seriously injured in an accident. The previous disability is based on bipolar disorder and the injured party has been on social security disability and Medicare for a decade prior to the accident. Medicare pays a number of medical bills related to the orthopedic injuries sustained in the car accident. The insurance company for the at-fault driver also pays some of the medical bills related to the car accident.

Approximately two years after the wreck and one year after the suit is filed, the injured plaintiff and the insurance company for the defendant driver agree to settle the case for \$200,000. For three months prior to reaching the settlement, the insurance company and the plaintiff's attorney have written letters to Medicare, requesting a final conditional payment amount. Medicare has not responded. However, Medicare did send a preliminary conditional payment letter six months prior to settlement, showing it had paid \$25,000 in medical bills since the accident. Medicare's ledger of bills, however, shows payments to the injured plaintiff's psychiatrist, payment for an unrelated podiatric surgery and a flu shot. In addition to these disputed bills, Medicare is required to share in the costs of recovery (proportionate attorney fees and costs) by virtue of 42 C.F.R. 411.37. The plaintiff's attorney believes the correct conditional payment amount is \$14,500.

The plaintiff's attorney and the defense attorney discuss these issues and to be safe, agree the plaintiff will keep the full \$25,000 in her attorney's trust account while working through the conditional payment issues with Medicare. The case settles and the parties go home. One week later, the release arrives, but contains the following provision that was not discussed at the mediation:

Attorney to Indemnify.

In addition to retaining \$25,000 in its trust account, as set forth in [section omitted] above, the plaintiff's law firm of Smith & Jones, P.C. agrees that it will hold harmless and indemnify Insurer for any future liability that may arise from any lien holder, including Medicare.

The plaintiff's attorney believes the \$200,000 settlement is to his client's advantage, but is concerned about the provision

in the proposed release that would require his law firm to indemnify the insurer. The plaintiff's attorney knows that the conditional payments need to be paid back to Medicare and will do so. The lawyer has heard that attorney indemnification agreements have been found to violate the Rules of Professional Conduct in other states and has concerns about his ethical obligations. Additionally, the plaintiff's attorney is worried that Medicare may, at some point in the future, clarify or issue new guidance regarding Medicare's rights regarding a liability set-aside. At present, his client's orthopedic injuries have healed, but there is some residual pain and reduced range of motion in a joint. The treating physician would not opine on future medical needs, saying it is impossible to predict the future. Thus, there was no medical basis at the settlement conference to seek damages for future medical needs. However, the plaintiff's attorney knows from other cases he has handled that the compromised joint may lead to other orthopedic problems down the road. Thus, Medicare may or may not have to pay for additional medical care potentially related to the accident at some point in the future.

The plaintiff's lawyer contacts the defense lawyer about the unexpected provision in the settlement agreement. The defense attorney is sympathetic, but states the insurance company is insistent that the attorney indemnification provision be included. The injured client is desperate for her money and instructs her lawyer to do whatever he can to expedite the settlement.

QUESTION PRESENTED

May an attorney sign a Release or Settlement Agreement that requires the attorney to hold harmless and indemnify the insurer for any future liability that may arise from any lien holder, including Medicare?

SHORT ANSWER

No. A lawyer should not agree to personally indemnify the Releasee from any lien claims.

It is ethical for plaintiff's counsel to hold money in a trust account to resolve the lawyer's obligation to secure funds that are subject to a lien by a third party, but that is not indemnification.

OPINION, next page

GENERAL DISCUSSION

The question presented has been addressed in 12 State's Ethics Committees and by New York City's Ethics Committee.¹ Each of the 13 agree that lawyers should not personally indemnify the Releasee from any lien claims, but they reach it under a mix of several rules of conduct.

This Committee agrees that Montana should join the majority in holding that the indemnification language as set forth is not appropriate under Montana's Rules of Professional Conduct. But the Committee also recognizes that the problem is not solely a plaintiff's bar issue. Medicare set-asides also strain the defense bar. The indemnification language is being requested because Medicare is legally entitled to seek repayment of its benefits from a multitude of parties, including defendants, defense counsel and defendant's liability insurer. The default solution for defense counsel has been to include everyone connected to the claim as a responsible party for reimbursement purposes. In some cases, defense counsel opt to include the lienholder on the settlement check. Defense counsel explains that if plaintiff's counsel does not want the lienholder on the settlement check, then plaintiff's counsel needs to indemnify the release so defense counsel's client isn't compromised. Most defense counsel do not use the indemnification language as a condition of settlement, but it has served as a bargaining chip. It is this Committee's opinion that some other solution will have to be developed, as the language proposed in the facts would violate Montana's Rule 1.2(a) allocating authority between a lawyer and client, Montana's Rule 2.1 delineating the lawyer's role as advisor, and Montana's conflict Rules 1.7 and 1.8(e).

THE RULE 1.2 VIOLATION

The first difficulty confronting the indemnification language proposed is Montana's Rule 1.2—*Scope of Representation and Allocation of Authority Between Client and Lawyer* which provides, in pertinent part:

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. *A lawyer shall abide by a client's decision whether to settle a matter...* [emphasis supplied].

If a lawyer is required to abide by the client's decision on

settlement, and the client chooses to settle and chooses to agree to the proposed indemnification language, the indemnification demand could cause the lawyer to refuse the settlement offer or try to dissuade the client from settling in order to protect the lawyer's own personal, financial or business interests. Put another way by Arizona's Ethics Committee, the attorney's obligation to abide by the client's decision whether to settle can be compromised by an offer "that injects the attorney's own financial exposure into the process." Arizona Ethics Opinion 03-05, at 3. South Carolina's Ethics Committee opined that the lawyer's "refusal, for ethical reasons, to accede to such a demand as a condition of settlement could prevent the client from effectuating a settlement that the client otherwise desires." Insistence upon a lawyer's agreement to indemnify as a condition of settlement could "cause the lawyer to recommend that the client reject an offer that would be in the client's best interest because it would potentially expose the lawyer to the payment of hundreds of thousands of dollars in lien expenses, or litigation over such lien expenses." South Carolina Ethics [Op. 08-07](#), at 1. In short, while a client may have no problem agreeing to the lawyer's future liability, the proposed indemnification asks too much of lawyers in service to their clients.

THE RULE 1.7 VIOLATION:

The second challenge flows straight from the first, in the potential for creation of Rule 1.7(a)(2) conflicts between plaintiffs and their lawyers. Montana's Rule 1.7-*Conflict of Interest: Current Clients* provides in pertinent part:

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or *by a personal interest of the lawyer* [emphasis supplied].

All 13 of the other states' Ethics Committees held that the proposed indemnification agreement pits a lawyer's personal interests against the client and materially limits the lawyer's relationship with their client. This Committee agrees. In the facts presented, the client wants to settle. Standing in the way is her attorney, who does not want to absorb the responsibility and liability of known and unknown potential liens. The conflict is real and the conflict is not one that a client can waive. Rule 1.7(a)(2) directly prevents a Montana lawyer from agreeing to indemnify a client's future liabilities.

THE RULE 1.8 VIOLATION:

The third challenge to the proposed indemnification agreement is Rule 1.8-*Conflict of Interest: Current Clients: Specific Rules* which provides, in pertinent part:

¹ See Wisconsin Formal Ethics [Op. E-87-11](#) (1987); North Carolina Ethics [Op. 2000-4](#) (2001); Arizona Ethics [Op. 2003-05](#) (2003); Indiana Ethics [Op. 1](#) of 2005; Illinois Ethics [Op. 06-01](#) (2006); Missouri Formal Ethics [Op. 125](#) (2008); South Carolina Ethics [Op. 08-07](#) (2008); New York City Ethics [Op. 2010-3](#) (2010); Tennessee Formal Ethics [Op. 2010-F-154](#) (2010); Ohio Supreme Court Ethics [Op. 2011-1](#) (2011); Kansas Ethics [Op. 11-02](#) (2011); New York State Ethics [Op. 852](#) (2011); Maryland Ethics [Op. 2012-03](#) (2012).



PRESENTED BY THE:

**ABA LAW
PRACTICE
DIVISION**
The Business of Practicing Law

Conference: March 27-29, 2014 • EXPO: March 27-28, 2014 • Hilton Chicago • Chicago, IL

Bringing Lawyers & Technology Together

Discount for Bar Association Members

Get the best legal technology with a discount on registration to ABA TECHSHOW for the members of
The State Bar of Montana

Register for ABA TECHSHOW under the Event Promoter rate and
enter your Association's unique code **EP1409**



(e) *A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:*

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client;
- (3) a lawyer may, for the sole purpose of providing basic living expenses, guarantee a loan from a regulated financial institution whose usual business involves making loans if such loan is reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that neither the lawyer nor anyone on his/her behalf offers, promises or advertises such financial assistance before being retained by the client [emphasis supplied].

Comment [10] to Rule 1.8 explains that lawyers may not subsidize lawsuits on behalf of their clients, “because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.”

The potential financial assistance included in the proposed indemnity language is for known and unknown future medical bills and liens. Medical liens are clearly not court costs and are far broader than litigation expenses. The indemnification language is the lawyer’s guarantee to pay the client’s debts after the case settles. On this all of the other jurisdictions’ ethics committees agree: A guarantee to pay a client’s debts falls squarely within the prohibition on direct financial assistance of Rule 1.8(e). While Montana’s Rule 1.8(e) contains a mechanism allowing attorneys to guarantee certain loans to provide financial assistance to clients (and so differs from the ABA’s Model Rule and most other states’ rules on financial assistance to clients), Montana’s mechanism does not allow direct indemnification of medical liens.

THE RULE 2.1 VIOLATION

Finally, the proposed indemnity language runs afoul of Montana’s Rule 2.1—*Advisor* which provides:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.

Several of the other states’ ethics opinions explain that “even if the lawyer were ethically permitted to provide such financial assistance [contrary to Rule 1.8(e)], such an agreement might compromise the lawyer’s exercise of independent professional judgment and rendering candid advice in violation of Rule 2.1.” Arizona Ethics [Op. 2003-05](#), at 3; see also Indiana Ethics [Op. 1](#) of 2005, at 14 stating that “[f]orcing the attorney to weigh the settlement’s benefits to the client with his own personal risk places an inappropriate burden on the essential element of independence” and South Carolina Ethics [Op. 08-07](#), at 2 “[E]ven if a lawyer were permitted and willing to enter into such an agreement to accept such a burden, acceptance of such a duty might compromise the lawyer’s exercise of independent professional judgment in violation of Rule 2.1”. Montana’s advisors should not be placed in a position of balancing their best advice against their own financial or business interests.

CONCLUSION

It is understood that to mitigate risk, defendants and their insurers may attempt to include in settlement agreements indemnification provisions by which the plaintiff’s lawyer promises to hold the defendant or its insurer harmless from any lien claims that might be asserted, and to indemnify them against any claims that the plaintiff should have paid out of the settlement proceeds. Plaintiffs’ lawyers are likely a more reliable source of indemnity than are their clients. While plaintiffs’ counsel may be more reliable, the proposed indemnification is not a bargaining chip available for use in Montana. This practice presents a number of professional responsibility challenges. In addition to the creation of direct conflict between counsel and client, the arrangement violates the prohibition on direct financial assistance, as well as undermines the attorney-client balance on whether to settle a matter, impairing the lawyer’s role as advisor. The proposed overbroad indemnification should not be accepted by plaintiff’s counsel.

THIS OPINION IS ADVISORY ONLY

1-888-385-9119

Montana’s Lawyers Assistance Program Hotline

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

2013

A year of changes for admission to the State Bar

By Marie Connolly

In May 2011, the Montana Board of Bar Examiners petitioned the Court for authority to adopt and administer the Uniform Bar Examination (UBE) as the testing component of the Montana bar admissions process.



Deputy Clerk of the Supreme Court, Rex Renk, administering the oath to the first group of applicants admitted to the Bar after adoption of the amended admission rules.

In a related petition filed under the same Cause Number, the Commission on Character and Fitness petitioned to revise and amend the Rules for Admission and Rules of Procedure of the Character and Fitness Commission to permit use of the National Conference of Bar Examiners (NCBE) online application and character investigation. The Court invited written comments on the petitions, and comments were filed by numerous interested parties. The Court received additional comments at public meetings held on October 25, 2011 and November 29, 2011. After much consideration of the impacts of the proposed changes, the Supreme Court issued an Order on July 3, 2012 that changed admission to the State Bar of Montana. The Montana Rules of Admission, the Rules of the Board of Bar Examiners and the Rules of the Character & Fitness Commission were all amended to comply with the Order. Here is a brief summary of those changes and how they have altered admission to the Montana Bar:

Revised application process

Prior to the Court's Order, applicants would complete a 19 page application, usually hand-written, that was submitted with supplemental documents required by the Commission.

All applicants must be certified by the Character and Fitness Commission prior to being allowed to sit for the bar exam, but the Commission's information was limited to the application received and the fingerprint background check. Beginning with the February 2013 bar examination, all applicants must now apply using the National Conference of Bar Examiners (NCBE) online character and fitness investigation service. The online application allows applicants a simple method to apply with an option to supplement their application to additional jurisdictions. By using the NCBE investigative services, the Commission is able to confirm applicant information on a national scale but retains the authority to decide whether to certify, conditionally certify or to deny an applicant. The transition to the new application was relatively seamless and the response from applicants to the new system has been positive.

Uniform Bar Examination:

Prior to the July 2012 Order, the Montana Bar Exam consisted of 2½ days of testing including the Montana Essay Exam, the Multistate Essay Exam, the Multistate Professional Test and the Multistate Bar Exam. In its Order adopting the Uniform Bar

ADMISSION, next page

Perspective for new members of the bar

Editor's note: U.S. Magistrate Judge Carolyn S. Ostby gave the following address at the Oct. 1, 2013, admission ceremony. Transcript courtesy of court reporter JoAnn Corson Bacheller.

On behalf of the federal courts, I congratulate you on this achievement, and it is quite an achievement, and I welcome you as fellow members of the bar.

As I prepared for today, I thought, "Well, this is an exceedingly bright, gifted, and well-educated group." I've had the pleasure of meeting many of you, and I've heard of many of the rest of you. And I thought about this day, and I questioned, "What of value can I add?"

I decided that I don't have your youth, I don't have your intelligence, probably, but I do have this: I have perspective. And that's what I want to offer you today, is a bit of perspective, because it seems, believe it or not, just a short time ago that I was with my classmates being admitted to the bar.

For 12 years now I've had a front-row seat, a front-row bench seat, to watching lawyers work. I've watched them examine and cross-examine witnesses. I've watched them argue to juries. I've listened to their oral arguments. I've read thousands

of briefs. And for today, I am going to condense my perspective into three words.

The first word is "credibility." As a lawyer, your credibility is your most precious commodity. And as you well know, if once it's lost, it's very rarely, if ever, regained. Never misstate the law or the facts. Never misrepresent, not to a court, not to opposing counsel, and not to your clients.

The second word is "integrity." Some would say this is just another facet of credibility, but I think it's more. It's doing what you say you'll do. It's taking the time to figure out what's right and then doing it. It's being courteous and honorable to others, even when it's hard. And I guarantee you there will be times when it is very hard. It's doing what's right even if no one is looking and no one will ever know.

No. 3 is "contribution." With your new license to practice law and your admission to practice law before Montana's state and federal courts come prestige, power, and privilege. But, as you well know, it also comes with responsibility. And I am

PERSPECTIVE, page 22

ADMISSION, from previous page

Examination, the Court stated:

"We conclude that a nationally uniform licensing examination for lawyers would facilitate lawyer mobility, increase the objectivity of the testing process, and enhance protection of the public.

Adopting the UBE does not constitute a revolutionary change in the Montana bar examination, because all three components of the UBE (the Multistate Bar Examination, the Multistate Essay Examination, and the Multistate Performance Test) are currently used in Montana. We are satisfied that these tests represent the state of the art in bar examining to discern whether an applicant has absorbed and understands generally recognized principles of law and can apply legal methods of reasoning to come to acceptable conclusions. The economies of scale achievable by the NCBE enable it to engage in a more rigorous test development process than is possible in Montana or indeed in any single American jurisdiction. We are satisfied that the NCBE's testing process also strives to reduce or eliminate any unintentional racial or sexual bias in the examination. In addition, adopting the UBE will permit an applicant who takes the examination to transfer the score achieved to another UBE jurisdiction, where it will be accepted as the measuring score for that jurisdiction's bar examination, thereby eliminating unnecessary redundant testing, the associated costs, and potential expensive delays in admission to practice."

Montana's first Uniform Bar Examination was held July 30-31, 2013, at the University Center on the University of Montana Campus. There were 148 people who sat for the two-day UBE, consisting of 38 attorneys and 110 students, of which 71 came from the University of Montana.

Increased cut score

The Board of Bar Examiners recommended that the minimum passing score be raised advising the Court that, at 130, Montana's minimum passing score was among the lowest in the nation. Setting the score at 135 (270 on the 400-point scale of the UBE) brought Montana's minimum passing score more in line with other jurisdictions. (Adjusting the minimum passing score as requested is the equivalent of raising the score from 65 to 67.5 on a 100-point scale.) The Court agreed and granted an increase in the passing score to 270, which was applied for the first time to the July 2013 exam scores. For comparison, 140 people sat for the July 2012 bar exam and 126 passed for a 90% pass rate; the July 2013 bar exam had 148 people sitting and 128 passed, for an 87% pass rate with an average UBE score of 295.

UBE transfers

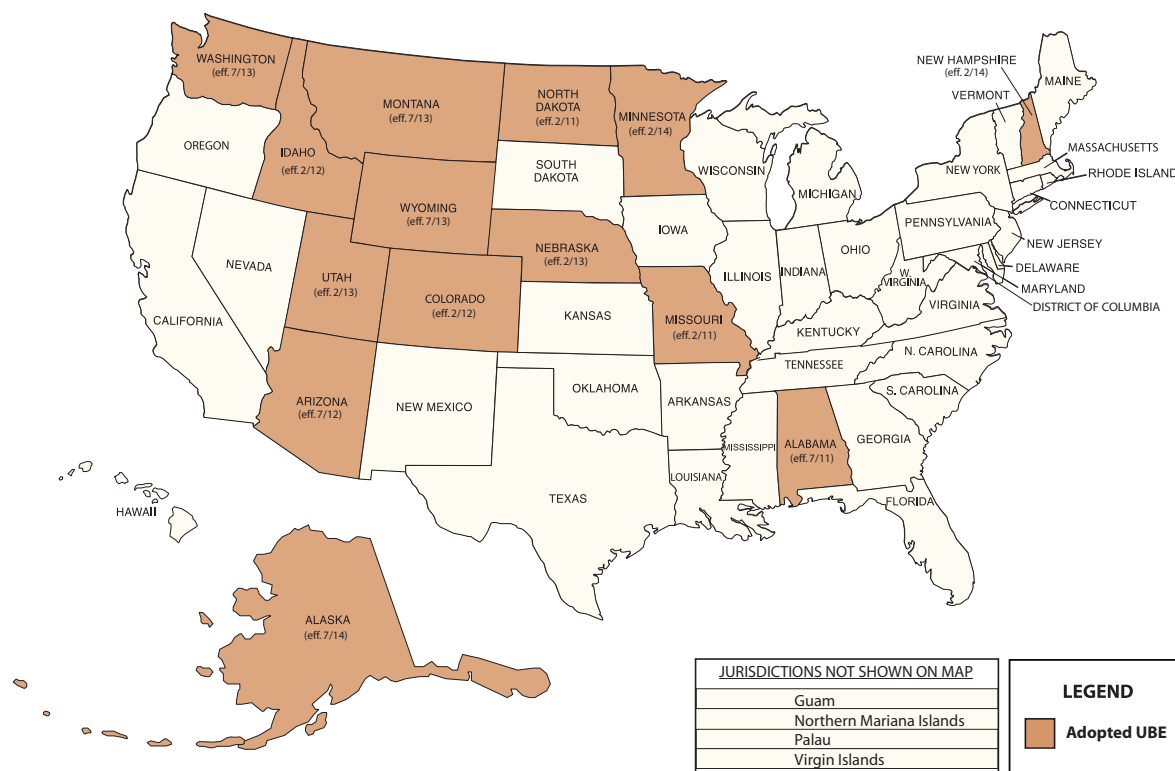
The Court ordered that "beginning with the July 2013 Montana bar examination, a Montana bar applicant's score on the UBE earned in another jurisdiction may be accepted and considered valid for a period of three years from when the score was earned. To be accepted in Montana, UBE scores must be certified by the National Conference of Bar Examiners to the Montana Bar Admissions Administrator." Currently 14 states have adopted the Uniform Bar Examination and other jurisdictions are considering adoption.

With the exception of sitting for the exam, all UBE transfer applicants must fulfill the same prerequisites for admission as exam applicants, including: (1) a JD from an ABA accredited law school; (2) certification by the Commission on Character & Fitness; (3) a qualifying MPRE score; (4) a qualifying UBE score

ADMISSION, next page

Adoption of the Uniform Bar Examination

12/6/2013



ADMISSION, from previous page

(whether by exam or transfer); (5) attend the Montana Law Seminar; and (6) pay the license tax, fees and dues to the State Bar of Montana.

For the July 2013 admissions cycle, 20 applicants transferred UBE scores from other UBE jurisdictions and 128 earned a UBE score sitting for the exam.

Eliminating the Montana Essay Exam and Introduction of the Montana Law Seminar:

Before the adoption of the amended rules, in addition to the 3 exams comprising the UBE (the MBE, MEE and MPT), the bar examination included the Montana Essay Exam (MTEE) consisting of four essay questions focusing on Montana law. The Board of Bar Examiners proposed eliminating those essays, questioning the psychometric reliability of the four essays for purposes of a competency examination like the bar examination. After comments and public meetings, a majority of the Court agreed to require a one- or two-day in-person seminar on Montana law. The Order directed that in addition to the UBE, before being admitted to the Montana bar, all applicants are required to personally participate in a Montana law seminar component to be developed by the Board of Bar Examiners, the CLE Commission, and the CLE Institute, and approved by the Court. The Court directed that the Seminar be designed to focus on the structure of the legal system in Montana, the unique aspects of Montana law, including the Constitution, and the accepted mores and culture of practicing law in Montana.

Board of Bar Examiners

Chair

Randy Cox

Michael B. Anderson

Gary W. Bjelland

Vice-chair

Jacqueline T. Lenmark

Loren "Larry" J. O'Toole, II

Debra D. Parker

Michael P. Sand

Members

Commission on Character and Fitness

Chair:

Annie M. Goodwin

Barbara Howe

Hon. Michael C. Prezeau

Vice-chair:

Barbara E. Bell

Scott H. Moore

Robert J. Sullivan

Margie M. Thompson

Members:

Robert M. Carlson

Michael W. Tolstedt

The first Montana Law Seminar was held at the University Center in Missoula the day after the July 2013 UBE. Three attorneys presented summaries of 14 areas of law unique to Montana to 175 applicants who attended. Content outlines were prepared by leading Montana practitioners and formed the basis of the presentations at the Montana Law Seminar. Those outlines are posted online at: <http://courts.mt.gov/library/bar-seminar/default.mcp.x>. Registration for the Montana Law Seminar (MLS) is open only to applicants to the Montana State Bar and the Seminar is held twice each year on the day after the February and July Uniform Bar Exams.

Marie Connolly is the admissions administrator for the bar.



U.S. Magistrate Judge Carolyn S. Ostby and the newest members of the State Bar of Montana -- Oct. 1, 2013.

PERSPECTIVE, from page 20

going to suggest to you that the largest part of that responsibility is to contribute. Take the time to contribute to your communities. Take the time to contribute to those and contribute time on behalf of those who don't have the prestige, who don't have the power, who don't have the privilege. Do pro bono work.

I suggest to you, also, that it's very important as lawyers that we all volunteer, for example, to organize or speak at Law Day events, to help educate, to fill this tremendous void we have in civics knowledge in our nation.

As you undoubtedly know, after many months of congressional wrangling over budget issues, the federal government is shut down as of today. If this ceremony had been scheduled in a few weeks, we probably couldn't have done it. And it's going to affect not only activities like this one but litigants, cases. Our government, I think it's no exaggeration to say, at least as of today, is in crisis. And yet over half of our citizens can't name the three branches of government.

So you're well educated. You're very smart. You're very gifted. Share it. Contribute. Please. It's part of what comes with this tremendous privilege you have of practicing law.

Now I know what you're thinking. You've heard all this before. You've been preached to about this probably since before you started law school. Certainly at the law school I know Dean

Russell makes all of this an important part of your legal education. You've all heard it before. But to this I would add:

Don't do it because I or others say you should.

Don't do these things because they're required by the rules of professional responsibility, although they are.

Don't do these things simply because they were part of the oath that you all signed this morning, although that is a solemn oath to which you're bound.

Don't do these things simply because they will gain you the respect of courts and of your colleagues and clients and communities, although they certainly will.

Don't do these things just because they will make you a successful lawyer, financial and otherwise, although I can tell you, after more than 30 years in this profession, it's true.

Don't do these things even just because you know they're right, and I suspect all of you do know that.

Here is what I'm going to suggest to you: Do them because they will make for you a satisfying, enriched, rewarding, and happy life. As one of my colleagues likes to say, do them because they will be good for your soul. And when you look back on your legal careers, it will be, I promise you, your credibility and your integrity and your contributions to others that you will remember and cherish.

So, to all of you, that's my perspective. I wish you all the very best, and, again, my hearty congratulations on your achievements.

MT law of premises liability not as simple as it seems:

The limited duties of landlords

By Wilton H. Strickland

Premises liability establishes the duties of a landowner toward other persons who come onto the land. While Montana law regarding premises liability may appear relatively straightforward, it features nuances that often go overlooked, particularly where control of the land is divided between landlords and tenants. Indeed, it is often a mistake to conclude that an injury caused by a property defect generates a cause of action against the landlord, who is presumed *not* responsible absent exceptional circumstances.

Broad scope of premises liability

To be sure, Montana law establishes broad responsibilities for landowners and equally broad rights for visitors. In its seminal decision of *Richardson v. Corvallis Pub. Sch. Dist. No. 1*, 286 Mont. 309, 950 P.2d 748 (1997), the Montana Supreme Court announced a break with old doctrines that had crimped a plaintiff's right of recovery when injured by a property defect. At issue was a woman who slipped and fell on a snow-covered path at the school where she had dropped off her son. The trial court granted summary judgment to the school on the basis that the danger was open and obvious, emphasizing that the premises were reasonably safe even if the school had altered the area somehow. Though the Montana Supreme Court affirmed, it conducted a thorough review of premises-liability precedent and explained how a new approach would almost always create a question of fact for a jury (albeit not for this plaintiff).

For one, the Court reminded that Montana no longer predicates recovery on whether the landowner invited the plaintiff onto the land. *Richardson*, 286 Mont. at 317, 950 P.2d at 753 (citing *Limberhand v. Big Ditch Co.*, 218 Mont. 132, 706 P.2d 491 (1985)). The older rule – which persists in other jurisdictions such as Florida, where I used to practice – features a sliding scale of landowner duties. If the plaintiff is an “invitee,” the landowner has an elevated duty to repair or warn of defects that are known or reasonably knowable. However, if the plaintiff is not invited but rather comes onto the premises

for his or her own benefit as a “licensee” or “trespasser,” the landowner must simply avoid inflicting willful harm. While this once was the approach in Montana, today anyone can recover for a negligent failure to repair or warn of a potentially harmful defect, even trespassers.

The Court in *Richardson* also amplified the right of recovery for defects that are open and obvious. Previously, the Court had drawn a crucial distinction between “natural accumulations” such as ice and snow – for which the visitor alone was responsible to exercise caution – versus a landowner’s affirmative acts changing the landscape – for which the landowner remained responsible if harm was foreseeable. *Id.* at 313-15, 751-52 (citations omitted). No longer, declared the Court. Now a landowner may be held liable for any obvious defect if the landowner could reasonably anticipate harm, regardless of whether the defect was natural or artificial, and even regardless of whether the plaintiff was aware of the defect. *Id.* at 320-21, 755-56. The Court nonetheless affirmed summary judgment against the plaintiff because no evidence showed that the school could have anticipated harm.

Thus in the wake of *Richardson*, the Montana law of premises liability looks fairly simple. Ordinary negligence principles apply to landowners, who owe *everyone* a duty to maintain the land in a reasonably safe condition and to warn of dangers that are known or knowable. *Even if defects are open, obvious, or known to the plaintiff*, the landowner remains responsible to correct or warn of them if he or she can anticipate their causing harm. While the landowner may assert defenses such as comparative negligence, liability remains a jury question in all but those few cases where no harm could be anticipated.

Recovery narrows as to landlords, who are generally not responsible for defects on leased premises

A dark horse roams this pristine landscape, namely the division of control between landlord and tenant. *Richardson*

LANDLORDS, next page

does not address this situation, and ample Montana precedent holds that tenants rather than landlords bear sole responsibility for property defects, with a few exceptions described below.

Perhaps the earliest instance where the Montana Supreme Court applied the rule against landlord liability was *Gray v. Fox W. Coast Serv. Corp.*, 93 Mont. 397, 18 P.2d 797 (1933). The plaintiff slipped and fell while attending a school graduation at a theater. At the time of the accident the theater was under lease to the school district, yet the plaintiff sued the landlord and won on a theory that inadequate lighting had contributed to her fall. Reversing, the Court cited case law from other jurisdictions and held in pertinent part:

In the case of injuries to third persons resulting from the condition or use of [leased] premises, it is a general rule that prima facie the breach of duty, and therefore the liability, is that of the occupant and not of the landlord, and that in order to render the latter liable more must be shown than merely that the premises on which or from which the injury arose were leased by him to another. *Gray*, 93 Mont. at 397, 18 P.2d at 800 (citations omitted).

This rule has stood the test of time and appears in later decisions such as *Parrish v. Witt*, 171 Mont. 101, 104, 555 P.2d 741, 743 (1976) (quoting *Gray*); *Hayes v. United States*, 475 F. Supp. 681, 682-83 (D. Mont. 1979) (citing *Gray* and *Parrish*); and *Stelle v. Missoula County Airport Auth.*, Cause No. 82493, 1997 Mont. Dist. LEXIS 881, at *10-*12 (4th Dist. Ct. Mar. 7, 1997). More recently, the Montana Supreme Court framed the rule as follows:

[A] lessor of land usually has no control over the conduct of the lessee or the person upon the leased land while the lessee is in possession of it. Therefore, the traditional common law rule has been that the lessor is under no obligation to anyone to look after the premises or to keep them in repair, and is not responsible, either to persons injured on or off the land for conditions which develop or are created by the tenant after possession has been transferred. *Larson Murphy v. Steiner*, 303 Mont. 96, 15 P.3d 1205, ¶ 103 (2000), superseded by statute on other grounds, Mont. Code Ann. § 27-1-724, as recognized in *Rocco v. Ogle*, Cause No. CDC-2006-31, 2007 Mont. Dist. LEXIS 224, at ¶ 14 (1st Dist. Ct. Mar. 1 2007).

Exceptions where landlords remain responsible for defects

As hinted in the recitations of the rule, however, exceptions may arise that keep the landlord responsible for harmful property defects.

One exception is where **the landlord retains control over common areas**, in which case the landlord must use reasonable care to maintain those areas. See *Lake v. Emigh*, 121 Mont. 87, 95, 190 P.2d 550, 554-55 (1948); *Limberhand*, 218 Mont. at 144, 706 P.2d at 498; *Stelle*, 1997 Mont. Dist. LEXIS 881 at *11

(citing Restatement (Second) of Torts §§ 360, 361 (1965)). Such cases often concern residential leases and the heightened duties associated with them, as in *Lake* and *Limberhand*.

A second exception is where **the landlord makes negligent repairs**, “thereby increasing the danger of the physical condition of the land or creating a deceptive appearance of safety.” *Stelle*, 1997 Mont. Dist. LEXIS 881 at *11. Yet this exception contains an exception of its own: **if the tenant knows or has reason to know of the defect before the harm occurs, the duty shifts back to the tenant** and leaves him or her solely responsible. See *Hayes*, 475 F. Supp. at 682-83 (citing *Parrish*, 555 P.2d at 743).

A third exception is where **the landlord fails to make repairs in violation of a contractual duty**, thereby allowing a harmful defect to persist. See *Steiner* at ¶ 103; *Stelle* at *11. This represents an “opting out” of the common law, as the landlord voluntarily assumes greater responsibility than otherwise necessary.

And a fourth exception adopted only as of 2000 concerns **offsite injuries or nuisances caused by onsite activities, provided that the landlord consented to, knew of, or should have known of the activities when executing the lease**. See *Steiner* at ¶ 104 (citing Restatement (Second) of Torts §§ 379A, 837 (1965)). At issue in *Steiner* was a car collision with a bull that had strayed onto a highway, and the motorist filed suit against the tenants as well as the landlord of the nearby pasture. The trial court granted summary judgment to the landlord, but the Montana Supreme Court reversed and remanded by holding that the new exception required additional fact-finding. *Id.* at ¶¶ 100-08. Shortly thereafter the Montana legislature immunized livestock owners and operators from this sort of liability, absent gross negligence or intent. See Mont. Code Ann. § 27-1-724. Notwithstanding, the exception announced in *Steiner* should remain valid in other contexts and thus can create landlord liability.

Regardless of whatever theory a premises-liability plaintiff asserts, basic negligence principles require that the landlord either knew of the defect or could have discovered it before the harm occurred. See *Stelle* at *14 (citing *Corrigan v. Janney*, 192 Mont. 99, 104, 626 P.2d 838 (1981)); see also *Meloy v. Speedy Auto Glass, Inc.*, 342 Mont. 530, 182 P.3d 741, ¶ 15 (2008).

Interesting, recent decision by the Montana Supreme Court

In 2013 the Montana Supreme Court had another chance to grapple with these issues in *Steichen v. Talcott Props., LLC*, 368 Mont. 169, 292 P.3d 458 (2013). A commercial tenant hired the plaintiff as an independent contractor to clean the building on a regular basis. On one such occasion the plaintiff slipped and fell on water that had leaked from defective plumbing, prompting him to file suit against the building’s owner. The trial court granted the owner summary judgment; oddly, though, it appears that the owner did not raise the rule against landlord liability, nor did the trial court address the rule. Instead, the trial court recited the general approach of *Richardson* and blended it with other standards from the construction industry governing workplace safety, concluding that the owner had no duty to protect the plaintiff.

On appeal, the Montana Supreme Court focused on the trial court's erroneous application of construction-industry standards, emphasizing that those standards apply only to employers. *Steichen* at ¶¶ 15-22. Again citing the general principles of *Richardson* while ignoring the rule against landlord liability, the Court reversed and remanded, particularly because "[t]here was evidence that [the building owner] specifically assumed maintenance responsibilities under the lease with [the tenant], and that [the owner] understood that it had those responsibilities[.]" *Steichen* at ¶¶ 15-19.

What makes this outcome intriguing is that even though the Court did not address the rule against landlord liability or its exceptions, the Court effectively upheld them, for the owner's failure to honor a lease obligation is one of the very exceptions that can create landlord liability. Therefore the Court was correct to reverse summary judgment, even if the Court never mentioned the precedent requiring that outcome.

Putting principles into action

While the rule against landlord liability might strike some as unusual or even questionable, not long ago I relied on this rule to dispose of a claim. The plaintiff had suffered injuries from a trip and fall at a post office, so she filed suit in federal

court against both the United States and my clients, who owned the premises. After performing an initial round of discovery I brought a motion for summary judgment on the basis of the rule against landlord liability, taking care to address the exceptions and explain why none of them applied.

The attorneys for the other parties were very professional and took the motion seriously. Before long, the United States indicated that it did not oppose the motion and would consent to my clients' dismissal from the case. Upon conducting further discovery and some depositions to ensure that there were no disputed questions of material fact, the plaintiff also indicated that she would not oppose the motion, which the court granted. See *Klute v. Dershem, et al.*, CV 11-97-M-DWM, Order Granting Summary Judgment, Dkt. #40 (D. Mont. July 23, 2012).

So premises liability in Montana is not an open-and-shut affair after all. While *Richardson* provides broad grounds for recovery, such is not necessarily the case where control of the premises is split between landlord and tenant.

Wilton H. Strickland of Strickland and Baldwin, PLLP, is a freelance attorney who performs legal research and writing for other attorneys. He obtained his J.D. in 2000 from the University of Virginia School of Law and practiced litigation in Florida before moving to Montana in 2010, where he continued practicing litigation until 2013. To learn more about his services, visit his firm website at www.mylegalwriting.com.

Mark your calendars!

The University of Montana School of Law invites you to participate in the

SPRING 2014

On-Campus Interview Weekend

Interview 1st, 2nd and
3rd year students
for intern, law clerk,
and associate
positions during
our semi-annual
on-campus
interview program.

Friday • Saturday March 21 • 22



Career Services

To advertise a position and
set up an interview schedule:

VISIT:

[http://www.umt.edu/law/
careerservices/employers.php](http://www.umt.edu/law/careerservices/employers.php)

LOG ONTO SYMPPLICITY:

<https://law-umt-csm.symplicity.com>

EMAIL:

jennifer.ford@umontana.edu
or

CALL:

406.243.5598

Forensic evaluation versus treatment of pretrial detainees

Setting the record straight

By Paulette Kohman

Anna Conley's article in the November 2013 edition of the Montana Lawyer, "Getting individuals committed to the MT State Hospital out of county jails" contains some truth: pre-trial detainees in local detention facilities do sometimes have mental illnesses, and the forensic unit at MSH does have a waiting list for a bed date for evaluations of a criminal defendant's fitness to proceed under § 46-14-202(2), MCA. However, this does not mean, as the article concludes, that persons with serious mental illness who require hospitalization are languishing in Montana's jails without access to appropriate care, or that "county detention centers [are] serving as the holding ground for individuals in need of mental health treatment." MSH has no waiting list for persons in need of psychiatric hospital care.

Ms. Conley's hypothetical pre-trial detainee, who stops taking medication and deteriorates in jail without mental health treatment, does have a constitutional and statutory right to receive appropriate outpatient mental health treatment - including prescribed medication - while incarcerated. Any inmate has a right to basic physical and mental health care services in a detention facility, regardless of ability to pay¹. All Montana community detention centers have the ability to provide this basic level of care.

The status of having a mental illness and requiring prescribed medication, does not, however, equate to a need for hospitalization. Over 22 % of Americans have a diagnosed mental illness in any given year,² but only 7% require hospital care.³ Those who do have an average length of stay at a psychiatric hospital of just over 7 days.⁴ Only a tiny percentage require the type of long term hospital care provided

by Montana State Hospital.⁵ Automatic commitment of all mentally ill inmates to MSH would be a dramatic reversal of the many decades of progress Montana and other states have made in reducing unnecessary institutionalization and the stigma that attaches to placing persons in mental hospitals, including those who are inmates of correctional facilities.⁶

Ms. Conley argues that the MSH waiting list for fitness-to-proceed evaluations delays necessary treatment. However, commitment for a fitness evaluation does not mean that the defendant actually has a mental disease or defect, and the purpose of the commitment is expressly *not* for treatment. Determining whether the person has a mental disease or defect requiring treatment to regain fitness to proceed is the sole purpose of this commitment.

In fact, a person committed solely for evaluation of fitness to proceed has a right to refuse all treatment except during an emergency situation.⁷ Ms. Conley's hypothetical detainee, if he continues to refuse treatment, would spend up to 60 days undergoing the forensic evaluation⁸, return to court to be found unfit to proceed⁹, be committed to MSH for 90 days of treatment¹⁰, and during that period be brought back to court for yet another hearing¹¹, before involuntary medication could be administered to actually treat his mental illness.

Thus, if the goal is to obtain hospital treatment for a serious mental illness for a pre-trial detainee, commitment for evaluation of fitness to proceed is neither effective nor appropriate. The most effective approach in these circumstances is civil commitment under Title 53 Chapter 20, Part 1, MCA. This is particularly important when the detainee is refusing medication, since involuntary treatment may be authorized "up front" by the committing court.¹²

DETAINEES, next page

1 Section 7-32-2245(4), MCA; *Farmer v. Brennan*, 511 U.S. 825, (1994); *City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 245 (1983); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Van Orden v. Caribou County*, 2013 U.S. App. LEXIS 23105, 3 (9th Cir. Idaho Nov. 15, 2013); *Mays v. Mundell*, 510 Fed. Appx. 512 (9th Cir. Idaho 2013); *Clouthier v. County of Contra Costa*, 591 F.3d 1232 (2010); *Montana Deaconess Medical Ctr. v. Johnson*, 232 Mont. 474 (1988); *Op. Atty Gen. Mont. No. 2* (1997).

2 <http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml>.

3 <http://www.nmha.org/is-hospitalization-necessary>.

4 <http://www.cdc.gov/nchs/fastats/mental.htm>.

5 The US Census Bureau estimated Montana's population in 2012 at 1,005,141, <http://quickfacts.census.gov/qfd/states/30000.html>. During FY 2013, Montana State Hospital recorded 604 total admissions, <http://www.dphhs.mt.gov/msh/annualreport/bytxprogramfy12-13.pdf>. Even assuming no repeated admissions, this is a rate of only .06% of Montana's population.

6 See, e.g., *Vitek v. Jones*, 445 U.S. 480, 492 (U.S. 1980).

7 § 53-21-163(5)(c), MCA; § 46-14-221(2)(b), MCA; *Sell v. U.S.*, 539 US 166 (2003).

8 § 46-14-202, MCA

9 § 46-14-221(1), MCA

10 § 46-14-221(2)(a), MCA

11 § 46-14-221(2)(b), MCA

12 § 53-21-127(6), MCA.

DETAINEES, from previous page

Montana law provides a number of avenues to commit a criminal defendant to MSH (or another mental health facility) for treatment of a mental disorder in civil proceedings or a mental disease or defect in criminal proceedings. None of these are subject to a waiting list.

- § 53-21-129, MCA: A person, including a pre-trial detainee, who is certified by a qualified professional person as in need of emergency treatment due to a mental disorder that poses an imminent danger of death or bodily harm to the person or others may be transported immediately and detained at MSH (or another mental health facility) until the next business day on an emergency basis without court action.
- § 53-21-130, MCA: A person in a facility of the Department of Corrections may be transferred to MSH (or another mental health facility) for up to 10 days without court action.
- § 53-21-124 and/or § 53-21-127, MCA: A person, including a pre-trial detainee, whose mental disorder has caused or creates an imminent risk of harm to self or others, or renders the person unable to provide for basic needs may be temporarily detained at MSH (or another mental health facility) and/or civilly committed for up to three months to MSH, by petition to district court.
- § 46-14-221, MCA: A defendant adjudicated as lacking fitness to proceed to trial, conviction or sentencing due to a mental disease or defect is committed to the custody of the director of DPHHS for treatment to restore fitness to proceed;
- § 46-14-301, MCA: A defendant adjudicated as not guilty by reason of lack of mental state due to a mental disease or defect and found to be a danger to self or others is committed to the custody of the director of DPHHS for custody, care and treatment;
- § 46-14-312, MCA: A defendant adjudicated as guilty, but found to have been, at the time of the offense, unable to appreciate the criminality of their behavior or to conform their behavior to the requirements of law due to the effects of a mental disease or defect, is sentenced to the custody of the director of DPHHS for custody, care and treatment.

Ms. Conley also argues that the existence of a waiting list at MSH for pre-trial evaluation of fitness to proceed delays justice and prolongs the defendant's detention. However, commitment to DPHHS is not mandatory when fitness is questioned, and commitment is not the only way to obtain an evaluation. The court may appoint an evaluator directly or request the Superintendent of MSH to designate an evaluator.¹³ MSH maintains a list of qualified evaluators willing to conduct these evaluations on an outpatient basis. In addition, the Office of State Public Defender (OSPD) contracts with a number of qualified professionals across the state to provide fitness evaluations for their clients.¹⁴ For an excellent review of the process of outpatient evaluation, see "How Lawyers and Courts Should Choose Forensic Mental-Health Examiners" by Patrick

Davis, PhD., Montana Lawyer, November 2007, page 6.

Outpatient fitness evaluations currently outnumber inpatient by 5:1. Over the past five calendar years, MSH has admitted an average of 20 patients per year for inpatient forensic fitness evaluations.¹⁵ In comparison, over the past three fiscal years an average of 11 outpatient evaluations per year were court-ordered and paid for by the Office of the Court Administrator,¹⁶ (OCA) and in Fiscal Year 2013 the OSPD obtained 92 outpatient fitness evaluations.¹⁷

We should keep in mind that MSH is a hospital. All patients admitted for any reason receive an intensive level of care by a multi-disciplinary team in a highly structured medical environment. A forensic fitness evaluation at MSH is labor-intensive. Each defendant is carefully observed 24/7 for many weeks by a trained staff of direct care aides, social workers and nurses, and is formally tested and evaluated by both a licensed psychologist and a board-certified forensic psychiatrist, who together prepare a formal report.

The cost per patient-day is \$596.58 in the MSH forensic unit¹⁸. Thus, each 60-day commitment for evaluation of fitness to proceed costs upwards of \$ 35,000. For Fiscal Year 2013, the OCA reports an average cost of \$ 2706 for a fitness evaluation, with formal report, conducted by a community-based professional,¹⁹ and the OSPD reports an annual budget expenditure for fitness evaluations of \$37,906, or an average of \$412 per evaluation.²⁰ Thus a single MSH inpatient evaluation costs about as much as the entire annual evaluation budget of the OSPD, and more than that of the OCA.

There will always be cases where the complex nature of the defendant's presenting history or symptoms justifies investing in an intensive and time-consuming hospital-based evaluation. But the code contains no guidance on criteria for selecting inpatient as opposed to outpatient evaluation of fitness to proceed.

Montana's code actually contains a financial incentive favoring a more expensive and time-consuming hospital-based evaluation regardless of need. The statute provides that the OSPD, the OCA or the Municipal or Justice Court must pay the full cost of each outpatient evaluation, but neither the OSPD nor the OCA may ever be charged for the cost of an inpatient evaluation at MSH.²¹

Hospital inpatient commitment for the sole purpose of evaluation of fitness to proceed has an important role to play in the criminal justice system. However, fitness evaluation should never be a substitute for civil commitment when the actual goal is to obtain psychiatric treatment for an uncooperative and clearly mentally ill detainee.

DETAINEES, page 33

¹⁵ Information provided by MSH staff

¹⁶ Information provided by OCA staff

¹⁷ Information provided by OSPD staff

¹⁸ Information provided by MSH staff

¹⁹ Information provided by OCA staff

²⁰ Information provided by OSPD staff. The calculated cost per evaluation may not be a true comparison because according to the OSPD contract protocol, found at <http://publicdefender.mt.gov/forms/pdf/MHPProtocolNov2007.pdf>, not all of these result in formal reports.

²¹ § 46-14-221(4)(iv), MCA.

¹³ § 46-14-202(1), MCA,

¹⁴ Information provided by OSPD staff

The ACA: Where are we now?

By Kristy Buckley

Prologue: It is now January 14, 2014, as I write this and the following two articles are scheduled to be published in the *Montana Lawyer*. Obviously, much has transpired since I originally presented the materials at the State Bar Annual Meeting on September 19, 2013. The legal principles, however, remain largely intact. Therefore, I have decided to publish the original articles plus this prologue to fine tune some additional thoughts about how lawyers can assist our business clients with a little bit of hindsight.

One development, impacting small employers, was the problem with launching the small employer exchange. Rather than the ease of logging into an online application, small employers are required to apply via paper applications if they want SHOP coverage. The paper applications are five pages in total, comprising four sections of information plus a signature section and two pages of instructions. Therefore, if your small employer clients want SHOP coverage please remind them that the application is in hard-copy and that the initial open enrollment period will close on March 31, 2014.

The end of 2013 hit a high-water mark for consumer frustration when carriers began cancelling policies that were not Affordable Care Act (ACA) compliant. The U.S. Department of Health and Human Services responded on November 14, 2013, by offering insurance carriers a transitional period to continue non-compliant coverage between January 1, 2014 and October 1, 2014. A second response on December 19, 2013 clarified that individuals could qualify for a hardship exemption from the individual coverage mandate if it is shown that an individual's policy was cancelled *and* the plan options available on the individual exchange are more expensive than the cancelled policy. A number of Montana insurance carriers decided not to continue (or revive) noncompliant policies under the transition rule. However, some of our clients and their employees who are left without individual or group coverage may be eligible for the hardship exemption or less expensive coverage on the exchange.

One of the largest impacts on employer-sponsored health programs came during the end of 2013. Among other things, this guidance seems to completely shut the door on certain stand-alone medical-expense reimbursement programs as of January 1, 2014. The guidance came from announcements by the U.S. Department of Labor (Technical Release 2013-03) and the IRS (Notice 2013-54) regarding ACA impacts to Health FSAs and HRAs, issued on September 13, 2013. As practitioners, we should ensure that our clients have reviewed their workplace benefits in view of this guidance. Large and small employers need to evaluate any medical expense reimbursement plan, health flexible spending arrangement, and health reimbursement arrangement to decide whether such plan(s) should be (1) "integrated" with an employer's group health coverage (2) isolated to only cover "excepted benefits" (3) not changed at all, (4) created, or (5) terminated entirely. If you have clients that offer these types of plans or want to offer these types of plans, a thorough evaluation and course of action must be addressed as soon as possible.

Finally, I would ask all of us to be diligent when any employer client seeks planning strategies to "help" their employees with benefits. Even the "simple cash" payment approach can result in a myriad of issues, such as creation of an ERISA plan and imposition of ACA compliance.

Articles begin next page ->

"The end of 2013 hit a high-water mark for consumer frustration when carriers began cancelling policies that were not Affordable Care Act (ACA) compliant. The U.S. Department of Health and Human Services responded on November 14, 2013, by offering insurance carriers a transitional period to continue non-compliant coverage between January 1, 2014 and October 1, 2014. A second response on December 19, 2013 clarified that individuals could qualify for a hardship exemption from the individual coverage mandate if it is shown that an individual's policy was cancelled *and* the plan options available on the individual exchange are more expensive than the cancelled policy."

ACA compliance, part I – small businesses

Many new laws under the Patient Protection and Affordable Care Act of 2010, PL 111-148 (“PPACA,” also commonly known as the Affordable Care Act or ACA) are effective in 2014, which is now here. Your small business clients might be wondering what they should be doing now in order to comply. This article will provide general information about the following “checklist” of key preparations:

1. Confirm the business is “small” and does not need to be combined with related entities
2. Provide employees and group health plan participants with certain new disclosures
3. Consider obtaining group health insurance coverage on the SHOP exchange
4. Determine if the business qualifies for the Small Business Health Care Tax Credit

Are you *absolutely* certain that you are a “small” business?

This is the predicate question to ask your small business clients. A large employer for 2014 is any employer that employs an average of at least 50 full-time employees (including full-time equivalent employees), based upon 2013 employment. Full-time employees are those that average at least 30 hours per week or 130 hours per month. The definition requires employers to convert all of their other employees into full-time-equivalents (FTEs) by totaling the number of hours worked by non-full-time employees and dividing by 120 hours per month. *[There are some nuances to the counting method, for example with seasonal workers]*. If your client is a large employer, then please see the second article in this series to understand additional large employer mandates, often called “play or pay” rules, as well as additional information regarding delayed penalty enforcement.

Montana small business owners sometimes own or are affiliated with a variety of small business entities. In these cases, your client could be a large employer by virtue of their related entities. Unfortunately, there is no “off-the-shelf” guide for evaluating when related entities must be combined. The employee benefits laws for aggregating companies are different than the controlled group rules that CPAs use to combine entities for tax purposes. Some examples of aggregated related entities include: a single owner holding 80% interests in all companies, parent-subsidiary companies with 80% ownership, family members owning 50% interests, nonprofits with common board members, companies engaged in providing services to each other or the same customer base, and a group of entities in which one or more entity provides management functions or employees for one or more other company.

Adding to the complexity, the term “small” business has different meanings when applied to different rules. The 50-employee threshold rule divides your clients into small

or large businesses for purposes of the employer shared responsibility rules, or “play or pay” rules. However, for purposes of qualifying to use the Small Business Health Options Program (SHOP) to obtain group health insurance coverage, a small business is defined as one with 50 or fewer full-time equivalent employees for 2014-2015 and one with 100 or less employees beginning in 2016. Furthermore, for purposes of qualifying for the Small Business Health Care Tax Credit, a small business is defined as one with no more than 25 full-time equivalent employees.

Regardless of your size, have you started working on your new notices?

Almost every employer (all that are subject to Fair Labor Standards Act), regardless of size and regardless of whether they are providing group health insurance coverage for their employees, must provide employees with a brand new notice about the exchange (also called the “marketplace”). Model notices have been provided by the Department of Labor and are available online.

Open enrollment for health insurance coverage through the new health insurance marketplace began in October 2013. In conjunction with the open enrollment period, employers were required to provide all employees with a written notice of coverage options available through the marketplace. This notice was due to be provided – automatically and free of charge – to all current employees no later than October 1, 2013, and, beginning October 1, 2013, to all new hires within 14 days of an employee’s start date. Although there is no specific penalty for failure to send the notice, it is nonetheless the law and we should confirm that our clients have sent it. The notice may be provided via first-class mail or electronically, provided certain Department of Labor electronic disclosure requirements are met.

The required notice to employees must include information describing: (1) the existence of the marketplace, with contact information and a description of services; (2) a person’s eligibility for a premium tax credit (a.k.a. subsidy) if purchasing a Qualified Health Plan in the marketplace; and (3) how an employee purchasing a health plan on the marketplace may lose the employer contribution, if any, to health benefits offered by the employer and all or a portion of such contribution may be excludable for federal income tax purposes.

Don’t forget that your clients should also be providing a new (2012) notice called a Summary of Benefits and Coverage (SBCs) during open enrollment periods (and at certain other times) beginning on or after September 23, 2012. The Department of Labor has issued template SBCs and instruction booklets for purposes of preparing SBCs. If your clients are small businesses with fully-insured health plans, the SBCs were likely prepared by the insurance carrier. However, the

ACA, next page

ACA, from previous page

responsibility for preparing and distributing SBCs is a shared obligation by issuers and employers and there is no small business exception.

Do you want to offer your employees health insurance coverage “from the exchange”?

Consider the SHOP

The Small Business Health Options Program (SHOP) is a specific marketplace for small businesses looking for health insurance. Montana is using what is called the federally-facilitated SHOP program. Your small business clients can access exchange information by going to <https://www.healthcare.gov/> and answering some questions in order to view rate quotes of what is available in the marketplace for their circumstances. The actual applications must be made in hard-copy and can be obtained by selecting a link at the www.healthcare.gov website. If your small business clients obtain health coverage through the SHOP, then they might be eligible for a substantial tax credit, described below.

If you obtained SHOP coverage, are you small enough to get some money back?

Eligible small businesses can receive an income tax credit of 50% of the group health insurance premiums they pay for employees and their dependents (tax years beginning after 2014) (35% for tax years 2010-2013). To be eligible, the employer must pay a uniform percentage (at least 50%) of employee-only group health insurance premiums and satisfy the definition of small employer. A small employer employs no more than 25 full-time equivalent employees (“FTEs”), with no greater than \$50,000 in average annual wages. Beginning in 2014, the employer must purchase health care coverage through the SHOP to qualify for the credit.

The following steps are necessary to determine the tax credit eligibility and amount:

- Determine the excludable employees.
- Calculate FTEs using total service hours.
- Calculate average FTE wages.
- Determine employer’s share of premium payments and confirm “uniformity.”
- Apply the credit percentage.

1. Who can you Exclude?

Seasonal employees, owner-employees, and owner-employee relatives are excluded when determining the total number of FTEs. Excluded owner-employees include sole proprietors, partners, a shareholder who owns more than 2% of a subchapter S corporation, and an owner holding more than 5% of ownership or capital or profits in other types of business entities (i.e., C-corps, LLCs). Working owner-employee family members are also excluded from FTE calculations.

Owners Don’t Count. Therefore, for example, a medical specialty corporation with 10 physician owners may qualify if they have less than 25 staff members, **even if the physicians earn well over \$50,000 apiece.**

2. What is your number of Full Time Equivalent Employees?

Full-time equivalent employees are calculated by totaling all eligible service hours of each non-excludable employee for the calendar tax year and dividing by 2080. Overtime hours in excess of 2080 hours are excluded from this calculation. The employer may select from one of three methods to calculate total service hours. The three methods are: (1) actual hours, (2) actual days (assumed to be 8 hours per day), or (3) actual weeks worked (assumed to be 40 hours per week).

The employer may also classify employees by group and use different hours-worked methods for each class of employees. For example, an employer may group employees into hourly and salaried classifications and use the actual hours and actual weeks worked methods, respectively.

Employers may have more than 25 actual employees and still qualify for the credit if several employees work part-time.

3. What are your average FTE Wages?

For tax years 2010-2013, employers are not eligible if average FTE wages exceed \$50,000. After 2013, the wage limit is \$50,000, indexed by the Consumer Price Index for Urban Consumers (approx. \$51,000 for 2014). Wages paid to owner-employees and owner-employee relatives are excluded in this computation. Average annual FTE wages are calculated by taking the aggregate amount of wages paid during the tax year (including overtime pay, even if overtime hours were excluded when determining FTEs) and dividing by the total number of FTEs determined above.

4. Is the Employer paying premiums Uniformly?

To receive the credit, the Employers must pay a uniform percentage of at least 50% of all FTE’s health premiums. Premiums can include those paid for health, dental, vision, long-term care, limited-scope coverage for specific diseases, and certain other insurance in which medical aspect is more than just ancillary or incidental. The uniformity rule for 2010 is slightly more lenient than the rule that applied for 2011-2013. The uniformity rule beginning in 2014 is very strict. It is not always clear whether contributions are uniform and complex legal analysis is often required.

5. Are you going to be Limited in what you get back?

The credit percentage is computed on the amount of premium contributions the employer made on behalf of employees during the tax year, but it is limited by the average total premium cost in the small group market for employer-sponsored coverage in your State (established by HHS and published by

ACA, next page

ACA, from previous page

the IRS).

The maximum credit percentage for tax years 2010-2013 is 35% if the employer is a taxable entity and 25% for tax exempt employers. The full amount of tax credit is available for employers with 10 or fewer FTEs and average annual wages of \$25,000 or less. For employers with 11-25 FTEs and average annual wages \$25,001-\$50,000, the credit is reduced using

phase-out calculations.

For tax years beginning in 2014, the maximum credit percentage is 50% (for-profit) and 35% (tax exempt). In addition, beginning in 2014, the credit is only available for two consecutive years (starting with the 2014 taxable year).

Another misconception is that it is too late to claim the credit for 2010 through 2012. This is not the case. Eligible employers may amend their returns to claim the credit.

ACA compliance, part II – large businesses

For large employers, 2013 brought an abundance of proposed regulations, new IRS forms, and a few delays in key areas. The purpose of this article is to cover the basics of the current legal landscape. If you have more complicated questions that arise, please do not hesitate to call us.

Your large business clients should:

1. Determine whether the business is large, including any applicable related entities
2. Understand how to be “penalty-proof” by offering:
 - a. Minimum value coverage
 - b. That is Affordable
 - c. To substantially all employees and dependents
3. Be aware of the penalties
4. Act Now – for making the offer of coverage, counting, and tracking

A special note about the delayed enforcement: Some of your clients may be telling you that ACA has been delayed. This is only partially accurate.

The IRS issued guidance in July 2013 that delays the enforcement mechanism (penalties) on large employers until after 2014. That guidance clarified that the rest of the ACA is left intact and employers must be making good faith efforts at compliance during 2014 even if they are temporarily not subject to penalties. The compliance is essential for your clients to understand because the individual health insurance marketplace and the small business marketplace will both commence open enrollment on October 1, 2013 for the 2014 coverage year.

Make sure you are a “large” employer — and how large you are?

If a business is a large employer, then the so-called “play or pay” rules of employer shared responsibilities will apply. Your client is a large employer for 2014 if it employs an average of at least 50 full-time employees (including full-time equivalent employees), based upon 2013 employment. On a going-forward

ACA, next page



MT Child Support
CALCULATOR

WWW.MTCHILDSUPPORT.COM

ONLY
\$24 mo.

USE PROMO CODE "MTLAWYER"
FOR A **30 DAY FREE TRIAL**

- **Create and Edit Calculations from Anywhere**
- **Always Up to Date**
- **Nothing to Install or Update**

basis, your client will determine its employer size for each year by measuring the number of employees in the preceding year. The definition of employer is broad and encompassing, such that it includes tax-exempt, government, and church employers. The mandates also apply regardless of a plan's grandfathered status and regardless of the plan type (e.g. self-funded or fully insured).

As mentioned in the Small Business article, a full-time employee is one that works, on average, at least 30 hours per week or 130 hours per month and full-time equivalent employees are determined by dividing all non-full-time employee hours by 120 hours per month. The hours of service for an hourly employee is the actual number of hours worked plus paid time off. Non-hourly employees are counted either using actual hours or an equivalency rule (e.g., 8 hours for each day or 40 hours for each week). The proposed rule directs your clients to use a "rule of reason" and includes some anti-abuse provisions for those who attempt to count hours of service in ways that are too heavily employer-favored.

If your client's business includes seasonal workers (note: teachers are not seasonal), then it may be able to take advantage of an exception. The exception applies if the combined total of full-time employees and full-time equivalent employees exceeds 50 for 120 days or less (or 4 months) during the preceding calendar year and the employees exceeding 50 are seasonal workers. The 120 days need not be consecutive. Generally, a seasonal worker performs labor exclusively during seasons or periods of the year which, due to its nature, may not be continuous or carried on throughout the year.

Remember to also evaluate your clients for possible related entities that will require aggregation, as discussed in the Small Business article. If you have a client that needs to be combined with other related entities, they should be aware that the play or pay mandates will apply to all companies in the group. In some instances, such as penalty computations, related entity groupings will require pro rata adjustments among companies. However, each related entity is solely responsible for its own penalties.

Do you know whether you can completely avoid penalties?

Your large employer clients can be "penalty-proof" if they offer: (1) minimum value coverage; (2) that is affordable; (3) to substantially all full-time employees and dependents. Here is the key: *Any employee who is offered enrollment in an employer plan that has both minimum value and affordability will not be eligible for individual tax credits (a.k.a. individual subsidies).* We emphasize this crucial point because the penalties can only apply to an employer when a full-time employee (1) becomes certified enrolled in the individual exchange marketplace and (2) is eligible for individual tax credits.

1. Have you checked your health insurance benefits against the "minimum value" test?

If your large business clients already offer their employees

a robust health insurance plan, then they might be meeting this test. Minimum value coverage is met if a plan's coverage of health care costs is 60% or more of the total allowed costs of benefits, on average, over a standardized population. There are many health plan features that impact minimum value, such as co-payments, out-of-pocket maximums, deductibles, and types of health services covered. Employers can use the U.S. Department of Health and Human Services minimum value calculator, to see whether the plan's benefits and coverage satisfy minimum value. Employers can also match their plans to design-based safe harbor checklists, which will qualify as minimum value. The employer might also be able to hire an actuary to provide an actuarial certification as to minimum value coverage, but this approach is only appropriate when a plan has several non-standard features.

Health Reimbursement Arrangements (HRAs) and Health Savings Accounts (HSAs) can be taken into consideration when determining minimum value

2. Are your employees required to pay premiums that exceed 9.5% of household income?

If so, then your client's health plan premiums might need fine-tuning before the plan is "affordable." Unfortunately, our client is not going to know each employee's "household income" and employees are not obligated to share that information with employers. To get around this, employers can use any one of three safe harbors to assess affordability. Your client will meet a safe harbor if the employee's share of premium for employee-only coverage using the lowest cost minimum value option is 9.5% or less of (1) the employee's Box 1 W-2 wages; (2) the employee's monthly salary, or hourly rate of pay multiplied by 130; or (3) the federal poverty line for a single individual. In these formulas, adjustments to the employer's share of premium payments will often drive affordability.

Substantially-All: An employer's offer of coverage must be made to substantially all full-time employees and dependents in order to avoid an annual penalty of \$2,000 per-employee. Substantially all is defined as "all but five percent" of its full-time employees and dependents (sometimes called a 95% test). However, employers must make the offer of coverage to ALL (100%) full-time employees and dependents in order to avoid all penalties.

A dependent is any child of a full-time employee who has not attained age 26. "Child" includes son, daughter, stepson, stepdaughter, or foster child. A spouse is not a dependent.

Have you evaluated the possible risks?

There are two different penalties that can apply to large employers, depending on the circumstances (however, see introductory note regarding delayed enforcement). The

ACA, from previous page

fundamental question is whether an employer is offering an “eligible employer-sponsored plan” (Eligible Plan) to substantially all full-time employees and dependents. Although the guidance has been vague, current law indicates that an eligible employer-sponsored plan is any program that pays the costs of medical care other than HIPAA-excepted benefits (e.g. excepted health FSAs, limited-scope dental/vision plans, on-site medical clinics). We’ve called the two penalties the “sledgehammer” penalty and the “tackhammer” penalty.

Sledgehammer: If a large employer either: (1) does not have an Eligible Plan; or (2) does not offer an Eligible Plan to at least 95% of its full-time employees and dependents, then the potential annual penalty rate is \$2,000. The penalty is multiplied by the number of full-time employees in excess of 30 people. [\$2,000 X (Full-time employees – 30)]. As described above, the penalty is only triggered when at least one full-time employee enrolls in health insurance from the exchange and receives a premium subsidy.

Tackhammer: If a large employer has (1) an Eligible Plan; and (2) offers the Eligible Plan to at least 95% of its full-time employees and dependents, but at least one full-time employee enrolls in health insurance from the exchange and receives a premium subsidy, then the potential annual penalty rate is \$3,000. The potential penalty is multiplied by the total number of full-time employees enrolled in the exchange with a subsidy. The amount assessed is the lesser of the sledgehammer penalty or the tackhammer penalty.

Although this article defines penalties in terms of annual amounts, the actual penalties will be assessed on a monthly basis, so employers should track data monthly.

Okay, so you’ll offer health insurance, have you started preparing for the changes of your offer?

The large employers that will offer their employees some type of health insurance coverage need to be acting now to make sure the offer of coverage goes as planned. Remember, penalties are generally tied to whether an employee is “full-time” for any given month. Some employers will have no

problem identifying all of their full-time employees every month (e.g., employers that only have full-time employees, with no part-time employees, and a very stable workforce with few fluctuations in new hires or fires).

The employers that experience fluctuations in work force or have different classifications of employees, such as variable-hour employees, part-time, and seasonal, might need to take advantage of safe harbor measurement methods to ensure the offer of coverage is made to the correct employees. The safe harbor method allows an employer to develop different periods when employees will be measured and offered coverage, using three concepts: a measurement period, a stability period, and an administrative period.

The measurement period allows employers to look back over a period of time to assess an employee’s actual hours of service (e.g., “lock-in” some employees as part-time). The stability period is the time when coverage is offered or available to employees who are identified during the measurement period. Finally, the administrative period is an optional window of time after the measurement period to give an employer time to determine which employees should be offered coverage during the stability period. If your clients are interested in using the safe harbor, they should be implementing administrative procedures now in order to properly track the different periods of time and count the relevant employees who must be given an offer of coverage.

Last but not least, the offer of coverage has a couple unique aspects that are new, such as limited waiting periods. Your large business clients can have a waiting period on their health insurance plans, but the waiting period must now be limited to a maximum of 90 days. (Note: the 90-day rule also applies to small businesses). If your clients are using a 3-month wait or even a 2-month wait with entry on the following month, there is some risk that they will now be violation of the new waiting rule and they need to act now to implement changes to their plans.

Kristy Buckley is an attorney at Crowley Fleck PLLP where she practices in employee benefits. The Affordable Care Act compliance team at Crowley includes Kristy and her partner, Sarah Loble. If you have questions about Affordable Care Act compliance, you can contact Kristy at (406) 522-4522 or kbuckley@crowleyfleck.com, or Sarah at (406) 457-2033 or sloble@crowleyfleck.com.

DETAINEES, from page 27

We can all agree that persons in local detention centers should have the same access to mental health treatment as everybody else, and that the treatment provided should be commensurate with medical necessity. Montana’s detention facilities are able to provide basic outpatient mental health care and medication, and do so every day across the state. Inpatient psychiatric hospital care is at the other end of the continuum of care, and should be reserved for those in need of intensive intervention.

Montana State Hospital will continue to prioritize providing the highest and most costly level of psychiatric care to persons who need that care, and will continue to admit those persons for treatment without delay.

Paulette Kohman, special assistant attorney general, DPHHS Office of Legal Affairs, is assigned to represent Montana State Hospital in its evaluation and treatment of forensic patients.



STATE BAR OF MONTANA

Serving the people of Montana and their attorneys

Would you like to boost your income while serving low- and moderate-income Montanans?

We invite you to participate in the Modest Means program {which the State Bar sponsors}.

If you aren't familiar with Modest Means, it's a reduced-fee civil representation program. When Montana Legal Services is unable to serve a client due to a conflict of interest, a lack of available assistance, or if client income is slightly above Montana Legal Services Association guidelines, they refer that person to the State Bar. We will then refer them to attorneys like you.

What are the benefits of joining Modest Means?

While you are not required to accept a particular case, there are certainly benefits!

You are covered by the Montana Legal Services malpractice insurance, will receive recognition in the Montana Lawyer and, when you spend 50 hours on Modest Means and / or Pro Bono work, you will receive a free CLE certificate entitling you to attend any State Bar sponsored CLE. State Bar Bookstore Law Manuals are available to you at a discount and attorney mentors can be provided. If you're unfamiliar with a particular type of case, Modest Means can provide you with an experienced attorney mentor to help you expand your knowledge.

Questions?

Please email: Kathie Lynch at klynch@montanabar.org or Janice Doggett at jdoggett@montanabar.org

You can also call us at 442-7660.



Are You Interested in Joining The Modest Means Program?

To get started, please fill in your contact info and mail to: *Modest Means, State Bar of Montana, PO Box 577, Helena, MT 59624.*

You can also email your contact info to Kathie Lynch -- klynch@montanabar.org

Name: _____

Address: _____

City, State: _____

Email: _____



Montana Justice Foundation 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. One way in which the MJF strives to fulfill its mission is through its Legal Aid Grants Program. The MJF awards grants to non-profit organizations qualified to carry out the following charitable objectives of the MJF:

Support and encourage the availability of legal services to vulnerable and underserved populations;

Increase public understanding of the law and the legal system through education;

Promote the effective administration of justice; &

Raise public awareness of and access to alternative dispute resolution.

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, 2013 to register for an online account.** For further information on the application process, please contact the MJF at 406.523.3920, or visit us online at www.mtjustice.org/grant-programs/.



Lawyer Referral & Information Service

When your clients are looking for **you** ... They call **us**

Why do people call the LRIS? Most people don't know who to call and the State Bar is recognized as a trusted source for referrals. Your participation assures the public that they will receive a referral to a capable, experienced Montana attorney and rewards you professionally at the same time.

The LRIS is not a pro bono or reduced fee program! Potential clients are advised that we do not provide pro bono or reduced fee services and that participating attorneys independently set their own fees. We do the advertising - you charge a fee for your work. The benefits from participating in the LRIS are almost identical to those some attorneys pay thousands for!

How does the LRIS work? The LRIS is staffed by an experienced paralegal and other trained staff. 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 can increase your business: The Lawyer Referral and Information Service (LRIS) is a national program of the ABA that exists in some form in every State in the nation. The Montana LRIS fields thousands of calls per year and makes thousands of referrals to participating attorneys in their practicing fields of law throughout the State. It's a great way to increase your client base and an efficient way to market your services!



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!

You don't have to take the case: If you are unable, or not interested in taking a case, just let the prospective client know. The LRIS can refer the client to another attorney.

You pick your areas of law: The LRIS will only refer prospective clients in the areas of law that you register for. No cold calls from prospective clients seeking help in areas that you do not handle.

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.montanabar.org -> For Our Members -> 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.

Patrick Charles Sweeney

On Friday, Jan. 3, 2014, Patrick Charles Sweeney departed this earth. Rick was a veteran and a thinker, a voracious reader, a true student of history and a man who was gifted with wry humor and appreciated it in others. Rick was a proper Irishman, evidenced through his musical tastes. He also loved the vast, wild beauty of the Bighorn Mountains, where he spent many summers with his family at the cabin.

Rick was born in Billings, Mont., on June 18, 1943, to Naomi and Charles Sweeney. At the time of Rick's birth, Charles, a decorated B-17 pilot during World War II, was declared missing in action, and would spend nearly two years in German prisoner of war camps before being liberated by the allies in 1945. Rick was two years old when his father returned home and reunited with him and Naomi. In 1946 the family moved to a farm outside of Hardin, Mont., where Rick spent a happy childhood and was eventually joined by younger sister, Nancy, and brother, Kevin. The family moved into Hardin in 1953, where Rick attended school and graduated from Hardin High School in 1961. During his high school years, Rick played on the varsity football team for the Bulldogs as a defensive lineman. Rick then attended the University of Montana where he earned a law degree in 1968. During the summer breaks, he worked on the construction of the Yellowtail Dam south of Hardin.

In 1969, Rick entered the Air Force as a commissioned officer, beginning a 20-year career as a Judge Advocate General

Officer (JAG). While he was at the university, he met and later married Diana Patrick, with whom he had five children, Shana, Charles, Michael, Darrel and Robert. They were an Air Force family, and lived in New Jersey, California, Michigan, and also spent two years stationed in Greece. After he and Diana divorced, Rick was stationed in Washington, D.C., where he finished his Air Force career as a Lieutenant Colonel and was honorably discharged. He returned to his home state of Montana and went into private practice in Billings, first as a partner with Allen Beck and later as a sole practitioner. In 1993 he married Lottie Blades, and acquired another son, Brett, whom he adopted in 2006. The marriage also brought stepson Seth into his life. Rick and Lottie divorced in 2013.

Rick was preceded in death by his father Charles, and is survived by his mother, Naomi Sweeney; brother Kevin Sweeney (Marnie); sister Nancy Keyes; children Shana (Paul) Silvestri, Charles, Michael (Laura), Darrel (Mary), Robert, Brett, stepson Seth (Sarah) Blades; nine grandchildren; and many nieces and nephews. Rick left this earth far too soon, but we who knew and loved him are better for it. He will be especially missed by Brett, his best buddy. Go with God.

Donations may be made in Rick's name to, Special Olympics Montana, P.O. Box 3507, Great Falls, MT 59403.

— www.billingsgazette.com

Michael Joseph Dooney



Dooney

Michael Joseph Dooney, age 66 of Gearhart, OR, resident, died suddenly on October 19th, while working on his property in Jewell, OR. Michael was born in Portland, OR, to Jack and Mary Claire Dooney and was a graduate of St. Stephen Grade School, Jesuit HS and Gonzaga University. He received his Doctorate of Jurisprudence at the University of San Francisco Law School and was a member of the Order of the

Coif. After passing the Oregon Bar, Michael worked as a Deputy District Attorney in Clatsop County, and went on to establish his private law practice in Seaside, Oregon, where he continued to practice law until the time of his death. Michael was a long-time active member of the State Bar of Montana. Michael never met a stranger and enjoyed talking to everyone he met. He had

a genuine interest in others and a sincere love of people, often remembering even the smallest details about their families, work or past conversations. He was a talented musician and an accomplished woodworker. He loved spending time in the woods and outdoors, especially on the family property in Jewell. He was a devout Catholic, a member of the Knights of Columbus and a devoted, generous and loving husband and father, as well as a dear brother, uncle, cousin and friend. Survivors include his wife, Lisa and children, Mary Claire, Maggie, John and Tommy Dooney of Gearhart, brothers, Patrick Dooney of Jewell, John (Donna) and Brian (Shawny) Dooney of Hillsboro, sisters, Sheila Boyd, Maureen Dooney (Jim Mosley) and Kathleen Dooney Foster (Cliff Foster) all of Hillsboro, and Marron Dooney (Jim Miller) of Portland, and many nieces and nephews.

Lorri A. Mott

Lorri A. Mott (Compton), 48, of Smithton, Ill., born Jan. 9, 1965, in Keokuk, Iowa, died Thursday, Dec. 26, 2013, at St. Elizabeth's Hospital, Belleville, Ill.

Lorri was a well-known and well-respected attorney for the past 22 years, practicing in Belleville, Ill. She specialized in adoptions, GAL (Guardian Ad Litem), and all facets of family law. She served on the Children's First Foundation board of directors, and worked on the continuing legal education program for the St. Clair County Bar Association. She served as the secretary for the Ledgestone Estates Homeowners Association in Smithton, Ill., and was treasurer of the St. Louis Barbie Club. She

enjoyed jazz music, traveling, arts and crafts, and creating Barbie doll accessories.

She was preceded in death her father, Leo Mott; and her father-in-law, David Compton Jr. Surviving are her husband of 22 years, Timothy P. Compton, whom she married on May 17, 1991; her mother, Lois, nee Young, Mott of Quincy, Ill.; three brothers, Randy (Barbara) Mott of Poland, Rick Mott of Washington, D.C., and John (Chris) Mott of Venice, Fla.; a sister, Nancy Barry of Quincy, Ill.; her mother-in-law, Frances L., nee Goodwin, Compton; and numerous nieces and nephews.

<http://iln.isba.org/blog/obituaries>

Job Postings and Classified Advertisements

CLASSIFIEDS Contact | Pete Nowakowski at pnowakowski@montanabar.org or call him at (406) 447-2200.

ATTORNEY POSITIONS

ASSOCIATE ATTORNEY: Bloomquist Law Firm, P.C. seeks an attorney for its Helena office. Candidate must have strong research and writing skills, 2 years of experience in natural resource litigation, and interest in water law. Send resume and writing sample to Bloomquist Law Firm, P.C., P.O. Box 799, Helena, MT 59624-0799.

CHILD PROTECTION ATTORNEY: Crow Tribe of Indians, Office of Legal Counsel. Full-time in-house attorney in the area of child protection law, Crow Agency, MT. Experience preferred. Candidates must be admitted to practice law on the Crow Reservation and in the State of Montana or be willing and able to obtain admission through the next available bar examination(s). Candidates should have strong research and writing skills, respect for and familiarity with Native American and Crow tribal law, culture, and history, and working knowledge of child protection law, practice, and the Indian Child Welfare Act. Must be an aggressive advocate, with time management skills and ability to maintain calendars in multiple courts. Day to day practice includes interaction with social workers from Tribal, State, and Federal jurisdictions, as well as contact with the community.

Job duties include preparation and presentation at the Tribal level of all filings related to child protection issues, representation of Tribal interest in state dependency cases, and addressing sovereignty issues relating to ICWA. Position also entails regular involvement with law enforcement and prosecution. Salary DOE. Position open until filled. Preference will be given to qualified Crow Tribal members and members of federally-recognized Indian tribes. Please apply via e-mail by submitting cover letter, resume, writing sample, and references to the following e-mail address: Melissa.HoldstheEnemy@crow-nsn.gov

Please address materials to:

Melissa Holds the Enemy
Managing Attorney
Crow Nation Office of Legal Counsel
P.O. Box 340
Crow Agency, MT 59022

CIVIL LITIGATION ATTORNEY: Established Bozeman law firm is seeking a civil litigation attorney (3-5 years of experience preferred). We offer a competitive compensation and benefits package.

Qualified candidate should possess the following qualifications:

- Licensed to practice law in Montana
- Strong work ethic and proven case management skills
- Excellent communication (both written and oral) and analytical skills
- Exceptional research skills
- Trial experience a plus

How to apply: Please mail cover letter and resume to 1 West Main St., Bozeman, MT 59715 or email to annaeverson@berglawfirm.com.

CROWLEY FLECK P.L.L.P. ATTORNEYS

LITIGATION ASSOCIATE: Crowley Fleck PLLP is a progressive and established law firm with over 130 attorneys. Our corporate office located in Billings, MT has expanded over the last several years to include an additional ten offices located throughout Montana, North Dakota and Wyoming. We are seeking a Litigation Associate with 1 - 4 years experience in the Helena, MT office. Successful applicants must be licensed in Montana, have a strong academic record, solid research, and writing capabilities. Competitive salary and benefits. All applications will be held in confidence. Please submit your cover letter, resume, transcript and writing sample to Crowley Fleck PLLP, Attn: Joe Kresslein, P.O. Box 2529 Billings, MT 59103-2529 or via email to jkresslein@crowleyfleck.com. Visit our website at www.crowleyfleck.com for more information about our firm.

ESTATE PLANNING/COMMERCIAL ASSOCIATE: Crowley Fleck PLLP is a progressive and established law firm with over 130 attorneys. Our corporate office located in Billings, Montana has expanded over the last several years to include an additional ten offices located throughout Montana, North Dakota and Wyoming. We are seeking an Estate Planning/Commercial Associate with 0 - 4 years experience in the Billings office. Successful applicants must have a strong academic record, solid research and writing capabilities, and an interest in estate planning and commercial transactions. Competitive salary and benefits. All applications will be held in confidence. Please submit your cover letter, resume, transcript and writing sample to Crowley Fleck PLLP, Attn: Joe Kresslein, P.O. Box 2529 Billings, MT 59103-2529 or via email to jkresslein@crowleyfleck.com. Visit our website at www.crowleyfleck.com for more information about our firm.

ASSISTANT CITY ATTORNEY: The City of Bozeman, Montana is growing! We are in need of an experienced attorney to accept a challenging position addressing a wide diversity of legal and organizational matters. We seek an attorney with a lively work ethic, an appreciation for collaboration, qualities of leadership, and an affinity for change. This is a new position with a primary emphasis on civil matters. Full Time position w/excellent benefits. \$64,588 to \$70,976 per year as earned depending on experience and qualifications. PREFERRED APPLICATION DEADLINE: Monday, February 10, 2014 @ 5:00 p.m. EOE/ADA/Vet Pref. See the full announcement, additional details, and application online at www.bozeman.net. Questions can be emailed to gsullivan@bozeman.net. No phone calls please.

ASSOCIATE ATTORNEY: Matovich, Keller & Murphy, P.C., is seeking an associate attorney with 1 – 5 years experience. Experience in civil litigation is preferred. Send letter of application, resume, references, and writing sample to Matovich, Keller & Murphy, P.C., Attn: Carey E. Matovich, P.O. Box 1098, Billings, Montana 59103-1098, or via email to mkmfirm@mkmfirm.com. All applications will be kept confidential.

ASSOCIATE ATTORNEY: Kasting, Kauffman & Mersen, P.C. of Bozeman seeks an associate attorney to assist in the firm's practice areas. Practice areas include business, real estate, commercial litigation and family law. Must have at least 2 or more years of experience practicing law. Please send resumes with writing sample and references to Hiring Partner, Kasting, Kauffman & Mersen, P.C. 716 South 20th Ave., Suite 101, Bozeman, MT 59718. (406) 586-4383. www.kkmlaw.net

PARALEGALS/LEGAL ASSISTANTS

PARALEGAL/LEGAL ASSISTANT: Whitefish law firm seeks FT paralegal/legal assistant with training and experience to hit the ground running. Only go-getters anxious to be involved in civil litigation and trial prep with prior experience, super organizational skills, and above-average computer/writing skills need apply. Salary and benefit package is negotiable DOE. Email resume and cover letter to wanda@morrisframpton.com.

PARALEGAL (posted 1/16): PPL Montana is seeking an experienced Paralegal or Senior Paralegal based on successful candidates' qualifications. The successful candidate must possess a BS/BA degree with a minimum of three years legal experience relating to research, investigation, and document preparation, along with a paralegal certificate. PPL offers a highly competitive salary in addition to medical, dental, and vision coverage, along with life and disability benefits and a 401k plan. PPL is an equal opportunity affirmative action employer dedicated to diversity and the strength it brings to the workplace—M/F/D/V. To apply for this opportunity or for further information and posting dates, please access our website: www.pplmontana.com/careers, and click on Job Openings.

ATTORNEY SUPPORT/RESEARCH/WRITING

RESEARCH, WRITING, SUPPORT: Experienced attorneys at Strickland & Baldwin, PLLP, offer legal research, writing, and support. We have over 25 years of combined experience representing both plaintiffs and defendants, and we use that experience to help you. Find out what other attorneys are saying about our service and contact us by visiting www.mylegalwriting.com.

COMPLICATED CASE? I can help you sort through issues, design a strategy, and write excellent briefs, at either the trial or appellate level. 17+ years experience in state and federal courts, including 5 years teaching at UM Law School and 1 year clerking for Hon. D.W. Molloy. Let me help you help your clients. Beth Brennan, Brennan Law & Mediation, (406) 240-0145, babrennan@gmail.com.

CONSERVE YOUR ENERGY for your clients and opposing counsel. I draft concise, convincing trial or appellate briefs, or edit your work. Well-versed in Montana tort law; two decades of experience in bankruptcy matters; a quick study in other disciplines. UM Journalism School (honors); Boston College Law School (high honors). Negotiable hourly or flat rates. Excellent local references. www.denevilegal.com. (406) 541-0416

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

OFFICE SPACE/SHARE

LAW OFFICE FOR SALE: A long-established, general practice, Eastern Montana law office for sale. Nice facilities, good location. Community needs legal representation. Plenty opportunity for growth. Contact rectorlo@neomon.net, or call 406-228-4385.

MEDIATION

AVAILABLE FOR MEDIATIONS AND ARBITRATIONS: Retired Montana attorney with over 40 years experience in personal injury and construction industry litigation. Michael Young, Great Falls, MT. 406-868-9666 or myoung@gfmontlaw.com

CONSULTANTS & EXPERTS

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

COMPUTER FORENSICS, DATA RECOVERY, E-DISCOVERY: Retrieval and examination of computer and electronically stored evidence by an internationally recognized computer forensics practitioner. Certified by the International Association of Computer Investigative Specialists (IACIS) as a Certified Forensic Computer Examiner. More than 15 years of experience. Qualified as an expert in Montana and United States District Courts. Practice limited to civil and administrative matters. Preliminary review, general advice, and technical questions are complimentary. Jimmy Weg, CFCE, Weg Computer Forensics LLC, 512 S. Roberts, Helena MT 59601; (406) 449-0565 (evenings); jimmyweg@yahoo.com; www.wegcomputer-forensics.com.

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

INVESTIGATORS

INVESTIGATIONS & IMMIGRATION CONSULTING: 37 years investigative experience with the U.S. Immigration Service, INTERPOL, and as a private investigator. President of the Montana P.I. Association. Criminal fraud, background, loss prevention, domestic, worker's compensation, discrimination/sexual harassment, asset location, real estate, surveillance, record searches, and immigration consulting. Donald M. Whitney, Orion International Corp., P.O. Box 9658, Helena MT 59604. (406) 458-8796 / 7.

EVICTIIONS

EVICTIIONS LAWYER: We do hundreds of evictions statewide. Send your landlord clients to us. We'll respect your "ownership" of their other business. Call for prices. Hess-Homeier Law Firm, (406) 549-9611, ted@montanaevictions.com. See website at www.montanaevictions.com.

MONTANA LAWYER

State Bar
— of —
Montana

State Bar of Montana
P.O. Box 577
Helena MT 59624



CONNECTION

*Eldon Shields, Partner in Gates, Shields & Ferguson
Overland Park, Kansas & Blue Springs, Missouri*

From the beginning, ALPS connected with the Main Street lawyer during a real time of need. For partner and longtime policyholder, Eldon Shields, that connection has remained strong over the past 25 years. Since 1988, ALPS has continued to fulfill its promise to its policyholders and the legal community as a whole.

Hear more from ALPS policyholder Eldon Shields at 25.alpsnet.com

 **ALPS**
A Family of Professional Service Companies