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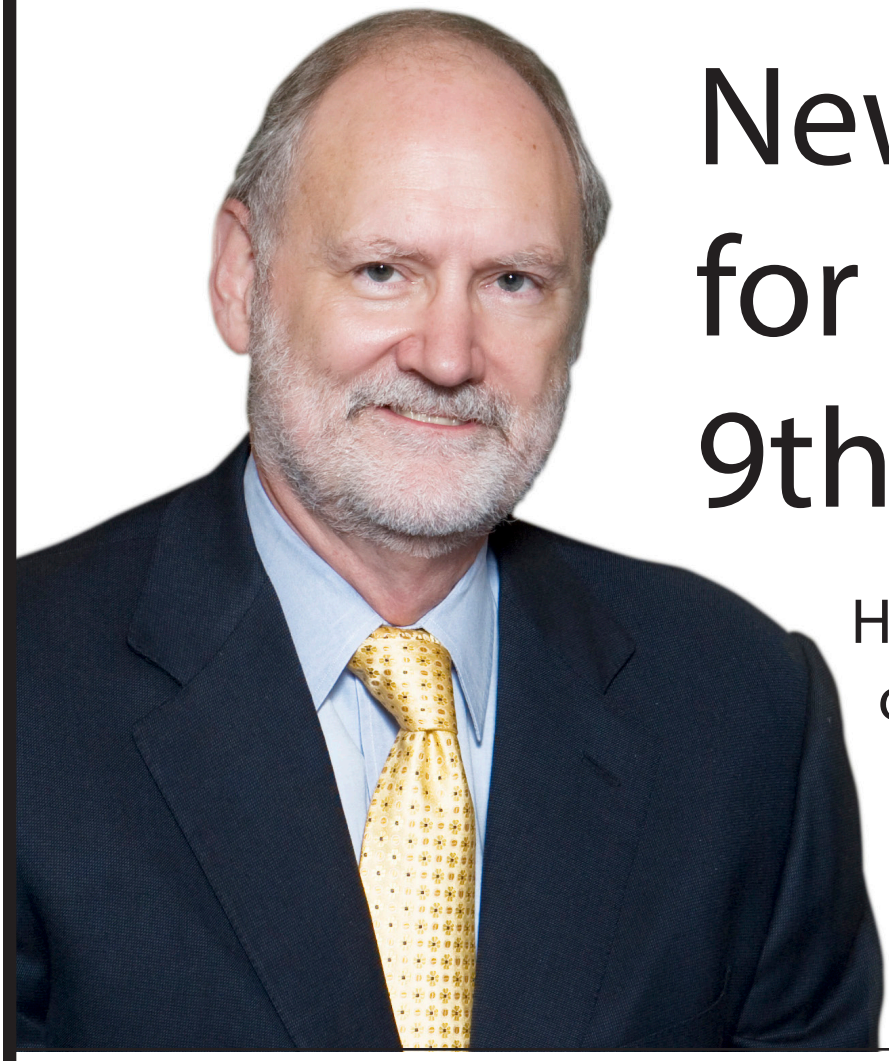

New chief for the 9th Circuit

Hon. Sid Thomas of Billings takes over top spot on appeals court in December

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> Raise a glass to Prohibition repeal anniversary!

> Elder Care: Should state provide civil cause of action for elder abuse

> Evidence Corner: The Best Evidence Rule explained — what it is, and what it's not

> Tips for getting the most out of your State Bar of Montana Fastcase benefit

MONTANA LAWYER

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Feature Stories

Regular Features

From the cover

Judge Sidney Thomas of the Ninth Circuit Court of Appeals will take over as chief judge in December. Photo courtesy of the NInth Circuit Court of Appeals.

Judge Thomas has made state proud in his time on bench

Look out Sid
It's somethin' you did
God knows when
But you're doin' it again

- Bob Dylan, "Subterranean Homesick Blues" 1965 (modified)

Judge Sidney R. Thomas is going to become the chief judge of the Ninth Circuit this December. He deserves it, and we deserve him.

As a sophomore novice debater on the Billings West forensics team, I knew of Sid Thomas, varsity debater from Bozeman. West High had a shot at winning every event at a speech and debate meet, except varsity debate. We could not beat Sid from Bozeman. But, even then, he smiled, never took a cheap shot, and was gracious (which aggravated the matter further). We were disgustingly disgusted that there was nothing about him that could disgust us. For this, he earned the most horrific honorific we could muster — "Smilin' Sid."

Apparently, he kept up his gracious ways, because 44 years later, he will be chief judge of the Ninth Circuit, realistically, the highest court in the land. U.S. Supreme Court review of cases from these parts of the world is so rare that it cannot be considered a factor in any litigated matter. The Ninth Circuit is the end of the line. If the Ninth Circuit makes a bad call, it stays bad. This reality makes the job tough. Some occasions are literal "life and death" decisions. For years, Judge Thomas had a fax machine in his home. Largely, when it rang, someone was seeking a last-minute reprieve from execution. Other decisions bordered on "life and death" — denying refugee status and sending an immigrant back home may be a life or death decision.

The Ninth Circuit runs from the tropics to the Arctic Circle and from St. Xavier to San Diego. It includes the highest point in the United States, and the lowest. It includes the most northerly, southerly, westerly and, arguably, most easterly points in the United States. It will be a big job.

Personally, I view Judge Thomas' ascension as a good development. I am not in Judge Thomas' close circle of friends, but over the years, our paths have crossed a few times. Perhaps more than a few, as I think about it. We served on the Yellowstone County Bar Association skit committee a few — about three — decades ago. I recall him being one of the first to have the guts to speak up and suggest we not be so horribly vulgar, and maybe temper the humor with actual humor, not just bad words. Again, a bit of grace.

When he was with Moulton, Bellingham, Longo and Mather, I was in a much smaller firm in the same building. There was some sort of dust-up between me and a Moulton attorney. I recall Sid stepping in to make sure it did not get inflamed further. It didn't. He didn't have to do that.

Rarely have I seen Judge Thomas on the bench, but from my observations and the reports of others, his questioning is firm and fair, indicative of a fellow who has read the record and moved to the central points. I have never seen him, or heard of him, trying to show up or embarrass an attorney or fellow judge.

Years ago, Judge Thomas and I were boarding the same plane. This was back when only a few random passengers were patted down just before boarding. Judge Thomas' number came up. Judge Thomas was in the company of a law clerk who clearly took umbrage that her boss was being frisked like a chicken thief. Arms folded, lips squeezed together and with toes tapping, she waited for what she viewed as indignation to stop. She was told to move on. "Get on the plane, ma'am." She did, but as she made the turn down the jetway, she stopped, swiveled and spat , "See you on the plane, JUUUUUUDGE!!!" Not even Judge Thomas' poker face could disguise the pain of her misbehavior. You could see the grimace from across the waiting area. Smilin' Sid was not smiling. The security guard patting him down was doing an honest day's work, and showing him disrespect pained Sid. I could see it.

We were all holding our breath hoping Judge Thomas would be named to the United States Supreme Court in 2010. I have it on good authority that the President Barack Obama was very favorably impressed by him. But, as with all political appointments, there are lots of moving parts, lots of celestial bodies, seen and unseen, with gravitational influence. It was not to be — at least, not yet.

So, I am glad he got this job — not just because he is a nice fellow, and not just because he is smart — in significant part because he has a level head and an even temper. But mostly because he is a homegrown, public school, Montanan. Bozeman High School to Montana State University to University of Montana School of Law. Plenty of fine attorneys and judges have come from the Ivy League and law schools with single digit *US News* ratings. But, my prejudices lean toward preferring a person rooted in Montana when a tough decision needs to be made, or leadership needs to be demonstrated — evidently, the Ninth Circuit agrees.

Shaw, Cole join Brown Law Firm

The Brown Law Firm P.C., with offices in Billings and Missoula, announces that Adam M. Shaw and Christine M. Cole have joined the firm as associates at the Missoula location.

Shaw, originally from Prescott, Arizona, received his bachelor's degree from Arizona State University in 2006 and earned his juris doctorate from the University of Montana School of Law in May 2010. He practiced in Dillon for four years before joining Brown Law Firm in 2014. While practicing in Dillon, Adam handled a variety of matters including complex civil defense litigation, insurance coverage disputes, real estate transactions, criminal law and family law matters. He also served as president of the Fifth Judicial District Bar Association and served on the board for the Fifth Judicial District CASA (Court Appointed Special Advocates). His practice focuses on civil defense litigation.


Cole


Shaw

Cole, a native Montanan from Great Falls, graduated with honors from the University of Washington, Seattle, in 2010 with a B.A. in Journalism and a B.A. in Italian Language and Culture. She earned her juris doctorate from the University of Montana School of Law in 2013. During law school she worked as a summer intern for Brown Law Firm and Montana Legal Services Association. Following law school, she worked as a law clerk for the Honorable Mary Jane McCalla Knisely in Yellowstone County. During this clerkship, she worked on a variety of civil claims from personal injury to products liability issues. Her practice with the Brown Law Firm is specialized in defense of personal injury, property and products liability claims. She also handles insurance coverage and first and third party insurance bad faith claims.

Cole, Keller, Nowels join Garlington firm

Garlington, Lohn & Robinson, PLLP is pleased to announce the addition of three attorneys. Justin Cole joins the firm as an associate in its civil litigation practice. Justin was raised in Missoula and received both his Bachelor of Science degree in Business Management and J.D. from the University of Montana. Prior to joining GLR, Cole clerked two years for the Hon. Carolyn Ostby. Cole may be reached at jkcole@garlington.com.


Cole


Keller

Tessa Keller joins the firm as an associate in the civil litigation practice. Tessa is a fourth generation Montanan and was raised in Plains. She received Bachelor's degrees in English Education and Spanish from the University of Montana and her J.D. from the University of Oregon School of Law. Keller clerked for Justice Laurie McKinnon at the Montana Supreme Court prior to joining GLR. She may be reached at takeller@garlington.com.

Robert Nowels joins the firm's commercial and real estate practice. Rob earned his Bachelor of Arts degree in Business Management from the University of Utah and his J.D. from the University of Montana School of Law. Prior to law school Rob worked in hotel management at Snowbird Ski Resort. Nowels can be reached at rlnowels@garlington.com.

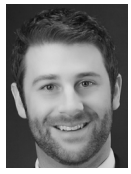
Aruchal joins Meyer, Shaffer & Stepans

The Missoula Firm of Meyer, Shaffer & Stepans PLLP is pleased to announce that Ali Archual has joined the firm. Archual will practice from the firm's Wilson, Wyoming, office and will focus on catastrophic injury cases, civil rights violations and select criminal defense matters. Archual graduated from the University of Montana School of Law in 2014 where she was the managing editor of the Public Land & Resource Law Review.

Aruchal hails from a long line of cattle ranchers from Big Piney, Wyoming. Prior to law school she obtained a bachelor's degree in political science from Stanford University and worked in Washington, D.C., as a legislative assistant.

Hash joins Marra, Evenson & Bell

C. Nicholas Hash has joined the law firm of Marra, Evenson & Bell. Nicho was born and raised in Kalispell and graduated from Flathead High School. He continued his education at Carroll College in Helena where he graduated with distinction in 2010.


Hash

Nicho went on to study at the University of Montana School of Law where he received his law degree in May 2013. During law school he served as a co-president for the Rural Advocacy League.

He is admitted to practice in all state and federal courts throughout Montana. He will be engaged generally in the firm's practice with an emphasis in litigation, commercial law and real estate.

MLSA gets grant to enhance, expand pro bono

MLSA has been chosen as one of 11 inaugural recipients of a new national pro bono initiative grant by the Legal Services Corporation (LSC) to address the civil legal needs of low-income people.

The $141,087 two-year grant will fund the Montana Pro Bono Connect project to support and enhance the current work of Montana pro bono professionals by expanding capacity to provide legal advice and brief services as well as to create new pro bono opportunities. The project will develop and implement innovative strategies and technological tools that will help pro bono attorneys provide services to clients throughout the state, including remote services.

MLSA Executive Director Alison Paul traveled to Washington, D.C., for a ceremonial award of the grant, as well as to serve as a panelist at LSC's 40th Anniversary on the topic of innovation to increase access to justice. MLSA is a nationally recognized innovator among civil legal aid providers, particularly in the development of technological tools to increase access to justice.

Tobias Cook, winner of the 2014 Montana Law Student Pro Bono Service Award, is shown with the Hon. Karen Townsend and Gary Connelly, pro bono counsel for Crowley Fleck PLLP.

Cook wins Law Student Pro Bono Award

Third-year law student Tobias Cook is this year's recipient of the Montana Law Student Pro Bono Service Award, Montana Legal Services Association and the University of Montana School of Law announced.

Cook received the award — including a $500 check donated by Crowley Fleck PLLP — on Oct. 17 at the Missoula County Courthouse.

Cook donated over 130 hours to volunteer legal work outside the classroom over the last three years. His involvement in pro bono has ranged from being a regular volunteer with the Montana Innocence Project to working with social studies students at St. Joseph's Middle School in Missoula, educating them about law and assisting with their mock trial. Cook's passion when it comes to the law is public service and working with underserved populations. He is vocal in his commitment to continue providing pro bono assistance to indigent Montanans after graduating law school.

Although pro bono benefits the community, Cook says he feels gratified from serving. "I have found each of my pro bono experiences to be rewarding in and of themselves. I hope these experiences are as rewarding or helpful to the client I am serving as they are to me."

Tarlow & Stonecipher welcomes McNulty

The law firm of Tarlow & Stonecipher, PLLC, recently welcomed Amy C. McNulty to its practice. Amy graduated with high honors from the University Of Montana School Of Law in 2013.

McNulty received a Bachelor of Arts degree in political science from Carroll College in 2010. During law school, she was a member of the National Moot Court Team and managing/business editor for the Montana Law Review. She has interned with the United States District Court for the District of Montana for Magistrate Judge Jeremiah Lynch and with the United States Attorney's Office for the District of Wyoming in Mammoth Hot Springs, Wyoming. After law school she served one year as a law clerk for Montana Supreme Court Justice Beth Baker. She will be engaged generally in the firm's practice, with an emphasis on civil litigation. She can be reached at 406-586-9714. Her email address is amcnulty@lawmt.com

McNulty

Bates joins National Wildlife Federation

Missoula attorney Sarah Bates recently joined the National Wildlife Federation's staff as deputy director of the Northern Rockies, Prairies and Pacific Region. Bates remains affiliated with the University of Montana, where she currently teaches Water Policy with the Department of Geography.

Her recent publications include Water Resource Management: A Casebook in Law and Public Policy (7th ed., with Tarlock, Corbridge, Getches and Benson) and Land Trusts and Water: Strategies and Resources for Addressing Water in Western Land Conservation (Land Trust Alliance).

Tappan joins Bloomquist Law Firm

Richard (Rick) Tappan has joined Bloomquist Law Firm, P.C., as an associate attorney. Tappan earned his law degree with honors from Gonzaga University School of Law and his undergraduate degree in geology from Northern Arizona University.

Tappan

Before law school, Tappan was an environmental consultant and professional geologist. His practice focuses on water law, natural resources, oil and gas, private and public lands issues, and commercial litigation. He may be reached at rtappan@helenalaw.com.

Johnston to be next magistrate judge in Great Falls Division

The United States District Court for the District of Montana has announced the selection of John T. Johnston of Butte to serve as the next United States magistrate judge in the Great Falls Division. Johnston was selected from among a highly qualified group of finalists compiled by a court-appointed Merit Selection Panel. He is currently a partner in the Butte law firm of Joyce, Johnston & MacDonald PLLP.

Johnston was born and raised in Butte, and graduated with honors from the University of Montana School of Law in 1988. He began his career with the law firm of Corette, Pohlman & Kebe, where he became a partner before joining his current firm. He is a member of both the Montana Trial Lawyers Association and the Association of Trial Lawyers of America. He and his wife, Angie, have four children.

The District of Montana has three full-time magistrate judge positions, located in Missoula, Billings, and Great Falls. Johnston will become the fifth magistrate judge to serve on a full-time basis in the Great Falls Division. His appointment takes effect on Jan. 5, 2015. He will succeed current United States Magistrate Judge Keith Strong, who will leave the bench upon expiration of his term on Jan. 4, 2015.

Construction Section honors Tarlow

The Construction Law Section of the State Bar honored Buzz Tarlow of Tarlow & Stonecipher PLLC in Bozeman for exemplary contributions to the section from 2005 to 2014. Shown with Tarlow at the section's Construction Law Institute in Bozeman Oct. 10 are the section's outgoing chair, Dorie Relfing, left, and incoming chair Bridget leFeber.

McCrea cited for work on pro bono for aging program

John McCrea received a Governor's Award for Excellence in Performance for his work with the State Bar of Montana and the Area Agencies on Aging to develop legal clinics where senior citizens — especially low income senior citizens — can get wills, living wills and other legal documents completed pro bono. In the past year, over 400 people have been able to receive assistance in getting their legal documents completed who otherwise might not have.

Surveys seek feedback on LRIS, Modest Means

In an effort to enhance your experience using the State Bar Modest Means and Lawyer Referrals and Information Service, we are currently collecting your feedback. Please visit our website to provide your perspective on how State Bar of Montana services can enhance your firm's opportunities to grow!

Surveys can be accessed directly at the following links:

- Modest Means Program Survey: www.surveymonkey.com/r/MMattorneyfeedback
- Lawyer Referral and Information Service Survey: www.surveymonkey.com/r/lrisfeedback

Feedback on the programs can also be sent directly to erin@montanabar.org.

Annual mandatory IOLTA compliance certification is due Dec. 3, 2014

What do I need to do?

For all active attorneys, starting Nov. 3:

Go to www.surveymonkey.com/s/2014ProBono-IOLTA or follow the link at www.montanabar.org

Complete the mandatory IOLTA certificate

Complete the annual pro bono report

- Under Rule 1.18(e) of the Rules of Professional Conduct, each lawyer/firm must file an annual certificate of compliance with the IOLTA program.

- The pro bono reporting form is provided for you to report you pro bono activity, conforming to Rule 6.1 of the Rules of Professional Conduct.

Modest Means

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*. You can also call us at 442-7660.

Court denies attorney's unusual request for disbarment over theft from clients

The Montana Supreme Court on Oct. 14 unanimously denied a petition by attorney David McLean to immediately disbar him over more than $350,000 he admitted stealing from clients and a trial lawyers organization for which he was secretary and treasurer.

McLean had asked the court on Aug. 28 to bypass the normal lawyer disciplinary system in order to allow his former clients to immediately seek relief from the Montana Lawyers' Fund for Client Protection. In his petition, McLean admitted to taking at least $321,866.33 from his former clients and $32,714 from the Montana chapter of the American Board of Trial Advocates.

The Montana Office of Disciplinary Counsel opposed the petition, arguing that it would create a bad precedent and did not allow for ODC to continue investigating the extent of McLean's wrongdoing..

In his petition, McLean "shamefully and with grave sorrow and sincere remorse" admitted to misappropriating the funds.

The petition noted that McLean's disbarment is a prerequisite for the affected clients' applications to be considered eligible for the Lawyers' Fund, so he should be disbarred as quickly as possible for their sake.

It also said that delaying McLean's removal as a licensed Montana attorney would undermine the public's confidence in the judicial system.

In response, Shaun Thompson, chief disciplinary counsel for the Office of Disciplinary Counsel, called McLean's request unusual and perhaps unprecedented, noting that the court created the Commission on Practice and procedural rules for lawyer discipline on Jan. 5, 1965.

"To ODC's knowledge, the Court's system and rules have been the exclusive means by which Montana lawyers have been disciplined. To allow lawyers to attempt to bypass the system and rules would create a perilous precedent with perhaps unintended consequences," Thompson's objection stated.

Thompson also noted that McLean's petition for disbarment did not address whether he should be ordered to pay restitution to his victims or potentially to the Lawyers' Fund, or how such restitution should be calculated.

Thompson pointed out that allowing discipline against McLean to proceed under the established Rules for Lawyer Disciplinary Enforcement will create a record for purposes of determining whether, and to what extent, McLean should be ordered to pay restitution; and also for purposes of considering any possible request for his reinstatement. ODC also points out that the Rules for Lawyer Disciplinary Enforcement include a provision allowing an attorney to make a conditional admission to a disciplinary complaint — but not until after formal disciplinary proceedings have been filed.

Thompson also noted in his objection that ODC's investigation is continuing, and it is reviewing a large amount of information on the case. There are still questions about the nature and the extent of McLean's misconduct.

The court determined on a 6-0 vote that McLean did not establish any reason why he should be allowed to bypass the lawyer disciplinary process.

Public comment ordered on pro bono recommendation

The Montana Supreme Court ordered a 60-day public comment period on an Access to Justice Commission (ATJC) proposal for voluntary reporting of pro bono activity by applicants for admission to the Montana Bar.

The order is dated Oct. 3 in case number AF 11-0765.

The proposal would give all applicants for the bar the opportunity to voluntarily submit a statement of any pro bono law-related activities they have performed as of the date of their application, with the guarantee that neither the information provided in the statement nor the refusal to submit a statement will affect the applicant's candidacy for admission in any way.

The voluntary statement would be intended for three purposes:

To inform bar applicants of the value Montana places on the obligation imposed by Rule 6.1 of the Rules of Professional Conduct and to notify them that admitted attorneys are encouraged to submit similar reports annually;

To gather non-identifying information and data about pro bono opportunities available to law students and about volunteer services already being provided by bar applicants in order for the court and the State Bar to evaluate pro bono activities and develop resources for pro bono attorneys; and

To provide bar applicants with an opportunity to indicate the interest in receiving information about training and their willingness to be contacted about pro bono opportunities upon admission to the bar.

To read the full order and the AJTC recommendations, go to http://supremecourtdocket.mt.gov/search/case?case=15022.

Raise a glass to constitutional history

DEC. 5 MARKS ANNIVERSARY OF 1933 REPEAL OF THE 18TH AMENDMENT, PROHIBITION

By Karen Powell

On Dec. 5, with an exploding market for Montana craft beers, wines and spirits, consider raising a glass of your favorite Montana libation in celebration of the anniversary of passage of the U.S. Constitution's 21st Amendment, in 1933. The 21st Amendment reinstated the U.S. people's ability to legally purchase alcohol by repealing the 18th Amendment (Prohibition.) The 18th Amendment to the U.S. Constitution is the only amendment ever repealed in the history of the United States.

The Movement to Prohibition

Prohibition and the passing of the women's right to vote were tied up in dramatic time of historical change just after the turn of the century. Women were a big part of the workforce in the first world war, tube lipstick was invested in 1915, and women were rebelling by continuing to wear pants, loose dresses and cut their hair even after the end of the war. Bicycles were becoming more commonplace, which made work outside the home more accessible to women. Women saw the importance of voting and controlling their households as part of their expanded freedoms.

The Prohibition movement was driven in large part by women who were experiencing terrible effects of alcohol abuse within their households — led by such organizations as the Women's Christian Temperance Union and the Anti-Saloon League, for example. This was a time of great activity for the women's movement, in parallel to women's suffrage movement[1]. After years of activism, prohibition of the sale of alcohol went into effect with the passage of the 18th Amendment.

U.S Constitution's 18th Amendment

In 1919, Congress passed the 18th Amendment to the U.S. Constitution. The 18th Amendment states in part:

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all the territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited[2].

During Prohibition, the manufacture, transportation, and sale of alcohol was illegal, but not the consumption of alcohol. This loophole spurred much economic activity and social changes across the country.

As the new constitutional amendment was in the news, wealthy people stockpiled liquor before the 18th Amendment went into effect[3]. Public places could not legally provide alcohol to customers, but many people bought it on the black market, and speakeasies were born—secret locations where one could "speak easy" and order a drink without worrying about being overheard and reported to the police. In New York, there were over 30,000 speakeasies during Prohibition. People were also making their own wine, cider, "bathtub gin" and "moonshine" at home.

There was some great slang developed during Prohibition, and of course many drinks named from these terms. The Bee's Knees (and cat's pajamas, bullfrog's beard, elephant's instep, caterpillar's kimono, duck's quack, monkey's eyebrows, oyster's earrings, snake's hips, clam's garter, leopard's stripes) inspired a variety of cocktails. Those drinks were concocted with "Giggle Water" (booze) and served at a "Juice Joint." At that point, maybe you'll need to "Iron one's shoelaces" (excuse oneself for the restroom.) And, if you're not careful, you might become Spifflicated (Drunk.) Or, as your friends might have said it: canned, corked, tanked, primed, scrooched, jazzed, zozzled, plastered, owled, embalmed, lit, potted, ossified or fried to the hat.

As implementation of Prohibition drove the social culture, even the regulation of Prohibition spilled over to the names of cocktails. During Prohibition, the U.S. Coast Guard had legal authority to patrol within 3 miles of the coastline to prevent the importation of illegal liquor. And thus, the "3 miler" cocktail was born (a concoction of rum, brandy, lemon juice and grenadine.) When the laws changed, and the U.S Coast Guard had the authority to extend its patrol, the "12 miler" became popular (all of the above plus rye whiskey.[4])

What about Montana during Prohibition?

Montana was caught up in the same sociopolitical historical moment as the rest of the country. Prior to Prohibition, in 1907, the Montana Legislature passed a law banning women from saloons (eliminating the wine rooms where women were separated) because it was believed that prostitution happened

Prohibition, page 19

1 The 19th Amendment was passed virtually at the same time.

2 **Section 2.** The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

3 The 18th Amendment was passed with a delayed effective date, and then the Volstead Act was passed. The Volstead Act provided oversight on putting the amendment into place. The Volstead Act set the starting date for nationwide prohibition for January 17, 1920, which was the earliest date allowed by the 18th Amendment.

4 For more on the rum runners and the U.S. Coast Guard, see https://www.uscg.mil/history/articles/RumWar.pdf

Montana native rising to top spot on Circuit

By Joe Menden

When Brian Pomper arrived in Billings in 1996 to be a law clerk for the Hon. Sidney Thomas, he didn't know a lot about his new boss.

He knew that Thomas, then newly appointed to the Ninth Circuit Court of Appeals, was a well-respected Montana lawyer.

But Pomper was immediately struck by a few of Thomas' qualities: For someone in such a powerful position, he was exceptionally easygoing, friendly and quick with a joke. Thomas' wife, Martha Sheehy, had recently given birth to their first son, Oscar. Thomas was still wearing the hospital bracelet on his wrist, Pomper remembers.

Thomas immediately welcomed him and his other clerks, treating them like members of his extended family.

But Pomper, who went on to become chief international trade counsel for the U.S. Senate Finance Committee and is now a partner at Akin Gump Strauss Hauer & Feld in Washington, D.C., quickly found out there was more to Thomas than his wit, charm and genial personality.

"He's not a flashy, showy guy. He is, however, one of the smartest people I've ever met, and that became clear in short order," Pomper said. "He was a brand-new judge, but he never shied away from tough work, in fact he sought out more work. And not just more work, the most difficult."

Thomas, of Billings, will become chief judge of the Ninth Circuit Court of Appeals on Dec. 1, taking over for current Chief Judge Alex Kozinski, who has held the job since 2007.

Thomas has served nearly 20 years on the federal bench. In 2010, he was interviewed by President Barack Obama as a potential nominee to the United States Supreme Court.

Photo provided by the Ninth Circuit

Judge Sid Thomas, of Billings, will take over as chief judge of the Ninth Circuit Court of Appeals in December.

But with all the accolades and accomplishments, people who know him say he's still the same easygoing, friendly Montana guy.

Trusted adviser to current chief

According to Kozinski, the same characteristics that have endeared Thomas to his clerks and colleagues in Montana also have made him one of the best liked

and most respected members of the Ninth Circuit among his colleagues on the bench. Kozinski thinks that fact will help make Thomas a very effective chief judge.

"He's a great judge and a great guy," Kozinski said. "Smart, nice, funny. I couldn't ask for a better successor."

He also said Thomas will be well prepared to take over the responsibilities, because he has relied on Thomas as a close adviser on all the decisions he's made in his own tenure.

"He's been involved in everything," Kozinski said. "Everything I've done with any significance I've done with his advice."

Kozinski relied on Thomas so much partly because he doesn't like to do things unilaterally and he trusts Thomas' judgment. But he said the fact that Thomas is well liked and well respected by all the other judges in the Ninth Circuit also factored into it.

"Colleagues trust him," Kozinski said. "People have to have confidence in the leadership. The stuff the chief judge does is not glamorous. You preside over en bancs, but that's about it. The rest is hidden from view and not very glamorous.

"But people have to realize if the wrong decisions are made, there are consequences. I think judges realize that if you have a chief who's not skilled or careful, a lot of mistakes can happen. They know he and I consult. That makes them more confident and more comfortable, that both our points of view are factored in."

Well respected, well liked

When Thomas began working as a new lawyer in the late 1970s at what is now Moulton Bellingham law firm in Billings, Larry Peterson, an attorney at the firm at the time, said it was already easy to see he had a bright future. He was smart. He was articulate. He had a great sense of humor.

But beyond that, Peterson said, Thomas understood things at an uncanny level for someone of his limited experience.

"You'd be discussing a problem, a particular case, and he would intuitively know things or have comments that you don't normally see in a first-year associate," Peterson said. "For many (new lawyers), the learning curve is steep. He got it from the beginning."

Montana Supreme Court Justice Pat Cotter has been friends with Thomas and Sheehy, who is herself a former president of the State Bar of Montana, for 20 years.

"One of the first things I'd say is there couldn't be a better choice," Cotter said. "He's very well respected by his colleagues. He'll be a steady hand. But more than that, he's just a nice guy from Montana. He's personable, he's unpretentious and he's fun to be around."

According to his former law clerks, Thomas also possesses a legendary work ethic.

Anthony Johnstone, who is now a professor at the University of Montana School of Law, clerked for Thomas in the early 2000s. At that time, Johnstone said, some cases had been piling up in the federal trial courts, including a number of urgent matters. Thomas sat in on some of those lower court cases to help clear the docket.

"That was on top of maintaining a heavier-than-typical caseload for judges," Johnstone said. "He got down there, rolled up his sleeves and did work to help out the district courts. He is one of the hardest-working and most effective judges."

Johnstone and Pomper also say that Thomas was a great mentor to them and all his clerks. The extended family that Thomas cultivated has grown year by year. The former clerks — who now rank in the highest levels of academia and public service, Johnstone noted, still get together for reunions.

"No matter how much pressure we might have felt — and there are some big issues that come through the courts — no matter how much pressure we were under, he would always share with us his dry yet sharp sense of humor," Johnstone said. "It doesn't get any better than that as a young lawyer soaking it all in.

"He was the best boss I have ever had and probably ever will have."

Montana roots

Like Judge James R. Browning — who served 50 years on the Ninth Circuit, including presiding as chief judge from 1976 to 1988 — Thomas was born and raised in Montana and educated at Montana public schools all the way through law school.

Thomas said he thinks his Montana roots have helped him be successful on the bench, for many reasons. For one thing, he said, it is a diverse practice in Montana. Unlike many appeals court judges, who come to the bench having had specialized practices, he had a general practice, giving him experience in

Thomas, next page

JUDGE SIDNEY R. THOMAS

BORN: Aug. 14, 1953, in Bozeman
EDUCATION: Montana State University, B.A., 1975; University of Montana School of Law, J.D., 1978.
CAREER HIGHLIGHTS: Legal intern, Judge W. W. Lessley, Montana State District Court, 18th Judicial District; private practice, Billings, Mont., 1978-1995; adjunct instructor of law, Rocky Mountain College, Billings, 1982-1995; appointed to the Court of Appeals for the Ninth Circuit by President Bill Clinton on July 19, 1995; confirmed by the Senate on Jan. 2, 1996.
FAMILY: Married to Martha Sheehy, two sons.
INTERESTS: Hiking and skiing with his family; when in San Francisco for the court, attending Giants games.

PASSING OF THE GAVEL

The passing of the gavel ceremony for Judge Sid Thomas' term as chief judge of the Ninth Circuit will be held on Dec. 5 at 4 p.m. PST at the James R. Browning Courthouse in San Francisco.

JANUARY RECEPTION PLANNED

Also, a reception in Judge Thomas' honor in Billings is being planned for January. Look for details on the reception in the December issue of Montana Lawyer and online at montanabar.org.

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a wide breadth of law. He said he basically only had to learn two new areas of law after becoming a judge — admiralty and immigration.

Another reason being from Montana helped is that he considers it a collegial law practice here.

"It's a practice where generally people are committed to dealing with each other fairly," he said.

Thomas will be continuing a proud history of chief judges from Montana. When he takes the gavel from Judge Kozinski in a ceremony in San Francisco on Dec. 5, Thomas will be the third Montanan to be chief judge of the Ninth Circuit.

Browning, who served 50 years on the court, was chief judge from 1976 to 1988. The main Ninth Circuit Courthouse in San Francisco was named in his honor in 2005.

Walter Lyndon Pope also briefly held the chief judge position in 1959.

Johnstone said the UM law school takes considerable pride that Thomas will be the third Ninth Circuit chief judge with ties to the school, pointing out that there is a room at the school named after Pope, who was a professor there for years before joining the Circuit.

"We're batting above our weight there," Johnstone said.

Thomas said Montana is right to take pride in that history, particularly of Browning, whom he considers one of the finest judges in American history.

Challenges ahead

Thomas said that one of the biggest challenges facing

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Paul Unger, Esq.
Affinity Consulting Group,
Columbus, Ohio

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iPad for Litigators *(2 hours)* — The iPad has captured at least 80 percent of the legal market according to recent studies by the ABA and ILTA. Legal and courtroom-specific apps are the reason. In this session, learn about how you can use the iPad for note-taking, legal research, deposition preparation, case management and trial presentation. Learn how to use the TrialPad app for courtroom presentation and get a review of the latest apps and iPad technology that you can use to stay paperless as a litigator from case intake all the way to trial.

Slave or Servant – Time, Task Document & Email Management *(1.5 hours)* — Own your technology – Don't let it own you! Learn how to manage your daily tasks and how technology can help you to improve client communication and achieve your professional goals. Enhance your time management and technology skills to regain control of your law practice… and your life. Learn the pathway to a productive, more paperless law practice. Most lawyers feel they are being over-run with paper, and ironically, the more paper lawyers have, the harder it is to find what they're looking for.

Flying Safe in the Clouds! Ethical Pitfalls of Mobile, Cloud & Everyday Law Office Computing *(1 hour)* — In this session, we will discuss the ethical pitfalls of the mobile, cloud and everyday law office computing. In this session, we will learn about cloud options and address how to safely store documents, data and programs in the cloud and on mobile devices. Learn what programs and features you should & must use in cloud storage options like Dropbox, Box & OneDrive. We also will discuss security vulnerabilities related to documents, emails and e-discovery, and the potential metadata nightmare. Finally, we will discuss how to properly delete client data, assign passwords, and dispose of computer equipment while protecting client privacy.

***Paul J. Unger** is a national speaker, writer and thought-leader in the legal technology industry. He is the Chair of the ABA Legal Technology Resource Center. Mr. Unger specializes in trial presentation and litigation technology, document and case management, paperless office strategies, and legal-specific software training for law firms and legal departments.*

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Tips for making most of Fastcase benefit

By Charles Lowry

Since the State Bar of Montana is offering Fastcase access as a valuable part of your member benefits package, Fastcase has supplied these hints and tips to make your use of Fastcase as effective and efficient as possible. In the coming months, we will publish more series notes, and you'll have a little primer on the use of Fastcase. We'll start with three easy ones:

ACCESS "How or where do I find Fastcase?": You must log in not through the Fastcase page (www.fastcase.com) but through the State Bar of Montana page at www.montanabar.org. You must sign in with your State Bar of Montana username and password. If you have forgotten either your username or password, please contact the State Bar of Montana at 406-442-7660.

CONTENT "So what does my access offer me?": The access arrangement the State Bar has negotiated on your behalf includes U.S. Supreme Court cases, all the U.S. Circuit Courts of Appeal, all U.S. District and Bankruptcy Courts and the two highest court levels from each state — and your plan includes access to all the states. If you need Montana cases or federal cases, it is all part of your plan, at no additional cost. Your plan also includes several specialty courts or tribunals covered by Fastcase: Court of International Trade, U.S. Court of Claims, U.S. Tax Court, Board of Immigration Appeals, etc. For more information, visit www.fastcase.com/barmembers.

UPDATING "How soon do new cases show up in Fastcase?": Fastcase offers daily updating for every court covered in our database: Wednesday's work is in the database on Thursday, Thursday's work on Friday, Friday's work on Monday, etc. All decisions go in as slip opinions. When/if the case subsequently appears in a case reporter, the slip opinion is removed from the database and replaced by the reported version, complete with reporter citation. If the case is not subsequently covered in a reporter, the slip opinion stays in the database as an unreported (or unpublished) case, still searchable by keyword.

In future notes, I'll get into the "nuts and bolts" of Fastcase: how do I find a case, how do I run a search, how do I frame my search terms, how do I organize and sort my results, how do I print or e-mail or save a case, how do I find out what courts have said about a case, what special Fastcase features can help me make my research as good as possible, how do I get help if I want to learn more or run into a problem, can I use Fastcase if I'm outside the office? If you have suggestions for topics to cover in future notes, please offer them. We want this to be as useful as possible!

Chuck Lowry is a sales representative for Fastcase. He can be reached at clowry@fastcase.com.

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the court during his term will be dealing with tight budget constraints.

"Because of decreasing funding, the effects of sequestration, and the government shutdown, the courts have faced very serious financial difficulties over the last several years," he said. "In the Court of Appeals, we have lost over 40 positions. A number of districts have declared judicial emergencies over the past several years. Although the budgetary picture improved this year somewhat, we still face significant financial challenges in the future."

Another issue that has flared up from time to time is the potential split of the Ninth Circuit. Depending on the makeup of Congress, it could come up again.

Both Thomas, who was nominated to the Ninth Circuit by President Bill Clinton, and Kozinski, nominated by President Ronald Reagan, oppose a split.

"I expect it will continue to arise. That's been a topic since the 1940s," Thomas said. "I think it would be very unwise. Montana would not fare well."

For one thing, he said, funding is based on caseload, and Montana, being relatively small, would not be as well funded should the court split. He also cited efficiencies due to shared staff resources that other courts don't enjoy.

"There's no good way to do it," added Kozinski. "You'd have to split California in two or you're still going to have a very large circuit."

Ultimately, it is Congress' decision whether the district is split or stays intact, but Kozinski said the Circuit can influence the decision.

"What you can do in those circumstances is fight back," he said. "They hold hearings. Send people to testify. It's a matter of engaging in the legislative process."

Thomas said the increasing number of pro se filings is also something that needs to be addressed. Over half of the caseload, he said, comes from pro se cases.

"We do a good job (with pro se cases), but we have to see if we can resolve them before they get in the system," Thomas said. "We get a fair number of pro se prisoner complaints. We need to strengthen the pro se unit that processes all those cases."

Thomas also sees immigration issues as important ones that need to be resolved, and intellectual property issues will continue to increase on the Ninth Circuit's docket.

There is also a high volume of death penalty cases, Thomas said, noting that those cases are very expensive and take a large amount of judicial resources.

But he said it is the unexpected challenges, which change from year to year, that seem to consume most of the court's time.

"Over the years we've developed a pretty good management system," he said. "That's in large part to former chief Browning. His innovations have met the test of time.

"It's an enormous challenge. It astonishes me that time has passed that quickly. But I've been fortunate. We've had some outstanding chief judges. They've left the court in very good shape."

Protecting the Elderly: Should Montana provide civil cause of action for elder abuse?

By Julie Sirrs

Elder abuse has been called "the crime of the 21st century"[1] in part because of the growing number of the elderly population. But is treating elder abuse as a crime the only or the best way to deal with this problem? This article will explore that question and particularly whether Montana should provide a civil cause of action for elder abuse and exploitation.

The first section will explore Montana's current criminal statutes prohibiting the abuse and exploitation of elderly and developmentally disabled adults. The second section will then discuss the possible advantages and disadvantages of establishing a civil cause of action for such abuse and exploitation, and the third section will consider the statutes in other states that have already created civil causes of action. The conclusion will recommend whether Montana should create similar laws.

Current Montana Law

Montana's elder abuse statutes were drafted to protect more than just the elderly. Montana's protections are found within the Montana Elder and Persons with Developmental Disabilities Abuse Prevention Act ("the Act"), Sec. 52-3-801, MCA *et seq*. Under the Act, a person who abuses or neglects an older person or a person with developmental disabilities is guilty of either a misdemeanor or felony (depending on whether the action was negligent or was committed purposely/knowingly, respectively) and may be fined up to $10,000 and imprisoned for a term of up to 10 years. Sec. 52-3-825(2), MCA. A person who financially exploits an older or developmentally disabled person may be fined up to $50,000 and imprisoned for a term of up to 10 years, depending on the value of the property involved. Sec. 52-3-825(3), MCA. A person may only be convicted of exploitation if the perpetrator committed the act purposely or knowingly. *Id*.

The Act defines an "older person" as someone who is at least 60 years of age. Sec. 52-3-803(8), MCA. A "person with a developmental disability" is a person 18 years of age or older who has a developmental disability, as defined in Secs. 53-20-102 and 52-3-803(9), MCA. Under the Act, abuse includes sexual abuse as well as the infliction of physical or mental injury or the deprivation of food, shelter, clothing or services necessary to maintain the physical or mental health of an older person or a person with a developmental disability without lawful authority. Sec. 52-3-803(1), (11) MCA.

Under the Act, Sec. 52-3-803(3), exploitation focuses on a person's property interests and is defined to include any of the following:

(a) The unreasonable use of an older person or a person with a developmental disability or of a power of attorney, conservatorship, or guardianship with regard to an older person or a person with a developmental disability in order to obtain control of or divert to the advantage of another the ownership, use, benefit, or possession of or interest in the person's money, assets, or property by means of deception, duress, menace, fraud, undue influence, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the ownership, use, benefit, or possession of or interest in the person's money, assets, or property;

(b) An act taken by a person who has the trust and confidence of an older person or a person with a developmental disability to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of or interest in the person's money, assets, or property by means of deception, duress, menace, fraud, undue influence, or intimidation with the intent or result of permanently depriving the older person or person with a developmental disability of the ownership, use, benefit, or possession of or interest in the person's money, assets, or property;

(c) The unreasonable use of an older person or a person with a developmental disability or of a power of attorney, conservatorship, or guardianship with regard to an older person or a person with a developmental disability done in the course of an offer or sale of insurance or securities in order to obtain control of or to divert to the advantage of another the ownership, use, benefit, or possession of the person's money, assets, or property by means of deception, duress, menace, fraud, undue influence, or intimidation with the intent or result of permanently depriving the older person or person with developmental disability of the ownership, use, benefit, or possession of the person's money, assets, or property.

Creating a civil cause of action — pro and con

Several problems arise when remedies for abuse and exploitation are limited only to criminal prosecution. First, victims must rely on others — usually the county attorney — to take action on their behalf. Anecdotal evidence indicates that at least some county attorneys are reluctant to take action in what

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the county attorney may view as an intra-family matter. The higher burden of proof in criminal law also presents a challenge for prosecutors, especially where the victim's mental incapacity may be an issue.

While existing civil causes of action may be available for certain types of elder abuse and exploitation, those do not necessarily encompass the breadth of elder abuse and exploitation as defined above. Moreover, such alternative civil remedies do not generally allow for an award of attorney fees. This limits both the cases that are brought as well as the victim's ability to be fully compensated for the harm.

Those opposed to civil causes of action for elder abuse and exploitation in other states have focused on the perceived breadth of potentially liability, particularly regarding financial transactions or within the employment context. Critics point out that some states, (which would include Montana), require no showing that the elderly person has any diminished mental or physical capacity. So far, however, fears of frivolous suits resulting from such laws appear to be unfounded.

Other states' statutes for civil causes of action

An increasing number of states are enacting statutes that allow a civil cause of action for the abuse or exploitation of elderly and developmentally disabled adults. These include Florida, Utah, Arizona, Washington, Oregon and California. The statutory frameworks of these states range from being relatively simple to highly complex. Each will be briefly examined below.

Florida. One of the more straightforward among the laws establishing a civil cause of action for elder abuse and exploitation is Florida's law, which provides in relevant part:

> A disabled adult or elderly person who has been named as a victim in a confirmed report of abuse, neglect or exploitation … has a cause of action against any perpetrator named in the confirmed report and may recover actual and punitive damages for such abuse, neglect or exploitation. … A party who prevails in any such action may be entitled to recover reasonable attorney's fees, costs of the action and damages. *See* Fla. Stat. Ann. Sec. 415.111(3).

Utah. Utah's law is similarly straightforward, providing a private right of action for any "vulnerable adult" who suffers harm or financial loss as a result of [financial] exploitation. Utah Code Sec. 62A- 3-314(1). Utah defines a "vulnerable adult" as an elder (65 or older) adult or an adult who has a mental or physical impairment (further defined). *See* Utah Code Sec. 62A-3-301(28). Utah permits a prevailing plaintiff to recover attorney fees, though such an award is discretionary for the court. Utah Code Sec. 62A-3-314(3). A prevailing defendant may recover attorney fees only if the court finds the action was "frivolous, unreasonable, or taken in bad faith." *Id*., Sec. 62A-3-314 (4).

Oregon. Oregon allows a vulnerable person who suffers injury, damage or death by reason of physical abuse or financial abuse to bring an action against any person who has caused the physical or financial abuse or who has permitted another person to engage in physical or financial abuse. *See* Or. Rev. Stat. Ann. 124.100(2). A prevailing plaintiff is entitled to reasonable attorney fees and an amount equal to three times all economic and noneconomic damages. *Id*. Oregon defines a "vulnerable person" as an elderly (65 or older) person, a financially incapable person, an incapacitated person, or "a person with a disability who is susceptible to force, threat, duress, coercion, persuasion or physical or emotional injury because of the person's physical or mental impairment." *Id*. (1)(e).

Arizona. Arizona's statutes differentiate between financial exploitation and neglect that harms the life or health of a vulnerable adult and allows separate civil causes of action for each. For financial exploitation, a person in a position of trust and confidence to a vulnerable adult who uses a vulnerable adult's assets for their own benefit or for the benefit of their relatives:

> shall be subject to actual damages and reasonable costs and attorney fees in a civil action brought by or on behalf of a vulnerable adult and the court may award additional damages in an amount up to two times the amount of actual damages. See Ariz. Rev. Stat. Ann. Sec. 46-456(A), (B).

Arizona law defines a "position of trust and confidence" to mean that a person is any of the following:

> A person has assumed a duty to provide care to the vulnerable adult.
>
> A joint tenant or a tenant in common with a vulnerable adult.
>
> A person who is in a fiduciary relationship with a vulnerable adult including a de facto guardian or de facto conservator.
>
> A person who is in a confidential relationship with a vulnerable adult.
>
> A beneficiary of the vulnerable adult in a governing instrument.
>
> *See* Ariz. Rev. Stat. Ann. Sec. 46-456(J)(5).

Certain exceptions apply to relieve a person in a position of trust and confidence from potential liability. These include prior court approval of the transaction or the transaction being specifically authorized in a valid durable power of attorney or a valid trust instrument. *See* Ariz. Rev. Stat. Ann. Sec. 46-456(A)(1), (2). The power of attorney or trust must also have been executed by the vulnerable adult. *Id*. Another exception is that the transaction is required in order to obtain or maintain eligibility for certain needs-based services. *Id*., (3). Finally, there is an exception if the person is the vulnerable adult's spouse and the transaction "furthers the interest of the marital community" including applying for various means-tested benefits. *Id*., (4).

Washington. Washington's law focuses its civil action in part on "vulnerable adults" who were subjected to abuse or

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financial exploitation while residing in a facility. *See* Wash. Rev. Code Sec. 74.34.200(1). If the vulnerable adult resides at home, a civil cause of action is available only if the vulnerable adult was subjected to abuse or exploitation from either an individual or business provider of home health care services. *Id.* In other words, Washington's law does not appear to extend to victims of elder abuse or exploitation where the perpetrator did not also provide some sort of health care service.

California. California's law is the most complex. California differentiates between physical abuse and financial exploitation primarily in terms of the burden of proof. For example, if physical abuse is proven "by clear and convincing evidence," the court must award reasonable attorney's fees and costs, and certain damages limitations do not apply. *See* Cal. Welf. & Inst. Code Section 15657. "Financial abuse," however, need only be proven by "a preponderance of the evidence" before a court must award reasonable attorney fees and costs. *Id*., Sec. 15657.5(a).

Before certain damages limitations that apply to other types of civil actions may be removed, a plaintiff must show by "clear and convincing evidence" that the "defendant has been guilty of recklessness, oppression, fraud or malice in the commission of the abuse." *Id*., Sec. 15657.5(b). California's statutory framework also extensively details additional civil remedies available to victims of elder abuse or financial exploitation including issuing an attachment (Sec. 15657.01), protective orders for injunctive relief or to exclude a party from a residence (Section 15657.03(a), (b)), allowing a "support person" to accompany a party in court (Sec. 15657.03(j)), and a separate statute specific to remedies where the cause of action is abduction (Sec. 15657.05).

Recommendations

Montana's current criminal statutes adequately identify the situations where the abuse or exploitation of elderly or developmentally disabled adults generally occurs. Establishing a civil cause of action for such abuse or exploitation could thus be relatively simple. Using the statutes of other states as models, a Montana statute could read something like this:

> An older or developmentally disabled person who suffers harm or financial loss because of abuse or exploitation as defined under this Act, shall have a private cause of action against the perpetrator.
>
> If the plaintiff prevails in an action brought under this section, the court shall order the defendant to pay the costs and reasonable attorney fees of the plaintiff.

Drafters of such a law may also want to consider granting a court discretion to award reasonable attorney fees to a prevailing defendant upon a finding that the action was frivolous, unreasonable, or initiated in bad faith. This could help to address

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when women were in saloons. And, in 1916, Montanans voted for statewide Prohibition and it passed by 58 percent[5]. Only three counties didn't vote for it: Deer Lodge, Lewis and Clark, and Silver Bow. At the time, Butte had three breweries and 250 saloons.

Regardless of the legislative Prohibition against alcohol, Montanans continued to drink. During Prohibition, Butte women were particularly active in keeping the liquor flowing. In fact, 134 Butte women were prosecuted for liquor violations between 1920 and 1934. And, not much else changed in Butte. There were at least 156 of the 250 saloons that were still serving liquor, barely disguised as soft drink parlors. Butte was apparently known as a "wide open town" — you could buy a drink, place a bet or visit a prostitute without being arrested.

Butte wasn't the only Montana area to take up moonshine as big business. Up north on the Hi-Line, there was many a bootleg trail running down from Canada — not only bootleg liquor, but also whiskey, beer, aliens, prostitutes, rustled cattle and silk stockings. Evidently, the anti-liquor laws[6] in the U.S. brought an economic surge to the also drought-stricken Canadian provinces. Though "dry," the Canadian provinces modified their laws to allow production and export of liquor and beer. Smuggling skills, which had been perfected over half a century moving U.S. alcohol north to Canada, now easily reversed the flow from north to south. Provincial police and Royal Canadian Mounties' vigilance extended only to sales made north of the border, and the bootleg trails were in heavy use, including routes near Chinook, Higham, Shelby and Big Sandy.

Some of Montana's more famous moonshine makers of the time include Bertie (Birdie) Brown, an African-American woman from Missouri who homesteaded in eastern Fergus County. Living alone with her black cat, she made home brew that locals described as the "best in the country."[7] It's said that you can still catch glimpses of a black cat in the cabin in Fergus County[8].

Ending of Prohibition

The movement to repeal Prohibition was driven by many of the same women who pushed for Prohibition in the first place. In the 13 years of the "failed experiment," the public considered that the law enforcement, or lack thereof, was leading to moral anarchy and a vacuum of rules. Not only was there a general belief that laws didn't matter, but the economic realities continued to hurt the country as violence increased and tax revenue was non-existent. This was partially due to the increased and ongoing crime relating to illegal alcohol, culminating in such events as the Valentine's Day massacre and the mob activities in Chicago, and partially because of the great loss of tax base for the federal and state governments[9].

On Dec. 5, 1933, ratification of the 21st Amendment repealed the 18th Amendment. The 18th Amendment remains the only constitutional amendment to be repealed.

What did the repeal do? It gave the states the right to control and regulate the sale and distribution of alcohol within their own borders. Specifically, the 21st Amendment states in part:

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Thus, the end of Prohibition put the regulation of alcohol to the individual states. This has created an interesting system of alcohol regulation, and a variety of legal challenges between the commerce clause and state's rights to regulate alcohol[10].

The federal government regulates production of distilled spirits, as well as a major excise tax on liquor. The excise tax and regulatory oversight occurs within the Treasury Department in the TTB[11]. (Alcohol and Tobacco Tax and Trade Bureau of the U.S. Department of Treasury[12].) Each of the states enacted a regulatory structure, including certain states with county or municipal regulations. A classic example of those state and local regulations is Moore County, Tennessee, which is a dry county, where Jack Daniels Whiskey is made, but not available for sale or consumption[13]. In Tennessee, all counties are "dry" by Tennessee statute, unless a county enacts a local ordinance to be a wet county. Moore County has not yet done so[14].

Montana and Post-Prohibition Legal Structure

Montana was the 38th state to ratify the 21st Amendment on Aug. 6, 1934. Ellen Baumler at the Montana Historical Society has a great tale about Montana's transition from the Prohibition era.

Eight months before the official end of Prohibition, patrons at Walkers Bar in Butte raised glasses of beer in celebration. A sign read, "The only place in the United States that served Draught Beer over the bar April 8, 1933." President Franklin

Prohibition, next page

5 Mary Murphy, History Professor at MSU Bozeman. Montana Legacy: Essays.

6 From Beverly Badhorse, the Chinook Opinion 1996.

7 http://montanawomenshistory.org/montanas-whiskey-women-female-bootleggers-during-prohibition/._This is a great blog with a variety of interesting tales on Montana women making moonshine.

8 http://ellenbaumler.blogspot.com/2013/10/birdie-brown.html

9 For a quick history on federal taxation, see http://www.ttb.gov/about/history.shtml

10 See ***Granholm v. Heald***, 544 U.S. 460 (2005), prohibiting disparate treatment of in-state and out of state wineries, including shipping.

11 On November 26, 2002 President Bush signed into law the Homeland Security Act of 2002. One provision of this Act divided the Bureau of Alcohol, Tobacco and Firearms into two new agencies, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), which has moved to the Department of Justice, and the Alcohol and Tobacco Tax and Trade Bureau (TTB), which remains in the Department of the Treasury. TTB enforces the Federal laws related to the production and taxation of alcohol and tobacco products. TTB will also continue to collect all excise tax on the manufacture of firearms and ammunition. See http://www.ttb.gov/about/history.shtml

12 http://www.ttb.gov/

13 "[T]here are two ways, and two ways only, in which an ordinary private citizen, acting under her own steam and under color of no law, can violate the United States Constitution. One is to enslave somebody…The other is to bring a bottle of beer, wine, or bourbon into a state in violation of its beverage control laws." Laurence H. Tribe, How to Violate the Constitution without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment. 12 CONST. COMMENT 217, 220. (1995.)

14 http://www.themoorecountynews.com/?page_id=589

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Roosevelt gave the repeal of Prohibition top priority because traffic in illegal liquor fostered so much criminal activity. Roosevelt knew its repeal would take time. So when he took office in 1933, he signed the Cullen-Harrison Act legalizing beverages with an alcohol content of 3.2 percent. Twenty states, including Montana, legalized 3.2 beer. The law took effect on April 7, and within 24 hours, the nation consumed 1.5 million barrels of beer. Montana enjoyed its 3.2 beer until the 21st Amendment repealing Prohibition took effect eight months later on Dec. 5

Although Montana was one of 20 states legalizing 3.2 beer, except for Walkers in Butte, beer didn't magically appear in local Montana bars. While state beer licenses brought in $73,000 in the first two days, legal beer only trickled into the state. The first shipment of 3.2 Pabst left Milwaukee on April 7, the very same day it became legal. A new refrigerated warehouse at the Northern Pacific Railway yards in Helena waited to store it for distribution. But it was five days before Helena got its first taste of legal beer. With 1.5 million barrels of beer consumed nationwide in the first 24 hours after the signing of the Cullen-Harrison Act, Walkers could not have been the country's only outlet. The question is: how did Walkers get its first legal 3.2 beer at a moment's notice?[15]

Montana set up its current system based on the Alberta, Canada, model for alcohol regulation and is considered a "control state." Currently, 19 jurisdictions are considered "control states" — i.e, the state controls the access and method of sales of liquor.

Montana's Alcohol and Beverage Control is primarily found in Title 16 of Montana Code Annotated. Under Montana's complex regulatory system, each type of alcohol has separate licensing and rules. Montana currently has a three-tiered system. Brewer/distiller (production) sells to the wholesaler/distributor who sells to the retailer (and ultimately to customer). The system has extensive regulatory requirements and limitations for each of the tiers[16].

In Montana, all spirits must go through the state liquor warehouse before going to a bar, tavern or consumer (unless sold out of a tasting room at a production facility.) Sales of beer and wine are also heavily regulated by the state, with slightly more relaxed distribution processes.

Liquor excise taxes and fees are a substantial funding source for the state of Montana. In 2013, alcohol control generated a total of $35.3 million, with the liquor control division contributing $28.7 million to the State General Fund. Another $6.1 million went to the Special Revenue Fund which DPHHS uses to help fund treatment, rehabilitation programs, prevent alcohol and chemical dependency programs. The state liquor control system is self-sufficient and provides those funds to the state[17].

In 2013, Montana had 42 licensed domestic breweries, 18 licensed domestic wineries, and 13 licensed domestic distilleries. Where do the bars and restaurants come in? Montana has had a "quota system" for establishments that sell liquor to the public. The quota system was based on the census taken under the direction of Congress and limits the number of licenses available in a certain location. The quota system all-beverage licenses work in conjunction with the ability to have gaming/gambling[18].

For more information on Montana's current regulatory system, the Montana Department of Revenue has extensive information available on its website at revenue.mt.gov. They also publish an annual report entitled Liquor Enterprise Fund Report of Operations[19]. As there has been significant economic change with the creation of Montana's breweries, wineries and distilleries, you can be sure that the upcoming Montana legislative session will bring changes to Montana's alcohol regulations.

Karen Powell is the chairwoman of the Montana Tax Appeal Board. This article is based on a CLE presentation she gave to the First Judicial District and is designed to give you just enough constitutional history to make you popular at your next cocktail party.

15 See more at: http://ellenbaumler.blogspot.com/2012/04/legal-beer.html#sthash.gUvhjQ4C.dpuf

16 For more information on Montana licensing and enforcement, see www.revenue.mt.gov and Title 16, Montana Code Annotated.

17 For general information, see http://revenue.mt.gov/home/liquor.aspx. For specific information in the liquor enterprise fund report of operations, including the 2013 data, see http://revenue.mt.gov/LinkClick.aspx?fileticket=bMRoKZ4BMCs%3d&portalid=9

18 https://dojmt.gov/gaming/

19 Available at http://revenue.mt.gov/home/liquor/resources.aspx#horizontalTab3

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the concerns of those who might otherwise be opposed to allowing an additional civil cause of action. On the other hand, allowing an award of fees to a defendant could have a chilling effect on the willingness of victims of abuse and exploitation to bring suit.

The author would welcome hearing from others regarding this issue.

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Endnotes

i See,e.g., www.ncoa.org/enhance-economic-security/economic-security-Initiative/savvy-saving-seniors/top-10-scams-targeting.html.

ii See, e.g., Heather Bussing, Financial Elder Abuse Laws – Paving the Road to Hell, HR Examiner, January 12, 2011, www.hrexaminer.com/financial-elder-abuse-laws-paving-the-road-to-hell/.

iii Id.

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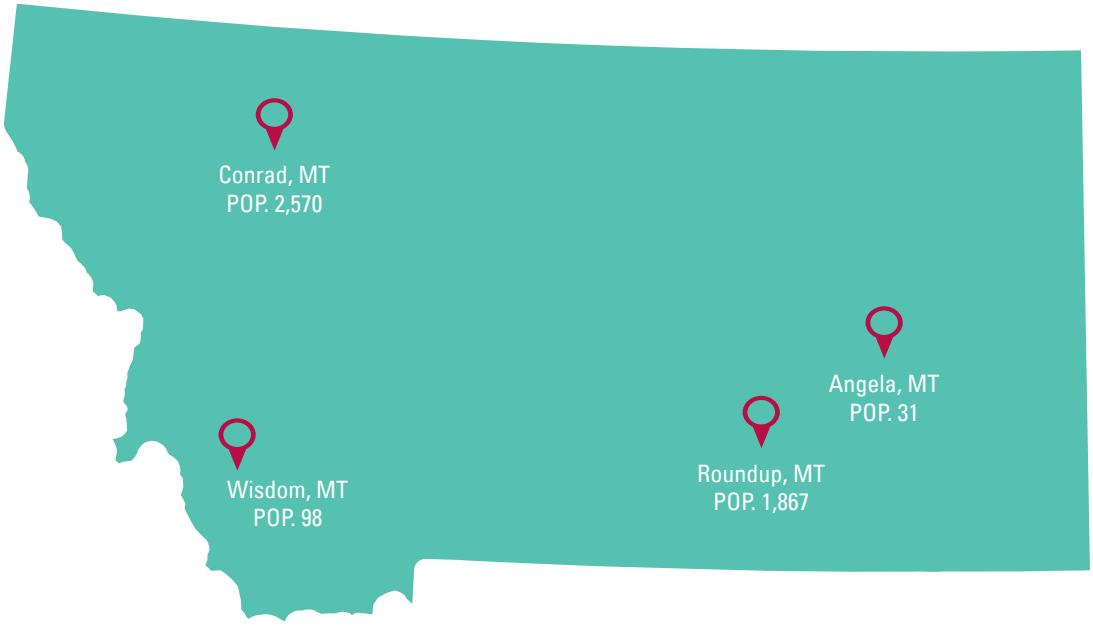

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What the Best Evidence Rule is — and what it isn't

By Cynthia Ford

Two witnesses are sitting at a bar: Larry Liar, just released from prison on his fifth perjury conviction, and the Dalai Lama. Just 10 feet away from them, they see another patron, Abe Accused, stagger up to the bartender, who is wiping a table. A scuffle ensues; a shot rings out; the bartender falls over dead.

At the wrongful death trial against Accused, you represent the defendant. The plaintiff elects to call only Larry Liar, rather than the Dalai Lama. (The Dalai Lama is available, in Montana to bless the Garden of One Thousand Buddhas, in Arlee).

Larry Liar was also deposed, and has a slightly different recollection of the events. He is back in the Montana State Prison, but the plaintiff was able to arrange his transport for the day and he is eager for the excursion.

Is this the "best evidence" available to the plaintiff? No! Is it the basis for a valid "Best Evidence Rule" objection? Also no. Of course you should always introduce the best evidence you have of the facts you are trying to prove. "Put your best foot forward," as your mother used to say. That is a rule of life, and a no-brainer.

However, it is NOT the Best Evidence Rule.

The Best Evidence Rule is much more limited. Although it is often over-cited, in fact it only applies in a very few situations. In those situations, it is easy to meet. So, the big lesson of this month's column is "Don't be ascared of the Best Evidence Rule." Conversely, the other lesson is "Don't make stupid Best Evidence Rule objections."

Montana, federal Best Evidence Rule similar

The Montana and Federal Rules of Evidence both contain Article X, each entitled "Contents of Writings, Recordings and Photographs." In both systems, the Best Evidence Rule ("BER") is stated in Rule 1002, which basically provides that an original is necessary to prove the contents of a writing, recording or photograph:

> [Montana] **Rule 1002. Requirement of original.** To prove the content of a writing, recording, or photograph, the original writing, recording or photograph is required, except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state.
>
> [Federal] **Rule 1002. Requirement of the Original** An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.[1]

The Montana Evidence Commission Comment to M.R.E. 1002 states:

> This rule is identical to Federal and Uniform Rules (1974) Rule 1002 except the exception clause found in those rules is deleted and an exceptions clause previously used in the Rules is substituted. It states the common-law rulee that to prove the contents of a writing, the original of that writing is required, unless otherwise provided. The exceptions to this rule of major concern are those found in the rules that follow. Rules 1003 through 1007.

The policy behind the Best Evidence Rule is to prevent unnecessary inaccuracy stemming from the fallibility of human memory or transcription

Remember Tiny Tim's father, Bob Cratchit, in Charles Dickens' "A Christmas Carol"? Cratchit worked for Ebenezer Scrooge as a scrivener, required to hunch over documents and hand-copy them, word for word. Of course, because he was cold, tired, hungry, and over-worked, it was inevitable that Cratchit's copies could carry mistakes, maybe even in critical terms. The common law Best Evidence Rule's requirement of the original to prove the contents of a document was meant to prevent such mistakes, in cases where the contents legally mattered. Lots of old Montana cases discuss the admissibility of handwritten copies of documents at issue in those cases, requiring the original of the document.

Because today we have so many ways to exactly replicate a writing, recording or photograph without the opportunity for human error (photocopying etc.), the "Cratchit" rationale for the rule has eroded. However, technology has not been able to improve the human memory, which was the other reason for requiring the document at issue, and the original thereof. My law students are perhaps the best example: at the beginning of each semester, I issue and post a syllabus for the course, which

1 The federal rule was amended as part of the restyling of the FRE in 2011, "to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility."

includes detailed information about various assignments and how they will be graded and weighted for the final letter grade. Eight weeks[2] into the semester, I usually am peppered with questions in class about how much the midterm will count, etc. I might think I remember whether the midterm/final exam split is 40/60 or 30/70, but the only good way to see what the class terms are is to consult the written document. The BER would require an original of the syllabus to answer the question "what does the syllabus say?"

The Montana Commission explained the purpose for the BER in its comment to Rule 1002:

> (T)he purposes of the rule requiring the production of the original should be kept in mind: first, the legal significance of particular words in a document requires the use of the original so that legal rights under those documents are not misinterpreted; second, use of the original prevents, to some degree, fraudulent use of copies; third, mechanical or human errors made in the process of copying are apt to be ignored when copies or other secondary evidence of the original is used; and finally, the use of the original allows a complete view of all that is contained in that document. McCormick, Handbook on the Law of Evidence, 561 (2d ed. 1972).

The modern version of the BER still requires an original to prove contents, but has expanded the definition of an original to allow introduction of those replications which are guaranteed to be accurate. Furthermore, it provides liberal exceptions allowing secondary evidence for cases where no original is available, so long as the proponent satisfies the court that there is a good reason for non-production.

The BER does not apply to most uses of writings, recordings, or photographs; it is implicated ONLY when you are attempting to prove the contents of the writing, recording, or photograph

The Best Evidence Rule requires the original only to prove the contents of a writing, photograph, or recording. Thus, whether the BER applies depends on the reason the writing, photograph or recording is being offered. In the vast majority of cases, the writing/photograph/recording is being offered to prove a fact, which does not implicate the BER. As the Advisory Committee noted in its comments to FRE 1002, there are only a few types of cases in which the content of the writing/photograph/recording is directly at issue, and should be proven by introduction of the original:

> On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g. automatic photograph of bank robber. See *People v. Doggett*, 83 Cal.App.2d 405, 188 P.2d 792 (1948) photograph of defendants engaged in indecent act; Mouser and Philbin, Photographic Evidence — Is There a Recognized Basis for Admissibility? 8 Hastings L.J. 310 (1957). The most commonly encountered of this latter group is of course, the X-ray, with substantial authority calling for production of the original.

The Advisory Committee Note to FRE 1002 indicates that most trial uses do NOT implicate the BER:

> **Application of the rule requires a resolution of the question whether contents are sought to be proved**. Thus **an event may be proved by nondocumentary evidence, even though a written record of it was made**. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. McCormick § 198; 4 Wigmore § 1245. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter. The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, **the rule will seldom apply to ordinary photographs**. In most instances a party *wishes* to introduce the item and the question raised is the propriety of receiving it in evidence… The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable.

Advisory Committee Note to FRE 1002. (emphasis added)

The Montana Evidence Commission agreed in its own comments to both MRE 1001 and 1002:

> (T)he rule requiring the production of the original applies to photographs in only a few special cases and not in the usual instance where the witness incorporates a photograph as part of his testimony by identifying it as a correct and accurate representation of what it depicts. Advisory Committee's Note to Federal Rule 1002, supra at 56 F.R.D. at 342. Examples of when a photograph is to be included within this rule are: "copyright, defamation, and invasion of privacy by photograph or motion picture ... Similarly as to situations in which the picture is offered as having independent probative value, e.g., automatic photograph of bank robber." Id. This definition is also new to and

2 This is the week in which "it's a long way to exams" morphs into "OMG! I am not ready to take an exam! Help!"

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an expansion of existing Montana law.

Comment to M.R.E. 1001.

> The Commission intends Rule 1002 to clarify these [former confusing common law] cases…; that is, the **mere existence of a written record does not mean that it is the only source of evidence to prove the existence of facts or occurrence of events, but when the facts or events are sought to be proved by a writing, unless an exception applies, the original of that writing is required.**
>
> Finally, as noted in the Commission Comments to Rule 1001(2), defining photographs, the **Commission intends Rule 1002 to apply to photographs in only a few special instances. The Commission does not intend to change the longstanding rule in Montana allowing photographs to be made part of the witness' testimony or illustrative of his testimony to assist the jury in their determinations.** *Stokes v. Long, 52 Mont. 470, 485, 159 P 28 (1916); Fulton v. Chouteau County Farmers' Bank Co., 98 Mont. 48,* 60, 37 P2d 1025 (1934). Under this case law rule, the trial court has the discretion to admit photographs.

Comment to M.R.E. 1002. (Emphasis added)

Therefore, the best response to an objection based on the Best Evidence Rule is: "Rule 1002 does not apply, Your Honor. We are not proving the content of the [writing/recording/photograph]. The fact we are trying to prove is …., and this [writing/recording/photograph] is simply a method of proving that fact."

This is exactly what happened in *Watkins v. Williams,* 265 Mont. 306, 877 P.2d 19 (1994), a contractual dispute between the owners of several racehorses and a horse trainer. The trainer sued for the balance of the money the owner allegedly owed him under their oral agreement. The trainer took the stand and testified at trial, saying that he charged $18 per day for each horse he trained:

> [W]hile testifying, Watkins allegedly read from a document which was excluded from evidence. The document was a summary of contents contained in a wall calendar kept by horse trainers in Sallisaw. Watkins presented it to the court for admission into evidence and the Williamses **objected, stating that the summary was not the best evidence of Watkins' training services**. After voir dire of Watkins, the Williamses also alleged that the document should be excluded as self-serving.[3] The court sustained the Williamses' objection.
>
> Watkins thereafter testified about the amount of training services he rendered. He specifically stated that he charged $18 per day per horse trained. … The total bill for his services for the year was $37,888. … Disputing the figure, the Williamses argue that the court erred by allowing Watkins to testify while reading from the calendar summary. They allege that the testimony is improper according to Rules 1002 and 1006, M.R.Evid.
>
> Watkins responds by asserting that the best evidence rule does not exclude oral testimony and that the court correctly permitted him to testify about the damages he suffered.

877 P.2d at 22. The Supreme Court agreed that the BER did not apply:

> **The best evidence rule** pertains to evidentiary documents only when the terms of the writing are material. *State v. Cronin* (1978), 179 Mont. 481, 587 P.2d 395. It **comes into play only when the terms of a writing are being established** and an attempt is being made to offer secondary evidence to prove the contents of the original document. See *Application of Angus* (1982), 60 Or.App. 546, 655 P.2d 208, cert. denied (1983), 464 U.S. 830, 104 S.Ct. 107, 78 L.Ed.2d 109.
>
> Secondary evidence may include a copy of an original or testimony in regards to the contents of the original. See 32A C.J.S.2d *Evidence,* § 775. The secondary evidence is admissible over a best evidence objection if one of the requirements set forth at Rule 1004, M.R.Evid., has been met and proper foundation is laid.
>
> Witness testimony adduced from personal experience or knowledge is not within the ambit of secondary evidence; **witnesses may freely testify about events which have occurred independently from and may have been memorialized by an antecedent writing**. See, e.g., *Roods v. Roods* (Utah 1982), 645 P.2d 640; see also *D'Angelo v. United States* (1978), 456 F.Supp. 127; Cf. Rule 602, M.R.Evid. **The best evidence rule remains inapplicable when a witness testifies about personal knowledge of a matter, regardless whether the same information may be contained in an inadmissible writing**. Moreover, our rules of evidence permit witnesses to use writings to refresh their memory while testifying. Rule 612, M.R.Evid.
>
> After reviewing the record, we conclude that Watkins testified from personal knowledge and experience and that his concurrent use of the summary of contents from the wall calendar was not reversible error. The summary's contents, as stated by Watkins during oral testimony, merely

3 I can't keep myself from commenting on this second ground: DUH! Of course a party's documents are "self-serving" — presumably that is why they are being offered — but that is NOT a valid objection based on any rule of evidence.

> set forth the number of days he trained the horses and the resulting charges which were incurred by the Williamses.

Watkins v. Williams, 265 Mont. 306, 312, 877 P.2d 19, 22-23 (1994). (Emphasis added)

The Court affirmed the jury's verdict and judgment thereon for the plaintiff trainer.

It is easy to comply with the BER, in the few circumstances when it does apply, by introducing the original

Both versions, state and federal, of the BER, provide an easy route to compliance: when the BER applies, because a party is trying to prove the contents: simply introduce the original of the writing, recording or photograph. M.R.E. 1001(3) defines "original:"

> (3) Original. An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

To show the Court (and your opponent) that you have met the BER by producing an original, just ask your foundation witness an additional question:

Q. I am handing you plaintiff's proposed Exhibit 1. Do you recognize Exhibit 1?

A. Yes, I do.

Q. How do you recognize Exhibit 1[4]?

A. I remember reading it at the bank, and then signing it.

Q. What is Exhibit 1?

A. It is the promissory note I signed when I got the money for the loan.

Q. Is Exhibit 1 the original of the note?

A. Yes, it is.

Q. How do you know that Exhibit 1 is the original?

A. I signed it in my special turquoise ink, and my signature appears in that ink on Exhibit 1.

This straightforward set of foundation questions should get you past both the authentication requirements of Article IX and the Best Evidence Rule of Article X. (If you are proving the contents of a photograph or recording, rather than a writing, you will have to add some additional questions of your foundation witness to establish that you have an exact print or printout, made electronically, so that you comply with the definition of "original," discussed below).

The definition of 'original' is broad

MRE 1001(3) defines "original" broadly:

> Original. An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

The Montana Commission Comment to Rule 1001 states:

> Existing Montana law has never precisely defined "original". However, in Bond v. Hurd, 31 Mont. 314, 318, 78 P 579 (1904), the court stated the common-law rule of what is an original of a telegram, which is dependent upon whether the telegraph company is the agent of the sender or the receiver. Montana law has also recognized the "duplicate original rule", superseded by this definition, in Morris v. Langhausen, 155 Mont. 362, 365, 472 P2d 860 (1970), which admitted an executed carbon copy of a retail installment sales contract. Therefore, this definition is consistent with existing Montana law as well as expanding the definition into new areas of photographs and computer printouts.

The "I signed in blue ink" testimony would certainly meet the definition of original, and thus comply with Rule 1002.

There can be more than one original. If you and I each signed two "copies" of the same contract, so that I signed both in blue ink, so did you, and we each kept a blue- ink-signed document, both of them are originals and admissible under the BER. Similarly, in a will contest, each party could have an "original" will — each document signed in blue ink, by the testator, maybe even with the same date, with different provisions. Both are "original" per Rule 1001, and admissible under Rule 1002. The factfinder will have to decide which of the two is legally operable, but they should both be admitted over any "Best Evidence" objection.

If you can't produce the original, you may still be able to meet the BER.

Both the state and federal versions of Rule 1002 require the original, but specifically state "except as provided…" The rest of Article X lays out several exceptions, carving routes for admission of other, non-original, evidence of the contents of a writing/recording/photograph.

DUPLICATES

The first is Rule 1003, which allows duplicates in most cases:

> **Rule 1003. Admissibility of duplicates, copies of certain entries.** A duplicate, or copy of an entry in the regular course of business as defined in Rule 1001(5)[5], is admissible to the same extent as an

EVIDENCE, next page

4 Notice that in each question about any exhibit, counsel should use the formal designation (letter or number) of the exhibit, to preserve the record on appeal. "I am handing you this" and "How do you know what it is?" may be obvious to the observers in the trial courtroom, but are prone to murkiness to later readers in Helena.

5 This clause appears in the state rule only, making it more liberal than the federal Best Evidence Rule.

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> original unless:
> a genuine question is raised as to the authenticity of the original; or
> (2) in the circumstances it would be unfair to admit the duplicate or copy of an entry in the regular course of business in lieu of the original; or otherwise provided by statute.

Rule 1001(4) and (5) define "duplicate" and "copy of an entry in the regular course of business":

> Duplicate. A duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.
> Copies of entries in the regular course of business. A copy of an entry in the regular course of business consists of an entry in a writing kept in the regular course of business copied from another such writing by manual or mechanical means at or near the time of the transaction.

Carbon paper—some of you remember that, I hope? — and "Xerox" copies clearly are duplicates, and thus usually admissible under Rule 1003. Here, the rationale is that some process has created a certainly accurate version of the original, so there is no danger of misapprehension of the contents of the original. Bob Cratchit is not a factor for duplicates, and we are still getting a physical representation of the contents, so human memory is not a problem either.

Thus, if you have a duplicate of the writing/recording/photograph whose contents you seek to prove, you can simply respond to "OBJECTION! BER" with: "Your Honor, we are offering a duplicate, per Rule 1003" and, if necessary, use your foundation witness to establish that the exhibit IS a duplicate.

BUSINESS HAND-COPIES??

In Montana, different from the federal rule, Bob Cratchit's work explicitly is allowed into evidence in lieu of an original, on the same footing as a duplicate. The Commission Comment to Rule 1001 explains why Montana chose to allow hand-made "copies" as well as duplicates:

> (5) **Copies.** This definition is based on Section 93-1101-18, R.C.M. 1947 [superseded], which provides: "When an entry is repeated in the regular course of business, one being copied from another or (sic) at or near the time of the transaction, all the entries are equally regarded as originals". It is included here so that it may be made admissible under Rule 1003. The Commission feels that this type of evidence is not admissible under any of the other definitions in Federal Rule 1001. The entry cannot be considered an original because the person making the entry has no such intent, but is carrying on a normal business function of collecting information to be stored in a single record. The entry cannot be considered a duplicate because as previously indicated, duplicates are defined to include only mechanical means of duplication and not manual means. Therefore, this definition is intended to continue existing Montana law contained in the statute.

The cases to which the Commission referred in the full version of the comment both involved "ledgers" made in businesses in the early 1900s.

There is only one Montana Supreme Court decision which touches on the "copies of entries in the regular course of business" language after the Rule was adopted, but it confuses rather than clarifies the matter. Albeit in dicta (after reversing summary judgment for an insurer based on a release executed by the plaintiff),[6] the Court tried to alert the trial court and/or the parties that the BER should be an issue at trial:

> There are other issues raised in this case which require a comment. The admissibility of the release in this case is in issue. On discovery, Farmer's produced what appears to be a photocopy of a carbon copy of the original of the release. The original of the release was not produced by the insurer.
> Under Rules 1001, 1002, 1003 of the Montana Rules of Evidence, a copy of a writing kept in the regular course of business copied from another writing is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original, or if under the circumstances it would be unfair to admit the duplicate or copy in the regular course of business in lieu of the original, or if a specific statute otherwise requires admissibility. We determine that whether the original of an instrument is authentic is a different question from whether an authentic original instrument was entered into by fraud or mistake. Unless, therefore, in this case Buskirk disputes the authenticity of the original, a true copy would be admissible. The original, of course, is the best evidence of the instrument, if it is available.
> *Buskirk v. Nelson,* 237 Mont. 455, 460-461, 774 P.2d 398 (1989).

With due respect, Montana evidence law might have been better off without this gratuitous comment. Although I have not seen the release produced by the insurance company, the Court described it as "a photocopy of a carbon copy of the original of the [1983] release." The plaintiffs apparently signed in (blue?) ink, and the carbon paper immediately below the top sheet was a "counterpart intended to have the same effect

6 The Court found that there were disputed issues of material fact, which the trial judge had ruled on in the course of deciding the summary judgment motion, and remanded the case for trial.

by a person executing or issuing it." Carbon paper is expressly mentioned in the Comments as being a form of original. Thus, the carbon copy was also an original of the release, and should be admitted. The document which was produced was "a photocopy" of the carbon original, and thus was a "duplicate" per MRE 1001(4): "a counterpart produced by … means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original." The *Buskirk* release should have been admitted as a duplicate per 1003 and 1001(4), just as it would have been in federal court.

This case does not shed any light whatsoever on the puzzling "copy in the regular course of business" license issued to Bob Cratchit's work by the MRE. In my view, given the inherent possibility of error in hand-made copies and given further the advances in technology whereby even Tiny Tim could "snap to pdf" on his phone any document anywhere anytime, Montana should remove these provisions from the Best Evidence Rule.

LOST/DESTROYED/OPPONENT HAS

Rule 1004 forgives the non-production of the original AND allows ANY evidence of the contents of the writing/recording/photograph if the proponent has a good reason for not having the original to offer:

> **Rule 1004. Admissibility of other evidence of contents.** The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:
> Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
> Original not obtainable. No original can be obtained by any available judicial process or procedure; or
> Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
> Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

This boils down to "Rule 1002 does not apply" if you have tried but simply cannot, for reasons outside your control, find an original. However, you have to put on some modicum of proof of the destruction or your attempts to find the document which lead you to believe it has been lost; the court should not simply accept the assurance of counsel. It is up to you to produce an original, a duplicate, or evidence as to why you cannot which meets the conditions of Rule 1004.

In *U.S.F. &G. v. Cromwell*, 237 Mont. 72, 771 P.2d 970 (1989), a bond company paid on its performance bond for a farm lease, and then sought indemnification from one of the farmers. The trial judge, sitting without a jury, found against the bond company, holding that it had never proven there was an indemnification agreement. The Supreme Court affirmed:

> Best Evidence
>
> At trial USF & G failed to introduce the original bond or the original rider. Instead, Williams, as custodian of the records for USF & G, introduced a sample form of the bond and the rider with the appropriate information typed in to show the court what obligations the bond purported to impose. Williams testified that the originals were likely in the hands of the lessors. However, USF & G offered no certainty as to where the originals were and no reason as to why they were not produced. That is not acceptable under the Rules of Evidence.
> Rule 1004, M.R.Evid., states that the original writing is not required if it is
> [1] lost or destroyed;
> [2] not obtainable by judicial process;
> [3] in the hands of the opponent; or
> [4] if it relates only to a collateral matter.
> The District Court was not allowed to make a finding under this rule as to whether the original was necessary because the plaintiff offered no reason for its absence.
> Rule 1007, M.R.Evid., states that no accounting for the nonproduction of the original will be required if the contents of the writing (1) may be proved by testimony or (2) by written admissions of the party against whom it is offered. However, this rule is inapplicable to these facts because USF & G tried both approaches and failed.
> During discovery USF & G requested Cromwell to admit the authenticity of a copy of the bond. Cromwell declined, stating that he had no actual knowledge that a bond had been issued and did not recall ever signing a bond. During trial Cromwell testified that while he believed a bond may have been issued, he did not know if he was the named principal and had no recall of signing a bond charging him with its obligations. Cromwell stated that he only signed an application filled out by an insurance agent in order to fulfill his obligations under the farm lease.
> When Cromwell declined to admit to the authenticity of a copy of the bond during discovery, it became incumbent upon USF & G at trial to come forth and produce the bond, or put in evidence the reason why the original bond was not produced and why secondary evidence should be allowed to prove that the contract existed, Rule 1004, M.R.Evid. **Those failures by USF & G were**

EVIDENCE, next page

Evidence, from previous page

fatal to its case.

237 Mont. at 75-76. (Emphasis supplied)

More recently, a husband in a divorce tried to use a purported prenuptial agreement to constrain the district judge in division of the marital assets. The husband testified that he remembered going to his lawyer's office with his fiancée two days before their wedding; he remembered paying his lawyer to draft a prenup; and he remembered both himself and his fiancée signing the agreement. He also testified that he looked for, but never found, the signed agreement. He did not put on any evidence from the lawyer to corroborate either the preparation or signing of the document, or from any notary who should have notarized such a document. The wife, on the other hand, testified that she had never signed any such document. The trial judge apparently concluded that in fact no such document had ever been signed by both parties, as MCA 40-2-604 requires, so that there was no original in the first place, and thus it could not have been lost. Therefore, the secondary evidence provisions of Rule 1004 did not apply. The Supreme Court affirmed, commenting that the trial judge's "application of Rule 1004 to the proceedings was correct in all respects." In re Marriage of Gochanour, 300 Mont. 155, 163, 4 P.3d 643, 648 (2000).

The husband in In re Marriage of Powell, 231 Mont. 72, 750 P.2d 1099 (1988), tried a different tack. During the dissolution proceedings, he refused to respond to discovery requests and ultimately failed to show up for the final hearing. The wife appeared and presented to the court copies[7] of two lists of the husband's assets, made in his own handwriting. The wife testified that she had found the originals of the documents in the husband's home office, and made copies but returned the originals to his desk. The trial judge admitted the lists over a Best Evidence objection, and the Supreme Court affirmed: "The copies of the original documents were admissible under Rule 1004(3), M.R.Evid." 231 Mont. at 75, 750 P.2d at 1101. This wife used the exception to the BER successfully; Mrs. Gochanour used the BER successfully because the husband failed to show he was entitled to the exception.

Conclusion

If you are the proponent, bring the original. If you can't, bring a duplicate. If you can't bring either, bring evidence as to why you can't which meets one of the excuses listed in Rule 1004.

If you are the opponent, check to see if the BER even applies. Don't object unless the proponent needs to prove the contents of the writing/photograph/recording. Don't object if the writing/photograph/recording is simply being used to prove another fact. If the contents are necessary, hold the proponent to the fire. Insist on an original: failure to bring one may be fatal.

Epilogue

While Larry Liar and the Dalai Lama were sitting at that bar, Larry asked the Dalai Lama to speak at the Montana State Prison in Deer Lodge, after the dedication of the Garden of One Thousand Buddhas. However, the Dalai Lama does not come to the prison. Larry sues him for breach of contract. The Dalai Lama answers, denying that any contract ever existed, and affirmatively alleging that he had said he could not do so. At trial, Larry is on the stand on direct examination:

Scenario One:

Q. What made you think that the Dalai Lama agreed to speak at the prison?

A. We made a deal, a contract.

When did you make this deal?

At the Thousand Drinks Bar, that night we were both there and started talking. I asked him if he would speak to the prison, and he said yes, if I would give him $10,000 for the Garden of a Thousand Buddhas. I was flush from the bank job, so I handed over the money right then. I asked the bartender to take a photo of the moment to record our deal.

I am handing you Exhibit 1. Do you recognize it?

Yes, it is a copy of the photo from that night.

Does Exhibit 1 accurately reflect what you remember from that night?

Yes, it does.

I move the admission of Exhibit 1. OBJECTION! BEST EVIDENCE RULE!

What is the best response/ruling?

Sustained.

Overruled, the BER applies but it was met.

Overruled, the BER does not apply.

Scenario Two — same underlying case, but different testimony from Larry:

What made you think that the Dalai Lama agreed to speak at the prison?

We made a deal, a contract.

When did you make this deal?

At the Thousand Drinks Bar, that night we were both there and started talking. I asked him if he would speak to the prison, and he said yes, if I would give him $10,000 for the Garden of a Thousand Buddhas. I was flush from the bank job, so I handed over the money right then.

Did you write out an agreement?

Yes, I pulled out a pen and we used a cocktail napkin. We both signed it. I wrote out the words, which were… OBJECTION! BEST EVIDENCE RULE!

What is the best response/ruling?

Sustained.

Overruled, the BER applies but it was met.

Overruled, the BER does not apply.

Correct answers:

Scenario One involves an oral contract. There is no writing at issue. The photograph's contents are not at issue, either. Rather, the sole function of the photograph is to illustrate the

7 The case does not say whether these were

oral testimony of the percipient[8] witness. The fact he is trying to prove is that there was an oral agreement, with a physical exchange of funds. The BER does not apply at all. Remember, Rule 1002 operates ONLY when the proponent is trying "to prove the content of a writing, recording, or photograph," M.R.E. 1002, which is not the case here.

In Scenario Two, however, the plaintiff is alleging that there was a written contract, and its contents are the basis of this lawsuit. The plaintiff is testifying from his memory as to what words were written, and signed to, on the cocktail napkin. This is EXACTLY what the BER prohibits. Because we are all forgetful—and some of us, certainly a guy named "Larry Liar," are prone to intentional misstatement for profit—the BER requires the writing itself. Thus, the objection should be sustained.

That does not leave the plaintiff without a way to prove the contents of the writing, however. He has two choices:

Scenario Two-A:

Do you still have that cocktail napkin?

Why, yes, I do.

I am handing you Exhibit 2. Can you identify Exhibit 2?

Yes. It is the cocktail napkin which we signed that night in the bar.

Is Exhibit 2 the original of your written agreement?

Yes.

How do you know?

I remember it, and I have kept it since that night. I signed in my special turquoise ink, and that is on this napkin. The Dalai Lama used a brush and wrote some characters but they weren't in English. My signature and his brush marks are both on this napkin. And see, the other side says "Bar of a Thousand Drinks." We agreed that I should keep it because the Dalai Lama did not have a pocket. I put it in my safe the next morning.

Q. I move the admission of Exhibit 2.

(This so clearly meets the requirement of the original that any objection would be ridiculous).

ADMITTED.

Scenario Two-B:

Do you still have that cocktail napkin?

No. I have looked everywhere for it, but I remember the Dalai Lama taking it with him that night. He seemed to have somewhere to stash it inside his robe, and said he would make a copy and send it to me but he never did. OR

A. No. I meant to put it in my safe deposit box next time I went to the bank, but my house burned down before I could do that, and the napkin burned up.

Do you remember what the cocktail napkin said?

Yes, perfectly. It was pretty short and to the point.

Q. What did it say?

OBJECTION! BEST EVIDENCE RULE!

RESPONSE: Rule 1004, Your Honor. COURT: OVERRULED, YOU MAY ANSWER.

EXTRA CREDIT

Did you see the copyright on this article? If someone plagiarized (impossible in Montana, I know) this article and published it under his own name in a national magazine without attribution or permission, what would be my cause of action? How would I prove that his publication was the same as this article? Would the Best Evidence Rule require my counsel to offer the original of this article? If so, what would be the original? Is what you are now holding in your hand an original? Why or why not?

8 This word is SO lawyerly (even worse, law-professorly), and should be confined to writing only. I wanted to have one big word this month, but in real life, in real courtrooms, it is much better to say "witness with personal knowledge." If I wouldn't use a word at my dining table (a very low bar, admittedly), I shouldn't use it in court.

Obituary

Russell Kenneth Fillner

Russell Kenneth Fillner, 88, passed away on Oct. 9, 2014, at the Montana Veterans home where he was a resident for the past two years.

Russ was born in Forsyth on April 18, 1926, to George and Jane Fillner. He spent his childhood in Forsyth, graduating high school there in 1944. Russ was a WWII veteran who served as part of the occupation forces in Japan. Following the war Russ returned to Montana, attending the University of Montana, where he graduated from law school in 1952. In 1952, he also passed his exam for Engineer for the Northern Pacific Railroad and was elected to his first term as Rosebud County Attorney.

Fillner

While attending college at the University of Montana he met his wife, D. Jane Jackson. They were married on Aug.28, 1949.

Russ was elected as Rosebud County Attorney in 1952, serving until 1965. In 1967 Russ and family moved to Billings where he practiced law until 1986, when he was appointed District Court Judge by Gov. Schwinden. He retired from the bench in 1996.

Russ enjoyed an active retirement with Jane, traveling, playing golf and spending time with family.

Russ was also active in his community, serving on the Billings City Council as well as many professional and community organizations including the Montana Bar Association, Montana County Attorneys Association, Lions Clubs International, Masons, Shriners, Eastern Star, and Elks Club. He was also an avid fan of the University of Montana Grizzlies.

Russ was a good, honest, fair man. He worked hard, loved his family, put five children through college, served his community in many ways and generously contributed to help those less fortunate. He will be missed by many.

Russ is survived by his wife of 65 years, Jane Fillner; his children Clifford Fillner (Beverly Fillner), William Fillner (Debra Martin), Myrna Ridenour (Bud Ridenour), Russ Fillner (Colleen Urquhart-Fillner); six grandchildren, 12 great-grandchildren and one great-great-grandchild. He was preceded in death by his parents; his sister Marion; half-brother John; his half-sister Frances; and his youngest son John.

Services to be held at a later date. Columbia Mortuary is caring for Russ's family.

CLASSIFIEDS Contact | *Joe Menden at jmenden@montanabar.org or call him at 406-447-2200.*

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