

# MONTANA LAWYER

State Bar  
— of —  
Montana

October 2014 | Vol. 40, No. 1

## HIGH-STAKES CASE

Annual Meeting features high court arguments on \$52M verdict



### Also in this edition:

- > Coverage of Access to Justice issues for National Pro Bono Week of the State Bar of Montana
  - Profiles of winners of the Neil Haight Pro Bono Award and the Karla M. Gray Equal Justice Award
  - Thank your from Montana Legal Services Association to pro bono attorneys
  - Profiles of several Montana Access to Justice organizations

**PRO BONO  
WEEK**

OCT. 19-25



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

One of the highlights of the State Bar of Montana's 40th Annual Meeting in Big Sky Sept. 25-26 was the oral arguments before the Montana Supreme Court in *Masters Group International v. Comerica Bank*. After the oral arguments, Supreme Court justices spoke to students from Bozeman High and Lone Peak High in Big Sky to explain how the process works. See story on page 14.

# State Bar will keep battles to a minimum in Legislature

One point to make here today: Dissent is invited, even encouraged. The State Bar of Montana, as do all bar associations, has a stated mission. These various mission statements are vague, and mostly unhelpful. Imaginative bar officers could use these uncertain directives to justify hijacking the voice of the bar to champion almost any good cause, or even bad cause. When the Legislature is meeting, there are scores of chances to speak up on legislation.

And, it's tempting. If unrestrained, I would campaign over the next year to rid the state of wolves, nonnative trout and "lite beer." I would campaign for big game drawing preferences for bar officers, moving the renamed Grizzly/Bobcat game back to Butte, and promise a free-range, Hutterite-raised chicken in every pot.

These temptations must be resisted. Here is why. Being a bar officer gives me a chance to listen to bar officers from other places. Recently, I have heard the lament of a handful. I will not reveal specific matters, which they might have assumed would be kept confidential. But bar associations in many states have been besieged by legislative attacks; judicial emasculation and membership revolts. The assaults have largely been very effective in either injuring the bar associations or at least creating distractions from their more core and traditional missions.

In each instance, the antagonists were mobilized because the bar decided to take the lead, or be near the lead on some controversial social issue.

They should have been more careful. We are a group of lawyers. Not many of us lack the resources to speak on matters of public importance, individually or collectively. Moreover, we are an integrated bar. There is no path out of the State Bar of Montana other than giving up one's license. We need to be careful when we weigh in on any matter of public policy. We end up speaking for conscripts. It's tough to stand by and watch a bison calf get swallowed by the Lamar River, but to some extent the bar needs to let nature, no matter how unpleasant, take its course on a wide variety of issues.

The State Bar of Montana is an arm of the judiciary. The Montana Supreme Court created us, and it can uncreate us. Each branch of the three branches of government must be respectful of the other two, but history proves that each branch needs to jealously guard against encroachments from either of the other two. These are facts of life.

Being part of the judiciary, I do believe that the State Bar can legitimately flex its muscles, of which we have but a few, and its vocal cords which we have plenty, in some instances. When there are encroachments on the judicial function, I see no other governmental body suited to fit the role of jealous guardian of judicial turf.

Thus, the State Bar will probably weigh in on few matters of social policy in the next legislative session and beyond. I doubt we will get into many battles, or support every good cause. The judicial turf can be encroached upon in a variety of ways. Starvation is the most efficient. The Montana Supreme Court cannot tax. Some encroachments are innocent trespasses by those who can be reminded that the boundary is not clearly fenced. We sometimes see the efficient and timely administration of justice hindered by well-meaning legislation that tangles things up more than necessary. We have seen this in family law, in my view.

Guarding the turf will be enough work, especially combined with our other duties. We lawyers, in one way or the other, pass on who gets in the bar; who stays in the bar; and what it takes to make sure one keeps up with legal learning. We also assist lawyers in need through the Lawyer Assistance

Program and even dig into our own pockets when a lawyer steals. Our plate is quite full.

I have already been asked whether the State Bar will take the lead on a few specific issues. The answer has been "No." We have work enough to do making sure we protect our own house, and keep it in order enough so that it is worth protecting.

*Being part of the judiciary, I do believe that the State Bar can legitimately flex its muscles, of which we have but a few, and its vocal cords, which we have plenty, in some instances. When those encroachments are on the judicial function, I see no other governmental body suited to fit the role of jealous guardian of judicial turf. ... Guarding the turf will be enough work, especially combined with our other duties.*

Mark D. Parker

### Sullivan recognized by NCBP

Great Falls attorney Joseph M. Sullivan, past president of the State Bar of Montana, was recently recognized for his outstanding service to the National Conference of Bar Presidents.



Sullivan

Sullivan served on the Conference's Executive Council for the last three years as well as acting as Chairperson of its Membership Committee and as a member of its Programming Committee.

The NCBP focuses on providing programming for current and incoming Bar Presidents nationwide. These programs develop leadership skills and help future bar leaders address legal needs of their communities and states. Sullivan served as a presenter and discussion moderator for multiple programs over the last three years.

Sullivan was president of the State Bar for 2010-11.

### Akland joins Matrium Law Group

Of Counsel Attorney Kristine M. Akland has recently joined Lili R. Panarella, Michael T. Wolfe and Janel F. Chin at Matrium Law Group.

Matrium Law Group is a family law and estate planning law firm committed to providing excellent, practical and affordable legal counsel. Matrium Law Group is located in



Akland

Missoula, but helps individuals, families, and businesses throughout Montana. Akland graduated from the University of Montana School of Law. While in law school, she served as president of the Environmental Law Group, worked in the Criminal Law Clinic representing indigent clients in Missoula County Courts and participated in the Law School's Environmental Moot Court team.

She brings a diverse skill set to Matrium Law Group including nonprofit development and oral and written client advocacy. Her practice includes business law, nonprofit formation and development, probate, estate planning, and family law. She can be contacted at: Matrium Law Group, 317 E. Spruce St., Missoula, MT 59802; 406-544-9863; or kristine@matriumlaw.com.

### Brown Law Firm, P.C. welcomes two attorneys

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.



Shaw



Cole

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.

### MLSA adds two to staff

Montana Legal Services Association is pleased to announce two new staff.



Quiel

Attorney Ian Quiel received his J.D. with honors from the University of Utah S.J. Quinney College of Law in 2014. While in law school, Quiel participated in numerous clinical programs and volunteered over 100 hours of pro bono legal work, focusing on the fields of immigration, domestic violence and family law. Prior to joining MLSA, he worked as an intern prosecutor at the Salt Lake County District Attorney's office, where he worked with victims of crime and abuse. Mr. Quiel currently serves victims of domestic violence, both within the State of Montana and on the Crow and Northern Cheyenne reservations.



Saunier

Intake Specialist Steve Saunier received his B.A. in History and Political Science from Ohio Northern University in 2013. His experience in Ohio includes service to disabled veterans, college students, the elderly, domestic violence survivors, and trauma victims. He served as an AmeriCorps volunteer in the Attorney General's Office of Consumer Protection and Victim Services in 2013/2014 where he provided services to victims of fraud, predatory lending, and unfair business practices. Saunier currently provides application intake, general legal information, and referrals to callers to MLSA's HelpLine.



**November 21, 2014** (Grizzly/Bobcat Weekend) ■ **6 CLE credits requested** (INCLUDES 1 HOUR ETHICS)

**Doubletree by Hilton Missoula-Edgewater, Missoula, Montana**

A limited block of rooms have been reserved for MDTL program participants. Call **406.542.4611** and ask for the MDTL room block.

For full schedule and additional information, visit [www.mdtl.net](http://www.mdtl.net).

## Legal Technology for Your Practice



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

**A Picture Is Worth a Thousand Words: Making Your Case to the Jury with Legal Technology** (1.5 hours) — Learn about high-tech courtroom presentations and the latest bells & whistles developed for the courtroom over the past year. Learn about Microsoft PowerPoint and other major software packages that can assist you in presenting your case in trial — where to get it, how much it will cost, proper PowerPoint design, storyboarding, whether you should do it yourself, and what these programs offer. You'll also learn how these programs can instantly retrieve documents and deposition testimony (even video) in the courtroom.

**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.

## Seminar Schedule

8:00-11:45 am	<b>Maximizing Technology</b> Paul Unger, Esq.
12:00-1:30 pm	<b>MDTL Annual Membership Meeting Luncheon</b> Lunch on your own if not attending
1:30-4:15 pm	<b>Maximizing Technology</b> Paul Unger, Esq.

## Fees

	On or Before Nov. 1	After Nov. 1
<input type="checkbox"/> MDTL Member	\$260	\$325
<input type="checkbox"/> Nonmember	\$345	\$410
<input type="checkbox"/> Paralegal	\$175	\$215
<input type="checkbox"/> Claims Personnel	\$140	\$160
<input type="checkbox"/> Law School Students	\$25	\$25
<input type="checkbox"/> Members of the Judiciary	Complimentary	Complimentary

Payment must accompany registration

**Total Enclosed \$** \_\_\_\_\_

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☐ Visa ☐ MasterCard ☐ Check (made payable to MDTL)

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City/State/Zip \_\_\_\_\_

**Registration Policies:** The registration fee includes all sessions and course material. Payment must accompany registration form to receive early registration discount. **Cancellations received in writing by November 1 will be subject to a \$25 service charge. No refunds will be made after November 1.** Course materials will be mailed to pre-paid registrants who were not able to attend the conference. Registration substitutions may be made at any time without incurring a service charge.

## Two Ways to Register:

### 1. Easy online registration at [www.mdtl.net](http://www.mdtl.net)

or

### 2. Registration Form

Name \_\_\_\_\_

Nickname for badge \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

Email \_\_\_\_\_

Phone \_\_\_\_\_ Cell \_\_\_\_\_

Do you plan to bring your tablet/laptop to the seminar?

☐ Yes ☐ No

Send registration form to:

**MONTANA DEFENSE TRIAL LAWYERS**

36 South Last Chance Gulch, Suite A • Helena, MT 59601

**Phone 406.443.1160 • Fax 406.443.4614**

# Residual funds in class-action cases earmarked for access to justice groups

The Montana Supreme Court ruled on Sept. 16 to adopt a new amendment to the Montana Rules of Civil Procedure calling for at least 50 percent of residual funds in class-action cases to be disbursed to an access to justice organization when the claims process has been exhausted and funds remain

The amendment was proposed by the Montana Access to Justice Commission, and the Court opened a 60-day public comment period to Rule 23 of M.R. Civ. P. 23, effective Jan. 1, 2015.

“Access to justice organization” was defined as a Montana nonprofit entity whose purpose is to support activities and programs that promote access to the Montana civil justice system.

The court may disburse the balance of residual funds beyond the percentage to an access to justice organization to another nonprofit entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interest of members of the certified class.

The Access to Justice Commission’s original proposal called for 50 percent of the residual funds to be disbursed to the Montana Justice Foundation. Several comments objected to the funds going to one organization. The Cascade County Law Clinic commented that the funds should instead be disbursed to an access to justice organization, a change that was accepted.

## Supreme Court allows copied, electronic signatures to be accepted in District Courts

### Summarized from Sept. 16 Order AF 07-0110

The Montana Supreme Court ruled on Sept. 16 to allow a new rule to be added to the Montana Uniform District Court Rules to allow an attorney’s copied or electronically generated signature to be deemed original for all court documents.

The Uniform District Court Rules Commission proposed the new rule in March. In its proposal, the commission said there was no consistency among the judicial districts or uniform rules concerning the copy of an attorney’s signature or an electronically generated signature of an attorney. Local district courts varied from allowing faxed or emailed to no fax filing “absent actual emergency,” while some required filing of an original copy after a fax copy is filed.

The Commission said that with the movement toward electronic filings in Montana district courts, the rule change will provide initial consistency among the judicial districts. It was noted that, concerning any possible abuse, Rule 11, M. R. Civ. P., provides for sanctions if an attorney were to violate the rule.

Phyllis D. Smith, clerk of District Court for the Tenth Judicial District, Fergus County, commented in favor of the rule change, saying it would clarify Questions clerks of court have since so many attorneys are emailing documents for filing.

## DISCIPLINE

### Summarized from Sept. 9 Orders PR 14-0055, PR 14-0245

The Montana Supreme Court ruled on Sept. 16 that Bradley Akelstad is suspended from the practice of law in Montana for an indefinite period of not less than two years.

The Court also ruled that Akelstad pay \$4,495.29 in restitution to Andrea Shafer within six months and pay the costs of proceedings subject to the provisions of Rule 9(A)(8).

Akelstad was already suspended from practice in Montana for an indefinite period under a 2012 order.

On Jan. 24 and April 29, respectively, formal disciplinary complaints were filed against Akelstad. He did not respond to the citations asking him to appear in either case, nor did he file answers to the complaints.

The Commission on Practice concluded that Akelstad’s failure to respond to the complaints in the matters constituted a violation of Rule 8.1(b) of the Montana Rules of Professional Conduct and is grounds for discipline.

The first matter involved the sale of real property. The Commission on Practice ruled that Akelstad failed to provide competent representation; that he failed to act with reasonable

diligence and promptness; and that he failed to promptly deliver property that a client or third person was entitled to receive or promptly render a full accounting of the funds involved.

In the second matter, the Commission concluded that Akelstad failed to act diligently and failed to respond to repeated orders to show cause in the estate proceeding; that he failed to disclose that he had been suspended from the practice of law; and that he failed to provide notice to his client that his representation of the client by virtue of his suspension and failed to surrender his file and important documents to the client.

### Summarized from Sept. 9 Orders PR 13-0069

Jeffrey L. Sutton was publicly censured by the Montana Supreme Court on Sept. 9.

The disciplinary complaint was based on his failure to make diligent efforts to comply with legally proper discovery requests by opposing party in litigation; and failure to provide a client with competent representation, to act with reasonable diligence and promptness in representing a client, to make reasonable efforts to expedite litigation consistent with the interests of a

## Continuing Legal Education

For more information about upcoming CLE, please call Tawna Meldrum at 406-447-2206. You can also find more info and register at [www.montanabar.org](http://www.montanabar.org). Just click on the calendar. Links to the registration pages are located in the calendar event listings. We do mail out fliers for all multi-credit CLE sessions, but not for 1-hour phone CLE or webinars. The best way to register for all CLE is online. Don't forget to log in before registering to make sure your transactions are linked to your member profile.

# Construction Law Institute to be Oct. 10 in Bozeman

The 10th Annual Construction Law Institute CLE will be held on Oct. 10 at the Hilton Garden Inn in Bozeman.

The CLE is approved for 6.0 hours of credits, including 1.0 ethics credit. Online registration is open through Oct. 8 at [www.montanabar.org](http://www.montanabar.org).

Faculty include Hon. Michael E. Wheat, Montana Supreme Court, Helena; Jim Scott, general counsel, CRB, St. Louis; Brad Gordon, general counsel and secretary, Gilbane Corporation, Providence, Rhode Island; Lee Davis, Sutherland Asbill &

Brennan, LLP, Atlanta; John Bulman, Pierce Atwood, LLP, Providence; Dean Thomson, Fabyanske, Westra, Hart & Thomson, Minneapolis; Dorie Refling, Refling Hodges Law Group, Bozeman; Kellie Sironi, Sironi Law, Billings; Bridget leFeber, Berg Lilly & Tollefsen, PC, Bozeman; Mick Taleff, Taleff Law Offices, PC, Great Falls; and Carson G. Taylor, Center for Collaborative Solutions, Bozeman.

Moderator is John "Buzz" Tarlow, Tarlow & Stonecipher, PLLC, Bozeman.

# Trust and Estate Practice CLE is Oct. 16 in Missoula

The BETTR Law Section will present a Trust and Estate Practice Basics CLE on Oct. 16 at the Hilton Garden Inn in Missoula.

The CLE is approved for 6.0 credits, including 1.0 Ethics. Moderator is Dirk A. Williams, Crowley Fleck PLLP, Missoula.

Faculty members are Alissa J. Chambers, Crowley Fleck PLLP, Helena; Bruce E. Bekkedahl, Patten, Peterman, Bekkedahl and Green PLLC, Billings; Gail M. Haviland, Worden Thane PC,

Missoula; Hon. James A. Haynes, district judge, Hamilton; Hon. John W. Larson, district judge, Missoula; William E. McCarthy, Worden Thane PC, Missoula; Ron A. Nelson, Church, Harris, Johnson & Williams PC, Great Falls; Julie R. Sirrs, Boone Karlberg PC, Missoula; and Diane M. Wilkins, paralegal, Church, Harris, Johnson & Williams PC, Great Falls.

Online registration is open through Oct. 13 at [montanabar.org](http://montanabar.org).

# Anti-Trust Issues in Health Care webinar is Oct. 23

The State Bar of Montana Health Care Law Section will be holding a webinar Oct. 23 on Anti-Trust Issues in Health Care Law.

Hospital acquisitions of physician practice groups are coming under the antitrust regulatory microscope. The first cases to address the antitrust implications of these acquisitions are Saint Alphonsus, et al v. St. Luke's, et al and Federal Trade Commission, et al v. St. Luke's, et al, before the US District Court for the District of Idaho. The court recently issued its decision in favor of the plaintiffs, confirming the legal framework for assessing future physician group acquisitions.

The webinar will be presented by David Ettinger, lead counsel for one of the successful plaintiffs, Saint Alphonsus, and Christi J. Braun, special deputy counsel and senior advisor to Shands Teaching Hospital in Gainesville, Florida. Tony Patterson, chief administrative officer and general counsel at Kalispell Regional Healthcare, will moderate the session.

The webinar will be at noon on Oct. 23 and will cost \$50 for members of the Health Care Law Section and \$65 for non-members. Please register by Oct. 22 by clicking on the link in the calendar at [montanabar.org](http://montanabar.org).

# 1-888-385-9119

## Montana's Lawyers Assistance Program Hotline

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

# A surprise: Montana's mental health provider privileges, or lack thereof

Last month's Evidence Corner, about the doctor-patient privilege, dealt with the protection of communications made by a patient to obtain physical health care. This month, I discuss the existence and limits of the corollary privilege for mental health practitioners.

As with the doctor-patient privilege, Montana's state court privilege is different from the federal version. In both systems, communications made for mental health enjoy stronger privilege than doctor-patient communications. Surprisingly, however, Montana's privilege is far more limited than the federal psychotherapist privilege. It may be time for a statutory extension of the state's mental health privilege; for sure, Montana's social workers should advise their psychotherapy clients that their sessions are not covered by any evidentiary privilege.

## THE FEDERAL PSYCHOTHERAPIST PRIVILEGE

Let's be clear: Justice Antonin Scalia doesn't need no stinkin' shrink. He apparently gets his counseling from his mother, or from his bartender, neither of whom is entitled to any sort of communications privilege, and that is good enough for him:

When is it, one must wonder, that *the psychotherapist* came to play such an indispensable role in the maintenance of the citizenry's mental health? For most of history, men and women have worked out their difficulties by talking to, *inter alios*, parents, siblings, best friends, and bartenders — none of whom was awarded a privilege against testifying in court.

*Jaffee v. Redmond*, 518 U.S. 1, 22, 116 S. Ct. 1923, 1934, 135 L. Ed. 2d 337 (1996) (Scalia, dissenting).

Seven other members of the Court outvoted him, however, and the majority opinion in this case established a federal evidentiary privilege for communications between a psychotherapist and a patient, pursuant to FRE 501's injunction that federal privileges are to be determined by the federal courts, rather than by legislative or rule-making bodies.<sup>1</sup> Justice Stevens, writing for the Court, articulated the public policy in favor of protection of

the disclosures made by a person seeking mental health services:

...the question we address today is whether a privilege protecting confidential communications between a psychotherapist and her patient "promotes sufficiently important interests to outweigh the need for probative evidence...." ... Both "reason and experience" persuade us that it does.

....

Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." *Ibid*. Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination, objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. As the Judicial Conference Advisory Committee observed in 1972 when it recommended that Congress recognize a psychotherapist privilege as part of the Proposed Federal Rules of Evidence, a psychiatrist's ability to help her patients

"is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure ... patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule..., there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment.' " Advisory Committee's Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972) (quoting Group for Advancement of Psychiatry, Report No. 45, Confidentiality and Privileged Communication in the Practice of Psychiatry 92 (June 1960)).

<sup>1</sup> FRE 501, which I have discussed at more length in previous columns about other privileges, provides:

### RULE 501. PRIVILEGE IN GENERAL

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.



By protecting confidential communications between a psychotherapist and her patient from involuntary disclosure, the proposed privilege thus serves important private interests.

Our cases make clear that an asserted privilege must also “serv[e] public ends.” *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). ... The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.

In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access — for example, admissions against interest by a party — is unlikely to come into being. This unspoken “evidence” will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

That it is appropriate for the federal courts to recognize a psychotherapist privilege under Rule 501 is confirmed by the fact that all 50 States and the District of Columbia have enacted into law some form of psychotherapist privilege. (Citations and footnotes omitted)

*Jaffee v. Redmond*, 518 U.S. 1, 9-12, 116 S. Ct. 1923, 1928-29, 135 L. Ed. 2d 337 (1996).

Once the *Jaffee* majority had decided to recognize some form of psychotherapist privilege, its next task was to define the class of mental health professionals to whom the privilege would extend. The defendant-patient in the wrongful death case, Mary Lu Redmond, was a city police officer who, while on duty, shot and killed the plaintiff’s decedent. After the incident, Officer Redmond participated in about 50 counseling sessions with a therapist employed by the city. That therapist was neither a psychiatrist nor a psychologist, but was a licensed clinical social worker.

When the plaintiff tried to discover what Officer Redmond had said to social worker Breyer in their counseling sessions, both the patient and the therapist objected on grounds of privilege and refused both to provide the therapist’s notes and to answer oral questions (or claimed that they could not recall what was said). The trial judge ordered disclosure, and when it did not come, informed the jury that there was no legal justification for the claim of privilege and that the jury could assume the information would be unfavorable to Redmond. On appeal, the 7<sup>th</sup> Circuit reversed and remanded, finding that such a privilege should exist. The Supreme Court granted cert to resolve the split

between the circuits.

The Supreme Court affirmed the existence of the privilege, with regard not only to psychiatrists and psychologists but also to licensed clinical social workers:

All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists<sup>2</sup> and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker such as Karen Beyer. Today, social workers provide a significant amount of mental health treatment. See, e.g., U.S. Dept. of Health and Human Services, Center for Mental Health Services, Mental Health, United States, 1994, pp. 85-87, 107-114; Brief for National Association of Social Workers et al. as *Amici Curiae* 5-7 (citing authorities). Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, *id.*, at 6-7 (citing authorities), but whose counseling sessions serve the same public goals. Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers.<sup>17</sup> We therefore agree with the Court of Appeals that “[d]rawing a distinction between the counseling provided by costly psychotherapists and the counseling provided by more readily accessible social workers serves no discernible public purpose.”

*Jaffee v. Redmond*, 518 U.S. 1, 15-17, 116 S. Ct. 1923, 1931-32, 135 L. Ed. 2d 337 (1996).

As you would expect, Justice Scalia vehemently — and entertainingly — disagreed:

I must observe that the Court makes its task deceptively simple by the manner in which it proceeds. It begins by characterizing the issue as “whether it is appropriate for federal courts to recognize a ‘psychotherapist privilege,’” *ante*, at 1925, and devotes almost all of its opinion to that question. Having answered that question (to its satisfaction) in the affirmative, it then devotes *less than a page of text* to answering in the affirmative the small remaining question whether “the federal privilege should also extend to confidential communications made to licensed social workers in the course of psychotherapy,” *ante*, at 1931.

*Jaffee v. Redmond*, 518 U.S. 1, 20, 116 S. Ct. 1923, 1933, 135 L. Ed. 2d 337 (1996). Justice Scalia’s dissent devotes substantially more room to the difference between psychiatrists and psychologists on the one hand and social workers on the other, concluding that if there is going to be some sort of psychotherapist privilege, it should be restricted to the former:

2 Remember that there is no doctor-patient privilege in federal court, so that the only protection for disclosures to a psychiatrist M.D. is through this psychotherapist privilege. Where the doctor-patient privilege is recognized, a psychiatrist’s sessions should fit under that umbrella. [Ford, *not* Supreme Court, footnote]

A licensed psychiatrist or psychologist is an expert in psychotherapy — and that may suffice (though I think it not so clear that this Court should make the judgment) to justify the use of extraordinary means to encourage counseling with him, as opposed to counseling with one's rabbi, minister, family, or friends. One must presume that a social worker does *not* bring this greatly heightened degree of skill to bear, which is alone a reason for not encouraging that consultation as generously. Does a social worker bring to bear at least a significantly heightened degree of skill—more than a minister or rabbi, for example? I have no idea, and neither does the Court....

With due respect, it does not seem to me that any of this [social work] training is comparable in its rigor (or indeed in the precision of its subject) to the training of the other experts (lawyers) to whom this Court has accorded a privilege, or even of the experts (psychiatrists and psychologists) to whom the Advisory Committee and this Court proposed extension of a privilege in 1972. Of course these are only *Illinois*' requirements for "social workers." Those of other States, for all we know, may be even less demanding. Indeed, I am not even sure there is a nationally accepted definition of "social worker," as there is of psychiatrist and psychologist. It seems to me quite irresponsible to extend the so-called "psychotherapist privilege" to all licensed social workers, nationwide, without exploring these issues.

*Jaffee v. Redmond*, 518 U.S. 1, 29-30, 116 S. Ct. 1923, 1938, 135 L. Ed. 2d 337 (1996).

Justice Scalia garnered only one vote, so his position went down 7-2. *Jaffee* remains the law in federal court, meaning that in federal criminal and non-state-law civil cases,<sup>3</sup> there is an absolute privilege for communications by a patient/client to her psychotherapist, whether she has selected a psychiatrist<sup>4</sup>, psychologist, or licensed<sup>5</sup> social worker to fill that role.

## MONTANA: PSYCHOLOGISTS ONLY?

As you will recall from earlier columns, Montana takes the opposite approach to creation of privilege. In our state, evidentiary privileges are restricted to those identified by the Legislature in Title 26 of the Montana Code Annotated. M.C.A. 26-1-807<sup>6</sup> provides such a privilege for some, but not all, mental health professionals:

**26-1-807. Psychologist-client privilege.** The confidential relations and communications **between a psychologist and a client** must be placed on the same

basis as provided by law for those between an attorney and a client. Nothing in any act of the Legislature may be construed to require the privileged communications to be disclosed. (Emphasis supplied)

Thus, Montana is included in Justice Stevens' list of "all 50 States and the District of Columbia [which] have enacted into law some form of the psychotherapist privilege." *Jaffee*, 518 U.S. at 12. The Court then includes Montana in its list of states that extend that privilege to social workers, but (shockingly?) the M.C.A. does not support that proposition, as I explain below.

### A. Psychologists are definitely protected by Montana statute

M.C.A. 26-1-807, in both its title and text, is limited to psychologists. The statute itself does not define "psychologist" but M.C.A. Title 37, "Professions and Occupations," Chapter 17, "Psychologists," states:

(4) (a) "Practice of psychology" means the observation, description, interpretation, and modification of human behavior by the application of psychological principles, methods, and procedures for the purpose of eliminating symptomatic, maladaptive, or undesired behavior and improving interpersonal relations, work and life adjustment, personal effectiveness, and mental health.

(b) The practice of psychology includes but is not limited to psychological testing and evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning; counseling, psychoanalysis, psychotherapy, hypnosis, biofeedback, and behavior analysis and therapy; diagnosis and treatment of mental and emotional disorders or disabilities, chemical dependency, substance abuse, and the psychological aspects of physical illness, accident, injury, or disability; and psychoeducational evaluation, therapy, remediation, and consultation.

(5) A person represents to the public that the person is a "psychologist" when the person uses a title or description of services incorporating the words "psychologist," "psychological," "psychologic," or "psychology" and offers to render or renders psychological services described in subsection (4) to individuals, groups, corporations, or the public, whether or not the person does so for compensation or fee.

M.C.A. 37-17-101. M.C.A. 37-17-301 requires psychologists to be licensed; 37-17-302 sets forth the requirements for licensure, which include a doctoral degree in psychology, an examination, and a minimum of two years of supervised experience in the practice of psychology.

Thus, a person who is a licensed psychologist in the state of Montana can guarantee to his clients that their communications are both subject to a duty of confidentiality<sup>7</sup> and privileged from disclosure by M.C.A. 26-1-807. The Montana Supreme Court

<sup>3</sup> See last month's column, expanding on the discussion of the last sentence of FRE 501: "But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."

<sup>4</sup> There is no doctor-patient privilege in federal court (see last month), so psychiatrists have to be covered by the psychotherapist privilege or not at all.

<sup>5</sup> Justice Scalia observes a difference between "licensed social worker" and "licensed clinical social worker," but the majority opinion specifically uses the less restrictive phrase.

<sup>6</sup> This statute was enacted in 1971, and its only amendment was in 2009, as part of a gender-neutralizing rewrite of a number of statutes.

<sup>7</sup> This ethical duty is expressed in APA Ethical Standard 4.05, Disclosures.

recognized this privilege and applied it to a sex abuse victim's psychological records in *State v. Duffy*, 300 Mont. 381, 6 P.3d 453 (2000).<sup>8</sup> In *State v. Reynolds*, the rape defendant sought inspection of the victim's mental health records, including those from her psychiatrist and psychologist. The Court ruled:

We further hold that the medical records pertaining to the victim's psychotherapeutic treatment are protected from disclosure by various recognized testimonial privileges which outweigh the defendant's purported need for or limited right to such information in the hands of a non-adversary third party. Section 26-1-807, MCA, provides an unqualified privilege for confidential communications between a psychologist and client. The District Court acted properly in denying defendant's motion to obtain access to Dr. Sievert's, Sandi Burns' and Dr. Newman's records pertaining to Janey Doe.

*State v. Reynolds*, 243 Mont. 1, 8, 792 P.2d 1111, 1115 (1990). More recently, in a non-citable 2009 opinion, the Court affirmed the denial of defendant's request for the mental health records of a non-victim witness for the State, citing both the patient's constitutional and statutory rights to privacy as well as M.C.A. 26-1-807. *State v. Miller*, 352 Mont. 553, 218 P.3d 500, 2009 MT 314N.

<sup>8</sup> This case does recognize the competing right of a criminal defendant to discovery of exculpatory information, and assigned to the trial judge the duty of in camera inspection of the records to ensure that only those which truly are exculpatory are turned over to the defense. Thus, *Duffy* does provide a way around the privilege in some criminal cases, despite the absolute language of the privilege statute.

Note that in order to obtain the protection of M.C.A. 26-1-807, there must be a psychologist-client relationship. When the psychologist is employed by the opponent, this relationship and thus this privilege do not exist, although the party may have other protections. Thomas Park was charged with homicide and forgery, and indicated that he intended to call mental health care providers at trial to support his affirmative defense of extreme mental or emotional stress. The State then sought to have its own expert examine Park for rebuttal purposes, pursuant to M.C.A. 46-14-212. The Supreme Court affirmed the trial court's order for such an examination, but laid out restrictions on such an examination and resulting testimony. Neither the Court nor the defendant made any reference to the psychologist privilege, relying instead on the defendant's constitutional rights against self-incrimination:

¶ 35 First and foremost, we recognize that if a defendant's privilege not to incriminate himself is to have any force, it must mean that he can decide with whom and in what terms he discusses such potentially incriminating matters as the events surrounding the charges against him. Further, a defendant's right to remain silent applies at all stages of a criminal proceeding. ... Therefore, a defendant clearly carries the privilege with him into a psychological examination with the State's expert. ...

The mere fact that a defendant wishes to introduce

**Evidence**, page 27



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<i>Trial Coordinators</i> Mikel L. Moore Kalispell, MT	<i>Closing Argument</i> Doris Cheng San Francisco, CA
Don L. Harris Billings, MT	<i>Defense Team</i> <i>Opening Statement</i> Michael P. Maguire Costa Mesa, CA
<i>Plaintiff Team</i> <i>Opening Statement</i> Zander Blewett Great Falls, MT	<i>Direct and Cross</i> <i>Examinations</i> Lon J. Dale Missoula, MT
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# New trustees and officers elected to the State Bar Board of Trustees

The State Bar of Montana sat a slate of new officers and trustees at its 40th Annual Meeting in Big Sky on Thursday, Sept. 25.

Randy Snyder of Bigfork stepped down as president of the State Bar. He was replaced by Mark D. Parker of Billings, who has served as president-elect for the past year.

Matthew Thiel of Missoula stepped down as chairman of the board to take on his new role as president-elect of the State Bar. Leslie Halligan of Missoula was nominated to take over the chair post. There were no other nominations, and Halligan was elected on a voice vote.

Elizabeth Brennan and Liesel Shoquist, both of Missoula,

took over as new trustees.

Another seat on the Board of Trustees opened up with the recent resignation of Mike Talia of Great Falls. Shari Gianarelli of Conrad and David Grubich of Great Falls applied for the open Area D trustee position, and the board interviewed both. After the interviews, trustees voted for Gianarelli to take over the open trustee post.

The Board of Trustees also said goodbye to Pam Bailey, who leaves after serving for 16 years. She had served as immediate past president for the past year. Snyder takes over as immediate past president and fills Bailey's seat on the board.

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## Bar members pass resolution calling for adequate funding of state OPD

The State Bar of Montana members passed a resolution for the Bar to call on the Montana Legislature and Gov. Steve Bullock to adequately fund the Montana Office of the Public Defender program.

The resolution, proposed by attorney Jim Taylor of Missoula, legal director of ACLU of Montana, said that current funding levels have led to an overburdened public defender system. This causes defendants who have been accused of a crime but not yet convicted to languish in jail awaiting trial, while also adding to the suffering of victims awaiting justice for crimes committed against them, the resolution stated.

The resolution passed unanimously at the Bar's business meeting during the 40<sup>th</sup> Annual Meeting at Big Sky on Friday, Sept. 26.

Three other resolutions that were proposed did not fare as well.

One of these proposals would have called on the Bar's Ethics Committee and Board of Trustees to consider petitioning the Montana Supreme Court to approve the American Bar Association Ethics 20/20 recommendations regarding protection of confidential information in the digital age.

The resolution was proposed by Randy Snyder, now the State Bar's immediate past president.

Shane Vannatta, State Bar delegate to the ABA, spoke in favor of the resolution.

"This is the train that is coming down the tracks," Vannatta

said. "Montana has unfortunately tried to avoid the issue in the past. It's a discussion that's been long overdue among members."

Others, including attorney Greg Murphy of Billings, were concerned about the possible implications of passing the resolution. Murphy said he wasn't necessarily opposed to the resolution, but he felt there needs to be a report by the ethics committee before members decide.

After a voice vote, Snyder determined the no votes outnumbered the yes votes.

Two other resolutions, both also proposed by Snyder, were pulled from consideration as inconsistent with the Bar's constitution or bylaws.

One of the resolutions would have called for a review of district representation in the Bar. The proposal would have reduced the number of trustees from 16 to 8. The other proposal called for adding a new class of bar membership to allow attorneys licensed from other states to perform limited pro bono work without being required to pass the Bar Exam.

Bar members also passed two other resolutions at the meeting.

One of these resolutions was to support funding of Montana Legal Services Association. It was passed without opposition.

The other resolution was to thank the members of the Gallatin County Bar Association for supporting the Annual Meeting through donations of time and money. This resolution also passed without opposition.

# Supreme Court hears oral arguments, discusses process with area students

The Montana Supreme Court heard oral arguments for a high-profile and high-stakes case at the State Bar of Montana's Annual Meeting in Big Sky Sept. 26.

The case, *Masters Group International v. Comerica Bank*, was an appeal of \$52 million in damages awarded to an office supply company that had planned to build a distribution center in Butte. The company defaulted on a loan for the project from Comerica Bank during the financial collapse in 2008.

The court's decision could help decide whether the state's \$10 million cap on jury awards for punitive damages will stand.

Comerica had four arguments: That Masters Group and the Butte Local Development Corporation colluded to have Comerica sued as a third-party defendant and that the district court should have granted its motion to sever the complaints; that the case should have been decided by Michigan law instead of Montana law; that the contract between Comerica and Masters Group was invalid because one of the guarantors didn't sign; and that the award exceeds Montana's \$10 million cap on punitive damages.

After the oral arguments, members of the Supreme Court met with students from Bozeman High School and Lone Peak High School in Big Sky to help explain the process and answer questions. The session was organized by the State Bar of Montana and moderated by Joe Sullivan, past president of the State Bar and members of the Law Related Education Committee.

Justices who attended the question-and-answer session were Chief Justice Mike McGrath, Justice Patricia Cotter, Justice Laurie McKinnon, Justice Mike Wheat and Justice Jim Rice.

The justices couldn't discuss specifics of the case, but they did explain how the process of a Supreme Court appeal works, the difference between an appeal and a trial, how the court comes to a decision, how long the process takes and other topics.

After the question-and-answer session, professors Hillary Wandler and Anthony Johnstone of the University of Montana School of Law facilitated a discussion with the students, wherein the students broke into groups, each led by an attorney, to discuss the case and decide who won, as if they were members of the court. Wandler presented a case summary of *Masters Group International v. Comerica* before the oral arguments to a packed house at the Missouri Ballroom.

Wandler noted that observers of the court can get some clues about how the court might decide on the case based on the questions justices asked during arguments. She said the court appeared to be more interested in some of the arguments than others, noting that a lot more time was spent talking about



Supreme Court Chief Justice Mike McGrath discusses with students from Bozeman and Big Sky Lone Peak high schools how the process of a Montana Supreme Court appeal works. At left are Justice Mike Wheat and Justice Laurie McKinnon. Justice Jim Rice and Justice Patricia Cotter also participated in the discussion.

the Michigan law vs. Montana law question and the missing signature than the other issues.

She also pointed out that both sides did a lot of arguing in the alternative. For instance, Mick Taleff, who represented Masters Group, argued that the court was right to apply Montana law, and that even if Michigan law had been applied it wouldn't have had a big effect on the case. Meanwhile, Jim Goetz, attorney for Comerica, argued that Michigan law should have been applied, and the fact that Montana law was applied had a major impact.

Wandler described this as a "heads I win, tails you lose" argument.

Erica Schnee, a social studies teacher from Bozeman High, said she and her students enjoyed and appreciated the chance

# IMAGES FROM THE BAR'S 40TH ANNUAL MEETING



D. Patrick McKittrick gives remarks to the crowd after receiving the Jameson Award at the Annual Meeting banquet at Big Sky on Sept. 25.



Pam Poon is shown after accepting the Neil Haight Pro Bono Award at the Awards Luncheon on Sept. 26.



Outgoing President Randy Snyder, left, transfers a reliable steed for travel to new President Mark D. Parker after he passed the gavel at the business meeting on Sept. 26.



Brent Cromley shows off his George L. Bousliman Professionalism Award during the banquet on Sept. 26.





From left, Kathryn Mazurek of Missoula and Shantelle Argyle and Dan Spencer of Salt Lake City field questions at a CLE on the Modest Means Business Model during the New Lawyers Section Meeting on Sept. 25.



Pam Bailey is shown after accepting a Distinguished Service Award Sept. 26 at the State Bar's Annual Meeting. Bailey, who just finished her term as immediate past president, left the Board of Trustees after serving 16 years on the board.



# MDTL tech CLE to feature impressive presenter

The Montana Defense Trial Lawyers Annual CLE in Missoula on Nov. 21 is one that any lawyer interested in technology will benefit from.

The program, Legal Technology for Your Practice, will be presented by Paul Unger, Esq., of Affinity Consulting Group in Columbus, Ohio. There will be 6 CLE credits, including 1 ethics.

Betsy Brandborg, State Bar of Montana's bar counsel, has this to say about Unger:

"I'm delighted MDTL is bringing Paul to Montana. I've seen him present at several national CLEs. He's a wonderful presenter; he knows how to pack the information; knows what lawyers NEED to know and teaches it well. This is not a CLE for lawyer

staff, though they would benefit. This is a CLE for lawyers. If someone is the slightest bit intimidated by technology, they won't be after listening to him. If they are already comfortable with the issues, he'll bring today's news and help anticipate tomorrow's. Paul's information falls into the 'You Shouldn't Miss this CLE' department. I'm getting the word out to as many non-MDTL members as I can, so they can benefit from your organization's effort."

The CLE will be held the day before the Montana-Montana State football game.

See the ad on page 5 for program information, pricing, and registration form, or visit [mdt.net](http://mdt.net) for a full schedule, additional information and online registration.



Students listen to discussion about the Supreme Court arguments at the State Bar's Annual Meeting in Big Sky.

**Court**, from page 14

to both hear the oral arguments and participate in the discussion afterwards. She said that many of her students are on the school debate team and quite a few have thoughts about pursuing a law career.

"They got a chance to have thoughtful discussion about the case with lawyers," Schnee said. "They valued it a lot."

The public won't know the Supreme Court's decision for some time. As Chief Justice McGrath explained to the students, the Court aims to have an opinion within 90 days of hearing arguments. In a complicated case such as *Masters*, it could take longer, as there is the potential for dissenting opinions to some or all of the four arguments involved in the case.

But the students did get a chance to make their decision. The consensus? *Masters Group International* was the winner.

We will have to wait and see if the court agrees.

## 2014 NEIL HAIGHT PRO BONO AWARD

# Poon honored for access to justice efforts

*Pam Poon, a longtime access to justice advocate who created and manages the Gallatin Legal Advice Clinic, is the winner of the 2014 Neil Haight Pro Bono Award.*

*The award is named in honor of Neil Haight, the executive director of Montana Legal Services Association for more than 30 years. It has been given since 1997 to a lawyer, other individual or organization who exemplifies Haight's legacy of providing outstanding legal services to Montanans living in poverty.*

*Angie Wagenhals, pro bono coordinator with Montana Legal Services Association, nominated Poon for the award. In her letter, she called Poon one of the driving forces for pro bono efforts in Gallatin County.*

*The following is from Wagenhals' nomination letter:*

On behalf of Montana Legal Services Association, I would like to nominate Pam Poon for the Neil Haight Pro Bono Award. Pam is one of the driving forces for pro bono efforts in Gallatin County. Pam utilizes her years of litigation and mediation experience to address the need for free legal services that she sees in her community. Her work in the creation and management of the Gallatin Legal Advice Clinic has been invaluable to the fight for access to justice in Montana.

Before the establishment of the Self-Help Law Center in Bozeman, Pam worked with the courts to hold dissolution clinics with the Community Mediation Center. Not only did she help to coordinate the clinic, but she also created the training materials. Even after the Self-Help Center was established and the dissolution clinics subsided, Pam still noticed an unmet legal need for low-income folks in Bozeman. After examining how other counties were dealing with the same problem, she developed plans to use a clinic model to help meet the legal needs of the community.

Pam put in months of planning, development, recruiting, restructuring and coordinating before the clinic could open its doors to the first client. The first clinic had its rough patches, but with Pam's fearless leadership, the committed group of pro bono attorneys in Gallatin County did not give up. They worked through the problems and setbacks and are now holding regular, monthly legal advice clinics. Pam continues to organize and participate in these clinics on top of her other duties as a solo practitioner and mediator. To date, the clinics have served 58 clients.

Her involvement in pro bono extends past the Self-Help Center and organization of the family law clinic. Over the years, Pam has taken eight pro bono cases for Legal Services, many of

them lengthy and complex family law matters that can last for years. Her peers in Gallatin County know her as someone who will take on the most difficult and complex cases because of her belief that justice should be accessible to all. Pam has always exhibited the utmost professionalism in her pro bono work with clients and is a strong advocate for volunteerism in the legal profession. Her character and professional efforts make Pam an excellent choice for the Neil Haight Award.

*Following is an excerpt from a letter from the 18th Judicial District — Judge Holly Brown, Judge Mike Salvagni, Judge John C. Brown — supporting Poon's nomination.*

Ms. Poon recognized the value of the Self-Help Law Center but also recognized that individuals representing themselves in family law matters often ran into legal issues that delayed timely

resolution of their case. In an effort to address this, Ms. Poon volunteered her time and talents to amass a larger group of attorneys called the Gallatin County Pro Bono Working Group to assist in addressing the unmet legal needs of low-income families in Gallatin County. She recruited attorneys willing to provide limited scope representation on a pro bono basis. The Gallatin Legal Assistance Clinic was born. In collaboration with Montana Legal Services Association and the Gallatin Self-Help Law Center, clinics are offered once each month. Free CLE training is offered on an ongoing basis to the volunteer lawyers. She continues to direct and monitor the needs and successes of the GLACs.

*The following is an excerpt from a letter of support from Patricia L. Fain, statewide pro bono coordinator:*

More than a year and a half ago, Pam gathered interested members of the Gallatin County Bar Association and formed the Gallatin County Pro Bono Working Group. Over the course of a year, Pam led group meetings, researched, formulated and created the Gallatin Legal Assistance Clinic (GLAC). ... Since GLAC's inaugural clinic in November 2013, Pam has organized endlessly, recruited volunteers, attended each clinic and facilitated post-clinic evaluations and planning. In addition, Pam has collaborated with partners Montana Legal Services Association, the Bozeman Self-Help Center and HAVEN (a program assisting victims of domestic violence). My best estimate is that Pam has donated hundreds of hours since in the year prior and since GLAC's successful launch. As the result of Pam's dedication and hard work, there is and will continue to be a sustainable and successful service to low-income Montanans.



Pam Poon



## 2014 KARLA M. GRAY EQUAL JUSTICE AWARD

# Chief justice is longtime equal justice champion

Montana Supreme Court Chief Justice Mike McGrath is the winner of the State Bar of Montana's 2014 Karla M. Gray Equal Justice Award. He was presented the award at the State Bar of Montana's Annual Meeting in Big Sky on Friday, Sept. 26.

In his nomination letter, District Court Judge Kurt Krueger noted McGrath's long and distinguished career as chief justice, Montana Attorney General and Lewis and Clark County Attorney, but also his service for over 20 years with Montana Legal Services Association.

"Mike not only demonstrated leadership but critical guidance to the Montana Legal Services Association in what was a very difficult funding time period. Mike was a personal friend and confidant of former MLSA Director Neil Haight; and together they helped establish a solid foundation for the association and continued legal assistance for underprivileged individuals.

The award, named after former Montana Supreme Court Chief Justice Karla Gray, honors a judge from any court who has demonstrated dedication to improving access to Montana



Mike McGrath

courts, demonstrating a combination of some or all of the following elements:

Personally done noteworthy and/or considerable work improving access of all individuals, regardless of income, to the Montana court system.

Instrumental in local Access to Justice efforts, including program development, cooperative efforts between programs, and support for community outreach efforts to improve understanding of and access to the courts.

Active support of citizen involvement in the judicial system

Active support and commitment to increasing involvement of volunteer attorneys in representing the indigent and those of limited means.

Other significant efforts that exhibit a long-term commitment to improving access to the judicial system.

Krueger pointed out that McGrath has worked on access to justice issues his entire career. After graduating from Gonzaga

McGrath, page 23

# 2015 Lawyers' Deskbook

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**Verify Your Listing!**  
All changes to your contact information for the next edition of the Deskbook & Directory are due by **October 17, 2014**

**Attention Firms!** If you would like to be included in the law firm section OR if you have an update from last year's please send the information to [jdiveley@montanabar.org](mailto:jdiveley@montanabar.org) by **October 17, 2014**.

# Letter of thanks to pro bono attorneys from Montana Legal Services Association

By Alison Paul

October — summer is over and school is back in session, the State Bar Annual Meeting has wrapped up, and there is nothing left to look forward to until the holidays, right? Not true! This month brings National Pro Bono Celebration week, Oct. 19-25, and I would like to start the celebration off early by offering my gratitude to all attorneys who donate pro bono hours.

Pro bono attorneys are essential in helping Montanans protect their civil legal rights. Pro bono attorneys help seniors stay in their homes, parents and children escape domestic violence, workers protect their wages and much more.

Pro bono attorney collaboration with Montana Legal Services Association, individually and through nine organized programs, allows MLSA to help thousands more clients protect their rights. In 2013, 313 members of the State Bar of Montana generously volunteered their time to help MLSA clients, providing much-needed legal assistance in 548 cases. With only 13 attorneys on staff due to critically low funding levels, MLSA would never have been able to address those cases without the help of its volunteer attorneys. The attorneys' willingness to offer limited scope services, to provide full representation, or to volunteer at legal clinics resulted in lasting positive impacts to clients, communities and to the courts.

Granted, pro bono work is not always easy, but pro bono is a professional responsibility and justice is the very worthy result. For Montanans who cannot afford attorneys, the opportunity to have legal questions answered, to obtain the knowledge and confidence to appear in court pro se, or to have skilled advocates represent them every step of the way means the difference between fairness in the justice system or a system that dispenses justice only for those with money. Pro bono attorneys literally provide access to justice where otherwise justice would be only a noble ideal.



The unwavering commitment to pro bono by attorneys in Montana is both admirable and humbling. On behalf of MLSA and the thousands of clients who benefit from pro bono services, thank you to all pro bono volunteers. You are appreciated not only during Pro Bono Celebration week, but also year-round. You really are making a positive difference for people in your communities.

*Alison Paul is executive director of Montana Legal Services Association*

## 313

Members of the State Bar of Montana who volunteered time to Montana Legal Services Association clients in 2013

## 548

Number of MLSA cases that State Bar members worked on in 2013

## 13

Number of MLSA staff attorneys — far fewer than would have been needed to handle the cases taken by pro bono lawyers



# Legal Services Developer program provides assistance for seniors

By Janice Frankino Doggett

The Legal Services Developer program works in collaboration with the Area Agencies on Aging, Montana AAA Legal Services, and the State Bar to provide legal assistance and legal documents to Montana seniors.

The legal document clinic program brings pro-bono attorneys, paralegals and notaries to many communities throughout the state. The clinics provide a much needed opportunity for seniors struggling with income or geographic restrictions to prepare legal documents. At the clinic, clients may have beneficiary deeds, declaration of homestead, durable powers of attorney, living wills, and simple wills prepared for them by experienced legal professionals. These clinics are a success because of Montana pro bono attorneys.

Besides the legal documents clinics, the Legal Services Developer Program provides the following services:

The Legal Advice Program coordinates with its contract attorney to provide legal advocacy and advice to clients. The program offers assistance in over 150 issues. We do not provide legal assistance in the areas of family law, criminal law, worker's compensation, medical malpractice and Medicaid.

The Pro bono/Modest Means program assists individuals needing representation. An internal committee reviews each case to determine if the case has merit and assess whether an attorney is available to provide representation.

The Legal Education Program provides educational materials

to seniors throughout the state. These materials cover issues that are especially relevant to seniors, such as information on advanced directives, landlord tenant laws, and estate planning.

We conduct legal presentations throughout the state. These presentations may cover specific areas of interest such as the complexity of power of attorney documents as well as more general areas such as how to create a fact pattern and conduct intake.

The Justice Served program provides advocacy and legal assistance to combat cases of high-end financial exploitation, financial mismanagement, and fraud.

We conduct phone clinics weekly. The phone clinics are offered to seniors who are unable to attend a local clinic due to geographic or economic limits. During the phone clinics we complete the same documents used at in-person clinics.

The Legal Services Developer program works closely with Montana AAA Legal Services in the implementation of a recent grant that it received. Montana AAA was awarded a grant to develop an efficient and economical method to assist older Montanans. The grant focuses on seniors in economic need in rural, frontier and reservation communities. An extensive needs assessment has been developed and will be an integral tool in the expansion of our services.

***Janice Frankino Doggett is Coordinator for the AoA Grant and AAA outreach activities.***

## Montana Legal Justice helps close access to justice gaps for low-income Montanans

Montana Legal Justice, PLLC, is a public interest law office in Missoula dedicated to closing the gap that exists for those Montanans who earn enough money to disqualify them from receiving free legal services, but still cannot afford to pay the typical cost of a retainer or typical legal fees. We currently offer services in the areas of family law, dependency and neglect cases, guardian ad litem, orders of protection, misdemeanor criminal defense, small business matters and simple contract review, as well as appeal work and limited scope research issues.

In order to achieve our goal of increasing access to justice, we work on a sliding fee scale which is based on each individual client's income and ability to pay. We also accept

referrals from the State Bar's Modest Means Program. We are excited to announce that we are currently gearing up to open a Walk-in Legal Clinic which will be staffed by a licensed attorney and provide limited scope representation. This clinic will offer legal advice and the ability to have an attorney draft legal documents for affordable flat rate fees. The mission of the Clinic is to ensure that all Montanans, particularly those who have been disadvantaged or underserved, have access to legal services at an affordable price. In honor of Celebrate Pro Bono week we want to highlight the need for increased legal services at affordable rates and encourage the legal community to do pro bono work and accept clients with limited financial 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](mailto:klynch@montanabar.org) or Erin Farris-Olsen at [erin@montanabar.org](mailto:erin@montanabar.org)  
You can also call us at 442-7660.



## Are You Interested in Joining The Modest Means Program?

To get started, please fill in your contact info and mail to: *Modest Means, State Bar of Montana, PO Box 577, Helena, MT 59624.*  
You can also email your contact info to Kathie Lynch -- [klynch@montanabar.org](mailto:klynch@montanabar.org)

Name: \_\_\_\_\_

Address: \_\_\_\_\_

City, State: \_\_\_\_\_

Email: \_\_\_\_\_

**Orders**, from page 7

client, to keep a client reasonably informed about the status of his legal matters and promptly comply with the client's requests for information.

Sutton previously tendered admission to the Court that he violated Rules 1.1, 1.3, 1.4, 3.2 and 3.4 of the Montana Rules of Professional Conduct.

## APPOINTMENTS

### Summarized from AF 11-0765

The Court reappointed five members of the Access to

Justice Commission and appointed a sixth member to replace Commissioner Teri Mazer, who resigned from the Commission.

Jennifer Brandon, Aimee Grmoljez, Rep. Chuck Hunter, Hon. Kurt Krueger and Hon. Michele Snowberger were reappointed to the Commission. Amy Blixt with the Missoula County Justice Court was appointed to fill Mazer's term.

### Summarized from AF 06-0651

The Court reappointed Casey J. Heitz, Kimberly Obbink and K. Paul Stahl on Sept. 16 to terms on the Commission of Continuing Legal Education expiring Sept. 30, 2017.

# Lawyer Referral & Information Service

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

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

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

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

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

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



The Montana Justice Foundation Board of Directors gratefully acknowledges the following donors for their support of the MJF and the access to justice cause.\*



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## Connors joins Doney Crowley

Doney Crowley P.C. welcomes John "Jack" Connors to the firm as an associate attorney.

Connors brings a unique perspective to the practice of law. After obtaining a degree in mathematics from Montana State University, he founded and operated Connors Construction, LLC, which specialized in building multimillion-dollar custom residences in Big Sky. His craftsmanship was featured in several books and trade journals, including the cover of Ralph Kylloe's 2010 book "Rustic Elegance."

Connors always had an interest in the complex nature of the law and chose to couple his 10 years of small business, real estate and natural resources expertise with a juris doctorate degree. In 2013, Connors graduated with honors from the University of Montana School of Law. He is admitted to practice before all state and federal courts in Montana.

When not exploring the law, Jack is exploring the world, seeking the next mountain to climb or ski. He also enjoys ranch life with his family.

## Olson pens historical book on state courts

Eric Olson's new book of Montana courthouse stories — "Courting Truth: Montana Courthouse Tales" — is now available for purchase in paperback or digital format from Amazon, Barnes and Noble, and select bookstores around Montana.

"Courting Truth" tracks the history of community justice in Montana from territorial days to the present time. A trial lawyer with 35 years of courtroom experience, Olson spent more than two years conducting interviews and researching court records, historical journals and contemporary writings.

For more information, go to [www.ericolsonmontana.com](http://www.ericolsonmontana.com).



Connors



Olson

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The *Montana Law Review* is proud to announce the launch of its new website:  
**[www.montanalawreview.org](http://www.montanalawreview.org)**

The website contains a free archive of all past issues, as well as event information, breaking news of interest to Montana lawyers, and exclusive online content. Check back every few weeks for previews of upcoming oral arguments in the Montana Supreme Court, recaps of the arguments after they occur, and case notes and comments analyzing current legal issues. You can also stay up to date by liking us on Facebook and following us on Twitter @MontLawRev. Online Montana Law gear sales will be coming soon!

## MONTANA LAW REVIEW

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Summer 2014, Volume 75, Issue 2

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- Public Water, Private Rights: All Are Not Equally Protected When the State Allows Some to Divert Small Quantities of Ground Water Outside the Permitting System - Article by Carolyn A. Sime
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psychological testimony and therefore must cooperate during an examination so that the State has the opportunity to rebut his expert testimony is insufficient to constitute a complete waiver of his right to remain silent. Accordingly, we conclude that a defendant has a constitutional right to remain silent when asked by the State's psychological expert about the events surrounding the alleged offense.

37 It does not follow, however, that a defendant's right to remain silent when questioned by the State's expert about the alleged offense should afford an opportunity to place un rebuttable testimony before the jury....

We reverse that part of the District Court's order that compels Park to answer questions during the examination regarding the alleged offense, but hold that if he refuses to answer those inquiries by the State's expert, and also remains silent at trial, he may not offer that evidence through his expert.

*Park v. Montana Sixth Judicial Dist. Court, Park Cnty.*, 1998 MT 164, 289 Mont. 367, 376-378, 961 P.2d 1267, 1272-74. See also, *State v. Van Dyken*, 242 Mont. 415, 791 P.2d 1350 (1990).

The privilege prevents testimony and documentary evidence about the psychologist-client relationship from being admitted at trial. However, like other statutory privileges, it does not apply to sentencing proceedings:

¶ 31 We have previously stated that "the rules of evidence are not applicable or controlling in sentencing hearings." *State v. Race* (1997), 285 Mont. 177, 180, 946 P.2d 641, 643 (citation omitted). A sentencing court is allowed "to have the fullest information possible concerning the defendant's life and characteristics, so that the court is able to individualize punishment." *Race*, 285 Mont. at 180, 946 P.2d at 643. **Thus, a statement that is covered by the psychotherapist-patient privilege may be inadmissible at trial but is admissible at a sentencing hearing.** *Race*, 285 Mont. at 180-81, 946 P.2d at 643. (Emphasis supplied)

*State v. J.C.*, 2004 MT 75, 320 Mont. 411, 419, 87 P.3d 501, 507.

The psychologist privilege applies in trial cases in Montana state courts, both criminal and civil. Furthermore, because psychologists are included in the psychotherapist privilege in federal court established by *Jaffee*, the psychologist's privilege does not depend on the court system. Therefore, the psychologists' privilege is broader than Montana's doctor-patient privilege in both respects. I would have no compunction about revealing the most difficult information (so long as it does not involve a potential future harm) to a psychologist, confident in its immunity from forced disclosure.<sup>9</sup>

9 The same caveat about waiver of this privilege in civil cases pursuant to M.R.Civ.P. 35 applies as to waiver of the doctor-patient privilege. See last month's column on doctor-patient privilege.

## B. Psychiatrists are covered by the doctor-patient statute

Psychiatrists are not psychologists, and so are not covered by Montana's psychologist privilege, if that statute is strictly construed. What is the difference? I turned to that trusty source, WebMD, for an explanation:

What's the difference between a psychologist and a psychiatrist?

That may sound like a setup for a knee-slapper, but it's actually a good question, and many people don't know the full answer. It's not as simple as who tends to what, like the difference between a goatherd and shepherd. Both kinds of professionals treat people with problems that vary widely by degree and type, from mild anxiety to schizophrenia. Both can practice psychotherapy, and both can do research.

The short answer is, psychiatrists are medical doctors and psychologists are not. The suffix "-iatry" means "medical treatment," and "-logy" means "science" or "theory." So psychiatry is the medical treatment of the psyche, and psychology is the science of the psyche.<sup>10</sup>

Because they are doctors, Montana's psychiatrists are covered under the doctor-patient privilege statute, although as we saw last month, that privilege applies only in civil cases. Thus, a criminal defendant who consults a psychiatrist for mental health treatment has no valid privilege to prevent disclosure of what he said to his psychiatrist, whereas communications to a psychologist are clearly privileged in both civil and criminal cases. This seems be counter-intuitive: seeking mental health treatment from an M.D. yields less privilege than using a psychologist, but that is the current status of Montana law. In federal court, under *Jaffee*, psychologists and psychiatrists are treated identically.

## C. Social workers are NOT covered by privilege, although they have a statutory duty of confidentiality

What about licensed social workers who provide mental health services? Again, in federal court under *Jaffee*, as much as Justice Scalia may dislike it, these mental health professionals have the same privilege as psychiatrists and psychologists.

In Montana, the statutory answer is that social workers are not "psychologists" so the privilege extended by MCA 26-1-807 does not cover them, nor does any other statute in the privilege section of the Montana Code Annotated, Title 26 Chapter 1.

Interestingly, the U.S. Supreme Court included Montana in its list of states that "explicitly extend" a privilege for disclosures to licensed social workers, citing M.C.A. 37-22-401.

<sup>11</sup> That statute is located in Title 37, entitled "Professions and Occupation," Chapter 22 of which deals with "Social Work." Part 4 deals with regulations for social workers. The specific statute provides:

37-22-401. Privileged communications — exceptions

A licensee may not disclose any information the licensee acquires from clients consulting the licensee in a professional capacity except:

10 <http://www.webmd.com/mental-health/features/psychology-vs-psychiatry-which-is-better>, last accessed 9/4/2014.

11 *Jaffee v. Redmond*, 518 U.S. at 17, fn. 17.

**Evidence**, from previous page

- (1) with the written consent of the client or, in the case of the client's death or mental incapacity, with the written consent of the client's personal representative or guardian;
- (2) that the licensee need not treat as confidential a communication otherwise confidential that reveals the contemplation of a crime by the client or any other person or that in the licensee's professional opinion reveals a threat of imminent harm to the client or others;
- (3) that if the client is a minor and information acquired by the licensee indicates that the client was the victim of a crime, the licensee may be required to testify fully in relation to the information in any investigation, trial, or other legal proceeding in which the commission of that crime is the subject of inquiry;
- (4) that if the client or the client's personal representative or guardian brings an action against a licensee for a claim arising out of the social worker-client relationship, the client is considered to have waived any privilege;
- (5) to the extent that the privilege is otherwise waived by the client; and
- (6) as may otherwise be required by law.** (Emphasis supplied)

This statute has not been substantively changed since its enactment in 1983, and there are no Montana cases construing or applying it. In fact, Westlaw research revealed only two cases nationwide citing this statute, *Jaffee* being one.<sup>12</sup>

With all due respect, I think that Justice Stevens over-relied (or under-analyzed) Montana state law in support of his conclusion that licensed clinical social workers were entitled to share in the psychotherapist privilege. The Montana Supreme Court is the final arbiter of evidence law in our state courts, and it is bound by the plain language of the statutes enacted by the Montana Legislature. The Legislature clearly limits privileged relationships to those specified in Title 26, Chapter 1:

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

Psychologists are enumerated in this part; social workers, licensed or not, are not.

The Montana Supreme Court has repeatedly referred to the legislative intent to limit privileges to those specified by statute.

<sup>12</sup> The other is from a federal court in the Southern District of Alabama in 2002, which analyzed the list provided in *Jaffee* to divide states on that list into those which do and do not require licensure of the social worker for recognition of the privilege. *Jane Student 1 v. Williams*, 206 F.R.D. 306 (S.D. Ala., 2002) (concluding that the federal psychotherapist privilege does not extend to unlicensed social workers or unlicensed professional counselors).

For instance:

16 Initially, we observe that testimonial privileges must be strictly construed because they contravene the fundamental principle that the public has the right to everyone's evidence. See *MacKinnon*, ¶ 21 (citing *Trammel v. United States* (1980), 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186, 195).

*State v. Gooding*, 1999 MT 249, 296 Mont. 234, 238, 989 P.2d 304, 307. "While serving these underlying policy goals, the [attorney-client] privilege must be construed narrowly because it obstructs the truth-finding process." *Am. Zurich Ins. Co. v. Montana Thirteenth Judicial Dist. Court*, 2012 MT 61, 364 Mont. 299, 303, 280 P.3d 240, 245. Justice Warner, joined by Justice Rice, observed in another context (venue) "it is not for this Court to add to what has been omitted to a statute." *Maupin v. Meadow Park Manor*, 2005 MT 304, 329 Mont. 413, 416, 125 P.3d 611, 614.

It is true that the words "privilege" and "social worker" do appear together in a statute, but that statute is not located in Title 26 Chapter 1, Part 8, and so is not "enumerated in this part" as required by M.C.A. 26-1-801. Moreover, the exception to the "privilege" in M.C.A. 37-22-401, stated as subpart 6, specifically requires a social worker to disclose confidential information "as may otherwise be required by law." A judge requiring disclosure of the communications in a court proceeding (through discovery or at trial), would certainly be "required by law." My best reading of the social worker statute is that it sets forth a statutory duty of confidentiality, but does not create an evidentiary privilege.

There is one Montana Supreme Court case that implicitly affirms disclosure of a social worker's records while protecting those of a psychiatrist and psychotherapist, without any reference at all to M.C.A. 37-22-401, although it had been enacted seven years earlier. In *State v. Reynolds*, *supra*, the young adopted daughter who was allegedly raped by her father, spent some time at a mental health facility in Billings after she was removed from the home. There, she was treated by a team of mental health care providers, including a psychiatrist, a psychotherapist<sup>13</sup>, and a social worker (Rochelle Beley). The defendant wanted access to all these records, but as discussed above, the trial court and Supreme Court both held that the psychiatrist and psychotherapist records were privileged:

We further hold that the medical records pertaining to the victim's psychotherapeutic treatment are protected from disclosure by various recognized testimonial privileges which outweigh the defendant's purported need for or limited right to such information in the hands of a non-adversary third party. Section 26-1-807, MCA, provides an unqualified privilege for confidential communications between a psychologist and client. The District Court acted properly in denying defendant's motion to obtain access to Dr. Sievert's, Sandi Burns' and Dr. Newman's records pertaining to Janey Doe.

<sup>13</sup> The case never defines the exact qualifications of this "psychotherapist" and it is not clear if in fact the patient or the prosecutor asserted the psychologist privilege: "The prosecutor also agreed to ask psychotherapist Sandi Burns to bring her records for a similar *in camera* inspection, but defense counsel made no further request for inspection." 243 Mont. at 7.

*State v. Reynolds*, 243 Mont. 1, 8, 792 P.2d 1111, 1115 (1990). However, without any critical comment, the Court also observed that the judge had allowed the defense to access to the social worker's records:

The files of Rochelle Beley, including any reports therein from Rivendell and Billings Deaconess Hospital's 2-North Psychiatric Unit, were subjected to an *in camera* inspection by defense counsel.

While allowing an inspection of Rochelle Beley's file, the District Court denied motions as to all other records. ...

243 Mont. at 7, 792 P.2d at 1115 (1990). Presumably, no one in the case made any claim to privilege for a social worker, and the Court certainly did not blink at the disclosure of her records. Reynolds' conviction was affirmed.

The primary reason that the U.S. Supreme Court extended the privilege to licensed social workers in *Jaffee* was the Court's reasoning that the many Americans receive their mental health treatment from the most numerous, and least expensive, providers: social workers. Justice Scalia's dissent questioned the truth of this proposition, and argued that such a decision was better left to the legislative branch. In Montana, where privileges are purely statutory, the Legislature has not yet been convinced to take such

a step. Social workers' clients do not have any privilege for their communications. I do not know if the clients or their providers are aware of this situation, but my hunch is that both sides assume that the duty of confidentiality is all they need. It is not.

## CONCLUSION

There is a clear privilege in both civil and criminal proceedings in Montana state courts for communications between a psychologist and a patient. Communications between a psychiatrist and a patient are privileged under the doctor-patient privilege, which applies in civil but not criminal cases, because a psychiatrist is a doctor. Communications between a client and a licensed social worker should be kept confidential by the social worker per the statutes regulating the profession, but are likely to be subject to disclosure in both civil and criminal court proceedings despite an objection of "privilege."

The Legislature should clarify the status of the mental health privilege, and if it concludes that social workers are entitled to a privilege, expand M.C.A. 26-1-807 to include licensed clinical social workers as well as psychologists and psychiatrists. In the meantime, Montanans who wish to keep their disclosures to a mental health practitioner privileged should go to psychologists, and not to either psychiatrists or social workers.

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### McGrath, from page 19

University Law School, he served as a Reginald Heber Smith Community Lawyer Fellow in Reno, Nevada, providing legal services to low-income clients.

And as chief justice, Krueger said, McGrath has fought to promote and establish self-help centers throughout Montana,

and he has made continued funding of self-help centers and pro bono services among his top priorities.

"Chief Justice Mike McGrath deserves to be recognized for improving access to the judicial system and a distinguished legal career that has demonstrated not only a personal commitment and dedication, but also excellence in the development of practices to expand and impact the delivery of legal services to the unrepresented Montana population," Krueger said.

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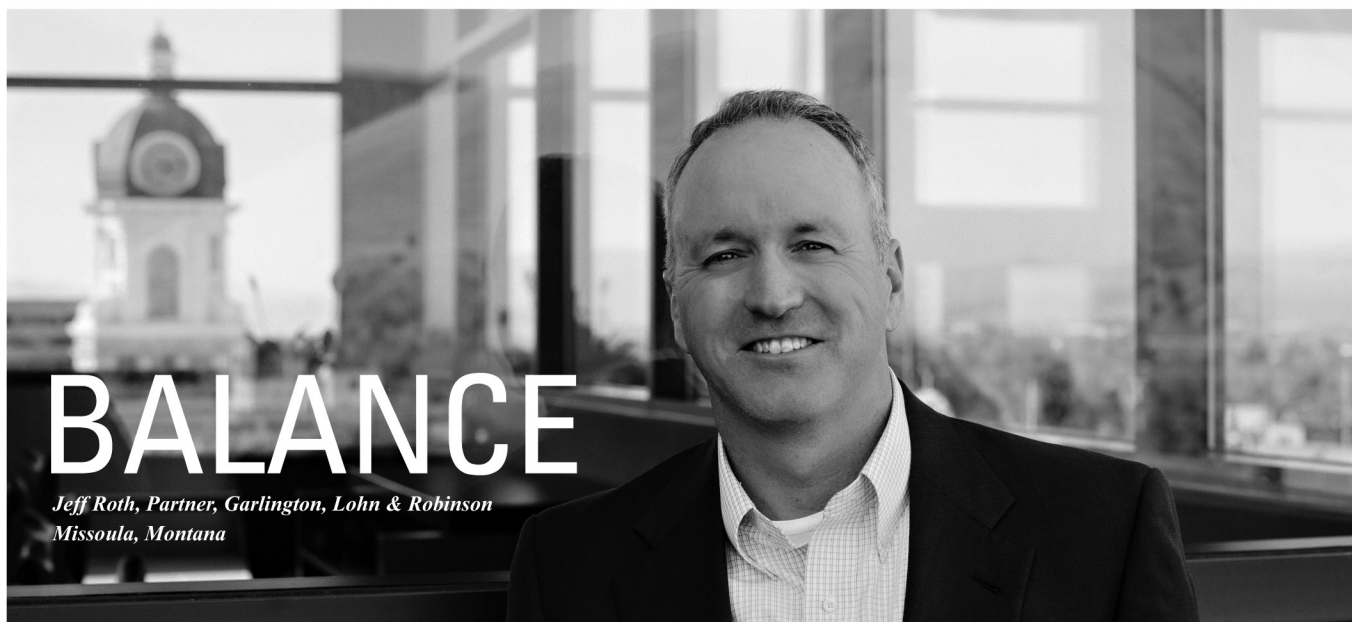
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