MONTANA LAWYER
State Bar of Montana
September 2014 | Vol. 39, No. 9

MCKITTRICK WINS JAMESON AWARD

Longtime advocate for Montana workers wins most prestigious honor bestowed by State Bar.
Also...
> Brent Cromley wins Bousliman
> James Nelson, Kristy L. Buckley and Cynthia Ford win Haswell

Also in this edition:

MONTANA LAWYER

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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Subscriptions are a benefit of State Bar membership.

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

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Regular Features

From the cover

Great Falls attorney D. Patrick McKittrick will receive the William J. Jameson Award at the State Bar's Annual Meeting in Big Sky on Sept. 25. Photo courtesy of Ralph Pomnichowski.

Will state judiciary be elected or bought?

By James C. Nelson

Probably every attorney, judge and justice in the State has been approached by a client, a friend or an acquaintance with the question: "I don't know anything about the candidates for justice (or judge); who should I vote for?" And the answer probably goes something like: "Well, Smith is a hardworking (attorney, judge or justice), has a good reputation for honesty, is experienced and fair, and would be a good choice." And, most likely, that recommendation will be followed in the voting booth. Members of the Bench and Bar are reliable persons to make those recommendations — after all, they, of all people, know the candidates, and it is they who appear in courts, litigate and read the decisions and opinions that are handed down.

Thanks to SCOTUS's 2010 decision in *Citizens United*, however, judicial elections have now become more complicated. That decision ushered in the unprecedented use of dark, individual and institutional mega-money to influence elections and, effectively, to silence the voices of individual small contributors and ordinary voters. The SCOTUS approach and subsequent court cases have chipped away at contribution limits imposed upon individuals, corporations, unions, special interests groups, "nonprofits," and trade associations. Nationwide, *Citizens United* has already resulted in millions of dollars being poured into elections with little or no disclosure of the source of the funding and with little, if any, accountability for the truth and accuracy of the "speech" that the money has bought.

In a dizzying hail of mind-boggling platitudes, SCOTUS decreed that money given *to* a candidate breeds corruption; but money spent for or against a candidacy does nothing but educate and inform the public. As a further result of the high court's decision, political parties can now endorse Montana's judicial candidates — thus subverting Montana's traditionally nonpartisan races. And, to make matters even worse, representatives of big money are presently challenging Montana's individual campaign contribution limits in federal court.

Though it is the law of the land, *Citizens United* is full of statements that might be charitably described as the stuff that most Montanans try to avoid stepping in when crossing a cow pasture. Indeed, in the real world of politics, money, whether contributed or spent, buys loyalty on the bench; and the more money contributed or spent, the greater the loyalty that is purchased. Public education and information are beside the point; one neither informs nor educates with misinformation, innuendo and lies. More to the point, does anyone but the *Citizens United* majority really believe that if a dark money organization with an opaque, feel-good name spends six or seven figures to get its candidate elected to the bench, there won't be a pay-back expected from and given by the electee?

There will be. But, then, don't take my word for it. There are two nonpartisan sources of information that fairly and accurately detail the *Citizens United* effect of mega money in judicial races. The first, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions* [1] is a scholarly study, released in June 2013, sponsored by the American Constitution Society for Law and Policy. Authored by Emory University law professor Joanna Shepherd, this nationwide analysis of state judicial elections provides critical data on the effect of campaign expenditures on judicial behavior from 2010-2012.

The second piece was published just this August by the Center for American Progress, a nonpartisan research and educational institute. Written by Billy Corriher, a lawyer holding degrees in political science and business, *Koch Brothers and D.C. Conservatives Spending Big on Nonpartisan State Supreme Court Races,* [2] is a well-researched, lengthy report discussing in depth the millions that are being dumped into judicial races in some of our sister states to elect state supreme court justices. There is inadequate space here to go into either study at length, but what they report is uniformly frightening and appalling. Here are just a few highlights:

From the *Justice at Risk* study:

> Business groups overwhelmingly dominate interest group spending on television advertising — the most expensive and effective form of campaign activity. With their unambiguous agenda favoring business and pro tort-reform, business groups typically focus on electing justices with that pre-disposition. Business groups regularly disguise their campaign support by channeling funds through nonprofit groups with inspirational but completely opaque names — i.e. via dark money. The plaintiffs' bar, while contributing about 2 percent less than business groups, typically represents a much more diverse range of clients and economic interests, and is less inclined to favor a judicial candidate with a particular ideological agenda or pre-disposition. Holding constant factors like individual justice characteristics, ideology and data about state law and political climate, there is a significant relationship between business group expenditures to state supreme court justices and those justices' votes on cases involving business matters. The more campaign expenditures a justice receives from business interests, the more likely the justice is to vote in favor of businesses in court cases. The influence of corporate campaign contributions goes far beyond ideological leanings. The largest influence was on judges affiliated with the Democratic Party, who are assumed to be less ideologically predisposed to favor business interests.

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1 See, www.acslaw.org/state-courts/justice-at-risk

2 See, www.americanprogress.org/

Year as State Bar president has been a great expedition

On September 23, 1806, Meriwether Lewis wrote to President Jefferson: *"It is with pleasure that I anounce to you the safe arrival of myself and party.... In obedience to your orders we have penitrated the Continent of North America to the Pacific Ocean, and sufficiently explored the interior of the country to affirm with confidence that we have discovered the most practicable rout which dose exist across the continent by means of the navigable branches of the Missouri and Columbia Rivers."*

Well, sort of. They didn't really find a means of transit, much less an efficient one.

Do you remember summer camp from junior high? Morning Bible lessons, staring at the cute girl I was too shy to talk to, long hikes and great bonfires. I've likely created better memories than there were, but they're fond ones. We heard over and over the camper's creed: have fun, make new friends, memorize a verse and leave the place better than you found it.

Never thought I'd have the chance to do that all again. Kinda like the explorers . . . I didn't find a water route to the Pacific. Haven't solved all the tussles. I didn't near get to visit every committee or knock on half the doors I'd intended. But also like Lewis and Clark, we made a few friends, shared some knowledge and got folks excited about some territory. Whether that's Fastcase, access to justice, making your cellphone secure or offering a local CLE, I hope we left the camp a little better. Come join us at Big Sky in a few weeks and see what else we're doing for you. This is a dang fine organization that anyone'd be proud to be part of. Riding the coach for a year — I'll testify to how well our members outshine darn near any other state. Thanks to our great staff and to all the volunteers who serve our committees, sections and commissions — it's where the real work of the Bar gets done. I was privileged to work with a few.

This year has passed by too quickly and I'll shortly pass my stick horse to Mark Parker, whose wisdom and humor far exceed mine. At least he dresses normal. But I smiled at our meetings, enjoyed your company and our visits. We shared concerns and solved a few problems. I couldn't be prouder of our group and the privilege I had to wear the badge this year. I hope you find a tad more relevance for your State Bar than you might have a year ago. Thanks for receiving me at your door and taking the time to visit.

And I did get the courage to say "hi" to the girl next door a few years back. We celebrate 30 years together this fall.

Notes from the trail June – August

June 6 – 19 Judicial District Annual CLE and Shootout

Lifetime Sheriff Gale Gustafson organizes their annual meeting in Conrad, this year combined with weekend parade, Calcutta-auction and trap shoot competition. About 26 lawyers gathered at the Pondera Shooting Club for a half-day CLE. We adjourned at 3 o'clock, went outside and drew guns at 30 paces. Actually, we loaded shotguns and had a friendly trap competition. I scored somewhere between not great and better than embarrassing — kinda like law school.

June 18 – 20th Judicial District Bar Startup

A short ride south to Polson, and we met up with the Lake and Sanders County members at the Elks Lodge for a noon meet, greet and CLE. Lucky stars, 27 hungry folk came for lunch and an update on what the State Bar's doing next. We celebrated Ann Harrie as the new local chief and looked at how *Flathead Lake Cases* have shaped Montana property law. Amazing what's happened from raising the lake 10 feet.

June 20 – Family Law CLE and Section Meeting, Kalispell

The Family Law Section, another cadre of fine ropers, put on a killer CLE in Kalispell. Pretty brave area of practice. This posse displays their guns without throwin' bullets in the fire. The CLE covered data and mobile device security (scary stuff), cohabitation and talkin' turkey to angry folk. Justice Mike Wheat rode trail to the Flathead and spoke on electronic filing, pro se litigation and judicial caseload. An impressive bench to send its justices to connect with hired hands. Thanks, your Honor! Hate watching a sunset ride, but Deputy Mars Scott will pass the reins to new help. Thanks for leading this posse so many fine years.

July 10 – Meet up with 3rd Judicial District, Anaconda

We wandered over west, to the only remaining big stack, our last remnant of the Anaconda Company. Did ya know that Marcus Daly founded the town (battling with William Clark, another "Copper King") and named it after an ornery snake? Seventeen hired hands plus the local judge Dayton met up for lunch and a CLE July 10. A truly fine group — kindred spirits

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Montana Defense Trial Lawyers — Annual CLE Seminar

November 21, 2014 (Grizzly/Bobcat Weekend) ■ 6.0 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.

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 you 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 hours)* — 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	**Maximizing Technology** Paul Unger, Esq.
12:00-1:30 pm	**MDTL Annual Membership Meeting Luncheon** Lunch on own if not attending
1:30-4:15 pm	**Maximizing Technology** Paul Unger, Esq.

Fees

	On or Before Nov. 1	After Nov. 1
❑ MDTL Member	$260	$325
❑ Nonmember	$345	$410
❑ Paralegal	$175	$215
❑ Claims Personnel	$140	$160
❑ Law School Students	$25	$25
❑ Members of the Judiciary	*Complimentary*	*Complimentary*

Payment must accompany registration **Total Enclosed $_____**

Payment Information:
❑ Visa ❑ MasterCard ❑ Check (made payable to MDTL)

Cardholder's Name (please print) _____

Account # _____ Exp. Date _____

Validation Code _____ Auth. Signature_____

Cardholder's Address _____

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

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

Member and Montana News

Clark, Dorrington join Crowley Fleck

Crowley Fleck PLLP has welcomed new associates Brett P. Clark to its Helena Litigation Department and Greg F. Dorrington to its Helena Energy/Litigation Departments.

Clark focuses his practice on commercial litigation and professional liability defense, with an emphasis in legal and accounting malpractice. Prior to joining the firm, he practiced in Minneapolis for seven years, representing lawyers and accountants in several jurisdictions. He received a B.A. in political science from Carroll College in 2003 and his J.D. in 2006 from the University of St. Thomas School of Law. He has also authored several articles for the Minnesota Lawyer. He can be reached at 406-449-4165 or via email: bclark@crowleyfleck.com.

Clark

Dorrington

Dorrington focuses his practice on environmental and energy law, counseling and civil litigation. Prior to joining the firm, he practiced in Anchorage, Alaska, where he represented individuals, municipalities, school districts and businesses in a broad range of legal affairs, including environmental permitting and counseling, CERCLA defense and immigration law. He graduated from Gonzaga University in 2003 with a B.A. in philosophy and he received his J.D. in 2007 from Vermont Law School. He can be reached at 406-449-4165 or via email: gdorrington@crowleyfleck.com.

Federal Defenders welcome Hunt

Joslyn Hunt has joined the Federal Defenders of Montana as research and writing specialist.

As research attorney for the Federal Defenders, Hunt will be stationed at the Helena Branch Office and officially assumed her duties on Monday, July 28. Immediately prior to joining the organization, she was a special assistant attorney general, Department of Labor and Industry. Her prior attorney positions include: chief appellate defender, Office of the State Appellate Defender; judicial research and writing clerk, Montana Supreme Court (for the Honorable James C. Nelson); and judicial clinical research and writing clerk, United States District Court (for then Chief Judge Donald W. Molloy).

Hunt received her Juris Doctorate with honors from the University of Montana School of Law (Montana Law Review Editor), having graduated with high honors with a Bachelor of Science degree in metallurgical engineering, with two minors (chemistry and mathematics) from Montana Tech. She has received many accolades in her career, not the least of which were the Lawyer of the Year Award from the Montana Association of Criminal Defense Lawyers and the Appellate Defender Award from the Office of the State Public Defender.

Crowley memorial to be held Nov. 22

The University of Montana School of Law is holding a memorial service celebrating the legacy of Professor Duke Crowley on Saturday, Nov. 22.

The service will be held at 10 a.m. in Room 101 of the law school.

Crowley was at the law school from 1966 until 1999, teaching Evidence, Civil Procedure and Criminal Procedure. He also was instrumental in the reorganization of the executive branch of state government and was a draftsman of Montana's criminal code.

Gifts in Duke Crowley's memory can be made to the University of Montana Foundation for the William F. "Duke" Crowley Endowment and mailed to The UM Foundation, P.O. Box 7159, Missoula, MT 59807-7159.

The law school is also compiling a list of Duke stories and "Crowleyisms." If you have any you would like to add, email them to kathleen.reeves@umontana.edu.

Fernando joins Kasting, Kauffman & Mersen

Kasting, Kauffman & Mersen, P.C., Attorneys at Law are pleased to announce that Sherine D. Fernando, Esq., has joined the firm as an associate attorney.

Fernando received her bachelor's degree from University of Montana with honors and her law degree from the University of Montana School of Law.

Prior to joining Kasting, Kauffman & Mersen, P.C., Fernando was an associate attorney at Datsopoulos, MacDonald & Lind, P.C. She will be assisting the firm in all aspects of its practice.

Court Orders

DISCIPLINE

Summarized from Order No. PR 13-0069

On Jan. 25, 2013, a formal disciplinary complaint was filed against Montana attorney Jeffrey L. Sutton. The disciplinary complaint may be reviewed by any interested person in the office of the Clerk of this Court.

Sutton subsequently tendered to the Commission on Practice a conditional admission and affidavit of consent, pursuant to Rule 26 of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE). The commission held a hearing on the conditional admission and affidavit of consent on July 18, 2013, at which hearing Sutton and his counsel were present. On July 11, 2014, the commission submitted to the Supreme Court its Findings of Fact, Conclusions of Law, and Recommendation that Sutton's conditional admission be accepted.

The court approved the findings, conclusions and recommendation of the Commission on Practice. In his conditional admission, Sutton has admitted that he failed to make a reasonably diligent effort to comply with legally proper discovery requests by an opposing party in litigation. Sutton also admitted to failing to provide a client with competent representation or to act with reasonable diligence and promptness in representing the client, failing to make reasonable efforts to expedite litigation consistent with the interests of his client, and failing to keep his client reasonably informed about the status of his legal

matter and to promptly comply with his client's reasonable requests for information. Sutton has admitted that, by his actions and failures to act, he violated Rules 1.1, 1.3, 1.4, 3.2, and 3.4 of the Montana Rules of Professional Conduct. Sutton's admission was tendered in exchange for the following discipline: a public censure by this Court; a two-year term of probation with terms and conditions; payment of $875 in July 29, 2014, restitution, together with interest, to his client; and payment of costs incurred in connection with this matter.

Based upon the foregoing, IT IS HEREBY ORDERED:

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

2. Jeffrey L. Sutton shall appear before this Court for a public censure to be administered in our Courtroom at 1 o'clock p.m. on Sept. 9 2014.

3. Sutton's admission to the practice of law in Montana is placed on probationary status for two years following the date of this Order, subject to the following terms and conditions:

a. Sutton shall obtain a mentor, subject to the approval of the Office of Disciplinary Counsel (ODC), to monitor his practice and review the status of any litigation cases.

b. Sutton shall submit quarterly reports to ODC regarding the state of his practice and his communications with his mentor.

4. Sutton shall pay restitution in the amount of $875 to James Leishman, together with interest payable from July 5, 2011, at the rate of 10 percent per annum.

5. Sutton shall pay the costs of these proceedings subject to the provisions of Rule 9(A)(8), MRLDE, allowing him to file objections to the statement of costs.

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

Summarized from Order No. PR 13-0293

On April 29, 2013, a formal disciplinary complaint was filed against Montana attorney Gregory L. Ingraham. The disciplinary complaint may be reviewed by any interested person in the office of the Clerk of this Court.

Ingraham subsequently tendered to the commission on Practice a conditional admission and affidavit of consent, pursuant to Rule 26 of the Montana Rules for Lawyer Disciplinary Enforcement (MRLDE). The Commission held a hearing on the conditional admission and affidavit of consent on October 16, 2013, at which hearing Ingraham and his counsel were present. On July 11, 2014, the Commission submitted to the Supreme Court its Findings of Fact, Conclusions of Law, and Recommendation that Ingraham's conditional admission be accepted.

The court approved the findings, conclusions and recommendation of the Commission on Practice. In his conditional admission, Ingraham has admitted making multiple advances of funds to clients, thereby acquiring a monetary interest in their case in violation of the Montana Rules of Professional Conduct (MRPC). He also admitted making false representations to the Office of Disciplinary Counsel (ODC) by untruthfully denying having made any other advances to clients except for litigation expenses. He has admitted failing to advise his clients, in writing, about the desirability of seeking independent legal counsel on the transactions; failing to get their written informed consent to the transactions and his role in them; and engaging in conduct involving deceit and misrepresentation. Ingraham has admitted that his conduct violated Rules 1.8(a), (e), and (i), 8.1, and 8.4(c), MRPC. His admission was tendered in exchange for the following discipline: a public censure by the Supreme Court, a 10-year term of probation with terms and conditions, and payment of costs incurred in connection with this matter.

Based upon the foregoing,

IT IS HEREBY ORDERED:

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

2. Gregory L. Ingraham shall appear before this Court for a public censure to be administered in our Courtroom, at 1 o'clock p.m. on Sept. 9, 2014.

3. Ingraham's admission to the practice of law in Montana is placed on probationary status for 10 years following the date of this order, subject to the following terms and conditions:

a. Within two weeks of the completion of a case involving a contingent fee, whether or not he shares the fee with another attorney, Ingraham shall provide ODC with the name and contact information of his client. ODC may contact the client and inquire whether Ingraham made any advances to the client not permitted by Rule 1.8, MRPC.

b. Ingraham shall not attempt to dissuade any client from cooperating with ODC.

c. Ingraham shall provide ODC with the name of any attorney or law firm with whom he enters into an arrangement to share a contingent fee. He shall provide the name within two weeks of the date of the arrangement.ODC may contact the attorney or law firm and inquire whether Ingraham made any advances to the client not permitted by Rule 1.8, MRPC.

4. Ingraham shall pay the costs of these proceedings subject to the provisions of Rule 9(A)(8), MRLDE, allowing him to file objections to the statement of costs.

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

Board and Commission Appointments

Summarized from Order No. AF 07-0300

Michael Anderson, a member of the Montana Supreme Court Board of Bar Examiners, has tendered his resignation from the Board. The Court thanks Mr. Anderson for his years of dedicated service to the Board of Bar Examiners, to this Court and to the people of Montana.

Tara Elliott, an attorney from Missoula, has indicated her willingness to serve on the Board. Therefore, IT IS ORDERED that Tara Elliott is appointed to the Board of Bar Examiners effective the date of this order, for an indefinite term.

More court orders on page 15

Should a guardian have power to initiate divorce?

By PENELOPE OTERI

With the aging of America, legal advocates face new challenges involving incapacitated clients and powers granted to a guardian. Situations arise when marital dissolution becomes necessary to protect the interests of an incapacitated client, raising the question of whether a guardian may initiate dissolution. With increasing frequency, lawyers are also seeing elderly clients with dementia coerced into marriage by a younger, predatory person. When the family members step in and initiate guardianship, can the appointed guardian file for divorce?

The majority rule has long held that, absent express statutory authority, a guardian may not bring an action for divorce on behalf of a conserved person.[1] While law and policy are evolving on this issue, Montana remains under the majority rule.[2] This article explores the current status of Montana law, rationale behind jurisdictions that have granted a guardian this power, and how (and why) Montana should follow.

CASE LAW

Guardianship is governed by state law; statutes as interpreted and applied by courts of the relevant jurisdiction dictate the duties and procedural and substantive matters of a guardianship.[3] A guardian has generally the same rights, powers and duties respecting the ward as a parent respecting an unemancipated minor child.[4] Because a child becomes emancipated upon marriage, states that narrowly construe this provision disallow a guardian the power to initiate or maintain a divorce, while states with a broad construction grant the guardian such power. The legislature grants guardians authority to interfere in intimately personal concerns of an individual's life, yet states remain divided on the issue of a guardian's power to terminate a marriage.[5]

Montana: *In re Marriage of Denowh ex rel. Deck*, 2003 MT 244

In *Marriage of Denowh ex rel. Deck*, the court reversed a judgment dissolving the marriage, holding that the husband's legal guardian did not have the power to file a marital dissolution proceeding on his behalf. The husband was diagnosed with lung cancer in 1997 after three years of marriage. By early 1998, he needed full-time care and was admitted to a VA nursing home.[6] In March 1999, the husband's adult daughter was granted temporary guardianship; the following month, the husband filed for dissolution. The wife moved to dismiss, alleging that the husband lacked capacity to bring a dissolution action on his own behalf.[7]

In December 1999, the District Court ordered that the husband lacked capacity and granted his daughter, then permanent guardian and conservator, leave to amend the petition. In April 2000, his daughter filed the amended petition as guardian on the ward's behalf. In June 2001 the marriage was dissolved; his wife appealed.[8]

The court found no single majority rule among sister jurisdictions as to whether a guardian has the power to initiate dissolution proceedings.[9] Analyzing § 72-5-321, MCA (a guardian may only bring proceedings on behalf of the ward that a parent may bring on behalf of an unemancipated minor child) and Montana Rules of Civil Procedure 17(c) (the guardian of an infant or incompetent person may sue or defend on behalf of the infant or incompetent person), the court determined the more specific statue controls; therefore, *§ 72-5-321, MCA,* by definition, precludes bringing or maintaining a dissolution proceeding (authority of the parent ceases upon marriage of the child).[10][11]

The court analyzed policy supporting its decision; a guardianship may be used only as necessary to promote and protect the well-being of the incapacitated person.[12] Permitted under Rule 17(c), MRCP, guardians regularly bring actions on behalf of the ward that seek some type of benefit for the ward; however, the court opined: 1) a dissolution provides no obvious benefit to an incapacitated ward, thus no basis exists for determining whether a dissolution is in the ward's best interests; 2) a dissolution involves not only the ward's interests but the interests of a third party not subject to a guardianship; and 3) allowing a guardian to bring a dissolution would interfere in the ward's highly personal marital relationship; therefore, for all foregoing reasons, it would be inappropriate to grant such power to a guardian on behalf of the ward.[13] Unfortunately, the court's opinion binds guardians whose ward stands to benefit from

dissolution by clearing property interest for payment of long-term care; whose ward may be subject to domestic violence; whose ward may be subject to manipulation and undue influence; and cases where the third party may be amenable to the dissolution.[14]

Illinois: *In re Marriage of Burgess*, 302 Ill. App.3d 807 (1998)

Montana's opinion in *Denowh* quoted *In re Marriage of Burgess*, 302 Ill. App.3d 807, 236 Ill. Dec. 280, 70 N.E. 2d 125 (1998), "a guardian is a creature of statute with only those powers granted to it and, thus, is without standing to do anything beyond its specific grant of authority." In *Burgess* (1998), the Illinois Appellate Court reversed a District Court judgment dissolving the marriage when the disabled ward originally filed the action prior to appointment of guardianship; the plenary guardian lacked standing to institute or maintain a dissolution proceeding, following binding Illinois precedent, *In re Marriage of Drews* (statutory standing accorded to guardian to represent ward in all legal proceedings did not encompass initiation of dissolution, which is a personal, not financial, proceeding). In a special concurrence, Justice Tully echoed the dissent in *Drews*: disallowing a plenary guardian's power to maintain a marital dissolution originally filed by the disabled adult does not serve the goals of preserving the ward's best interests and protecting him or her from neglect, exploitation or abuse; "[B]y allowing guardians to make such decisions regarding dissolution actions, a court preserves 'the dignity and worth of such a person [an incompetent] and affords to that person the same panoply of rights and choices it recognizes in competent persons.'"[15] Justice Tully expressed a need for a legislative change to allow plenary guardians this power.

***In re Marriage of Burgess*, 189 Ill.2d 270 (2000)**

While Montana's 2003 case law cites the 1998 *Burgess* opinion, *Burgess* was overturned in 2000 when the Illinois Supreme Court reversed the Appellate Court and held that, even absent express statutory authority, a plenary guardian has standing to continue a dissolution action filed by the ward prior to the adjudication of disability.[16] The court found other cases involving a guardian's power to make highly personal decisions absent specific statutory enunciation, including withdrawal of artificial nutrition and hydration, consent to a ward's adoption, and consent to an abortion on behalf of a disabled ward.[17] The court distinguished the policy reasons underlying *Drews*; that in *Burgess*, the husband made a clear and convincing showing of his choice to end his marriage 14 months before being adjudicated disabled. During the *Burgess* appeal, the Illinois Legislature amended Illinois Compiled Statutes Annotated § 11a-17, Duties of Personal Guardian, to specifically provide that a guardian of the ward's person and estate may maintain an action for dissolution of marriage when the petition was filed prior to adjudication of disability. Although neither party had argued that the court apply the new section, the court noted the amendment in its opinion.[18]

In 2012, the Illinois Supreme Court overruled *In re Drews*, and held that a guardian has standing to institute marital dissolution proceedings on behalf of a ward upon satisfying a clear and convincing burden of proof that bringing a marital dissolution petition is in the ward's best interests.[19]

Connecticut: *Luster v. Luster*, 128 Conn. App. 259 (2011)

Conservators of the person and estate had inherent authority to file a cross complaint for divorce in *Luster v. Luster,* 128 Conn. App. 259 (2011). The wife filed for legal separation and alimony pendent lite against the husband and his involuntary conservators, the parties' adult daughters. Conservators filed cross complaint for dissolution on the husband's behalf, later amended to include an intolerable cruelty claim.[20] As a matter of first impression, the court analyzed statutes delineating duties of conservators of the person and estate, which include managing the estate and providing for the care, comfort and maintenance of the ward; and which allow a conserved person, similar to a minor, to pursue civil litigation through an appointed representative.[21] The court determined that duties of the conservators to protect the person and estate included, under the circumstances, the responsibility of protecting the husband's interests by pursuing dissolution on his behalf. It reversed the trial court decision that, absent legislative authority, a conservator appointed by the Probate Court could not bring such a cross complaint.[22]

New Mexico: *Nelson v. Nelson*, 118 N.M. 17 (N.M. App 1994)

As a matter of first impression, the court examined case law from states upholding both the majority rule and the minority rule (allowing a guardian to bring or maintain a divorce action), and New Mexico statutes and policy. The court found the analysis in decisions adopting the minority view to be most persuasive and held that a guardian may initiate divorce proceedings on behalf of an adult incompetent ward. The court noted that New Mexico statutes do not expressly grant authority to initiate a divorce action on behalf of a ward, but grant guardians exceedingly broad powers; generally the same rights, powers and duties respecting the ward as a parent has respecting an unemancipated minor child.[23] The guardian is required to make decisions in accordance with the values of the ward, as in medical care and treatment, and should likewise recognize the primacy of the ward's values in determining whether to file for divorce.[24]

Arizona: *In re Marriage of Ruvalcaba*, 174 Ariz. 436 (Ariz. App. Div. 1 1993)

In 1993, Arizona determined that a guardian could petition for dissolution on behalf of an incompetent adult ward. A "substituted judgment" standard was appropriate upon a showing of clear and convincing evidence of ward's desire to dissolve the marriage while competent. Like Montana, Arizona's general powers and duties of a guardian respecting a ward are those that a parent has respecting an unemancipated minor child; and like Montana's Rule 17(c), Arizona Rule of Civil Procedure 17(g) provides that a guardian or other representative fiduciary of an infant or incompetent person may sue or defend on behalf of a ward.[25] Similar to New Mexico, Arizona recognized that an incompetent's right to refuse medical treatment is not expunged by physical or mental impairment; therefore, an incompetent's right to petition for dissolution of marriage is similarly maintained under physical or mental incapacity. The Court could not justify treating competent and incompetent spouses differently, and held that a spouse who has been adjudged "incapacitated" retains the means to dissolve his or her marriage, a means which a guardian may assert on the ward's behalf pursuant to general statutory powers and duties of a guardian and Rule 17(g) of the Arizona Rules of Civil Procedure.[26]

Vermont: *Samis v. Samis*, 2011 VT 21

Vermont recently declined to grant a guardian the power to initiate dissolution. The husband appealed a dissolution granted in an action brought by the wife's guardian, her adult son from a first marriage. The wife suffered from dementia, and stood to gain Social Security benefits from her first marriage upon dissolution of her current marriage. The guardian had difficulty securing from the husband the financial support necessary for the wife's care and sought divorce on her behalf.[27] The trial court based its decision on Vermont Rule for Family Proceedings 4(b)(1)(a), which allows a divorce complaint to be signed and sworn by the guardian when the plaintiff's mind is not sound.[28] The Supreme Court of Vermont recognized the vitally personal right of marriage and opined the right to bring a dissolution petition is strictly personal. Vermont held with majority rule jurisdictions: absent explicit statutory language

Divorce, page 36

William J. Jameson Award

McKittrick has devoted career to serving state's working people

By JOE MENDEN

D. Patrick McKittrick's legal career has spanned parts of six decades and is filled with a long list of accomplishments that would be considered highlights for anyone.

He was a member of the Montana House of Representatives from 1971-77, including Speaker of the House from 1975-77. He was named an Outstanding Legislator by the Eagleton Institute of Politics, Rutgers University. He was selected by Judge James Browning to be a delegate to the Ninth Circuit Court of Appeals Judicial Conference.

He has been president of the Cascade County Bar Association, chairman of the State of Montana Economic Development Board, chairman of the Montana State Bar's Judicial Committee, and has been on a long list of other committees, foundations and boards.

But McKittrick considers his latest laurel the biggest of them all.

McKittrick will receive the 2014 William J. Jameson Award at the State Bar of Montana's Annual Meeting in Big Sky on Thursday, Sept. 25. The award, named after the late Montana federal judge, is the State Bar's highest award, going annually to the attorney who has exemplified the highest values of the legal profession throughout his or her career.

"I'm just totally surprised," McKittrick said. "It's the zenith of a career. It's the highest award an attorney can receive in the state of Montana. Judge Jameson was the model. To receive something in his name is just a wonderful honor.

"It's an award that has made my career. I hold it in that high of esteem."

McKittrick was nominated for the award by his brother and partner for the past 30 years, Timothy McKittrick.

Photo courtesy of Ralph Pomnichowski
D. Patrick McKittrick

In his nomination letter, Timothy said Pat was instrumental in passing some of the most progressive legislation in Montana history and said that his work on cases before the Montana Supreme Court has established a far-reaching imprint on legal jurisprudence in the state.

Timothy also cited the work that has made up a large part of Pat's law practice, representing unions to fight for workers' rights and fair wages.

"The majority of that work goes unpublicized," Timothy wrote. "However, countless families in Montana can thank Pat for saving a worker's job, enabling people to earn a living wage with benefits, and providing a safe and healthful work environment. The overriding concern for Pat has always been that every person is an individual and deserves to be treated with dignity and respect, regardless of their lot in life. His practice has epitomized that tenet."

Pat is the oldest of four children of an Irish immigrant, Dan T. McKittrick, who worked as a smelter, worked his way up to being president of the smelters union and, eventually, the mayor of Anaconda. All four went on to careers in the legal profession: The Hon. Thomas McKittrick is a retired District Judge; their sister, Eileen, was a deputy clerk of court in Anaconda.

Both Timothy and Thomas McKittrick say the example set by their older brother was an inspiration for them to become lawyers themselves.

In fact, Thomas said he was all set to go to school in Oregon on a baseball scholarship. But their mother, he said, was worried about him becoming a "baseball bum" and asked him to go to Carroll College, where Pat was attending, for one year. After that, he could go to school anywhere he wanted.

"He was a senior and I was a freshman," Thomas McKittrick said. "He blazed the way. You look up to him and follow in those footsteps."

The rest is history. Thomas stayed at Carroll and followed Pat to law school. It was the exact same path Tim later followed.

The McKittrick family legal tradition will continue well into the future. Other family members who have followed in Pat's footsteps include Pat's daughter, Ann Marie, and his daughter-in-law, Jamie, and his nephew, Matthew. Pat's sister Eileen was a deputy clerk of court in Anaconda, and another nephew, Joe, entered law school in 2013.

Though the Jameson Award was

Jameson, page 28

George L. Bousliman Professionalism Award

Cromley has long and distinguished history devoting self to public service

Brent Cromley is the 2014 George L. Bousliman Professionalism Award winner. The award is dedicated to George Bousliman, former State Bar executive director.

Brent Cromley, an attorney at Moulton Bellingham PC in Billings, is the 2014 winner of the State Bar of Montana's George L. Bousliman Professionalism Award.

Cromley will be honored with the award at the State Bar's 40th Annual Meeting, to be held at Big Sky Resort Sept. 24-26. The award will be presented during the meeting's banquet on Thursday, Sept. 25.

Cromley said he was surprised and honored to receive the award.

"It's certainly a very pleasant thing to go through to have that kind of recognition from your peers," he said. "I appreciate the fact that they were willing to think of me in that light."

The award is given annually to an attorney who has established a reputation for and a tradition of professionalism as defined by Dean Roscoe Pound: pursuit of a learned art as a common calling in the spirit of public service; and within two years prior to the nomination, demonstrated extraordinary professionalism in a least one of the following ways:

Cromley

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

Cromley was nominated by Pam Bailey, immediate past president of the State Bar.

Bousliman, page 13

Frank I. Haswell Writing Award

Nelson, Buckley, Ford share 2014 honor

The Frank I. Haswell Award for the best article submitted in the past year to The Montana Lawyer, the State Bar's monthly magazine, will be shared by three contributors this year: Former Montana Supreme Court Justice James Nelson, University of Montana law professor Cynthia Ford and Kristy Buckley, an attorney at Crowley Fleck in Bozeman.

The award comes with a $200 prize through an endowment set up by the late Montana Chief Justice Frank Haswell. The winner is chosen from a number of finalists by the State Bar's Past Presidents Committee.

Nelson was honored for his opinion piece "The Religion Clauses, A Sword with Two Edges," which was published in the March 2014 edition of The Montana Lawyer.

Nelson

Buckley

Ford

The article argued against a push by religious and conservative groups in some states for a legally protected right to discriminate against lesbian, gay, bisexual and transgender citizens to preserve the First Amendment right to free exercise of religion.

"Although it was completely unexpected, I am very honored to receive one of this year's Haswell Writing Awards," Nelson said. "The State Bar of Montana and the editorial staff of the Montana Lawyer are to be congratulated for encouraging and publishing member submissions on topics of interest to Montana's bench and practitioners. Again, my thanks."

Buckley was honored for her article "The ACA: Where are we now?" from the February 2014 issue of the magazine. It

Haswell, page 13

Annual Meeting Schedule

Wednesday | Sept. 24

5 to 7 p.m. | Local Bar Reception at Buck's T-4, with music by Buzztones, a Bozeman rock band featuring some local attorneys. (Shuttle available; limited capacity, first come, first served)

7:30 to 8:30 p.m. Registration desk opens

Thursday | Sept. 25

7 a.m. | Registration desk opens

Hot Topics CLE 5.0 CLE/1 Ethics

LESSONS FROM THE BAKKEN: IMPACT ON PRACTITIONERS

7:30 to 8 a.m. | Community ramifications — Laura Christoffersen, Ryan Rusche
8 to 9 a.m. | Regional ramifications — Max Main
9 to 9:15 a.m. | Break
9:15 to 9:45 a.m. | Property issues — Chuck Peterson
9:45 to 10:15 a.m. | How to Read a Royalty Statement and Division Order — Don R. Lee
10:15 to 10:45 a.m. | Estate Planning for Mineral Owners — Bruce Bekkedahl 0.5 ethics CLE
10:45 to 11 a.m. | Break
11 a.m. to noon | "Man Camp Fallout: Water, subdivision, regulatory and environmental issues — Margarite Thomas, Craig Brown, Martha Williams
Noon to 1 p.m. | Probate: Ancillaries, Re-Openings and What-Ifs — Laura Christoffersen 0.5 ethics CLE

10 a.m. to noon | Executive Committee Meeting
1:15 to 2:30 p.m. | Elder Law Committee Meeting
1:15 to 3:30 p.m. | New Lawyers Section Luncheon (1.5 CLE)

- Modest Means Business Model — Shantelle Argyle
- How to Market and Develop Business for the New Lawyer — New Lawyer Presenters, TBD

3 to 5 p.m. | Board of Trustees Meeting (Bar members invited to attend)
5 to 6:30 p.m. | President's Reception (Lone Peak Pavilion) featuring distillery, beer and wine tastings
6:30 to 9 p.m. | Banquet — We will honor the winners of the Jameson, Bousliman and Haswell Awards and the recipients of 50-year membership pins. Also, there will be a presentation on highlights of the last 40 years of the State Bar of Montana.

Friday | Sept. 26

7 a.m. | Registration desk opens

Hot Topics CLE 5.0 CLE/1 Ethics

PRACTICE MANAGEMENT
7:30 to 8:30 a.m. | 30 Tech Tips in 60 Minutes — P. Mars Scott, Cort Jensen and Shane Vannatta
8:30 to 8:45 a.m. | Break

MONTANA SUPREME COURT ORAL ARGUMENTS
8:45 to 10:15 a.m. | *Masters Group International Inc. v. Comerica Bank*. Introduction by Greg Munro, interim dean of the University of Montana School of Law, and case summary by Professor Hilary Wandler of the University of Montana School of Law.

HOT TOPICS IN HEALTH CARE LAW FOR THE GENERAL PRACTITIONER
10:15 to 11 a.m. | ACA for Small Employers — Kristy L. Buckley
11 to 11:20 a.m. | A New Look at Powers of Attorney, Advanced Directives and POLST — Erin MacLean, Chuck Willey and Randy Snyder
11:20 to 11:40 | Health Law Transactional Concerns for the Montana Lawyer — J.A. "Tony" Patterson

PRACTICE MANAGEMENT
11:40 to noon | The Five Best Fastcase Features — Joshua Auriemma
Noon to 1 p.m. | Protecting Your Clients' Data — Sherri Davidoff 1.0 ethics CLE

1:15 to 2:30 p.m. | Awards Luncheon (Karla Gray Equal Justice Award, Neil Haight Pro Bono Award and Distinguished Service Awards)
2:30 to 5 p.m. | Health Care Section Meeting
3 to 5 p.m. | Paralegal Section CLE (2.0 CLE credits)

- Fastcase training/demonstration — Joshua Auriemma
- Adobe Pro — Tina Sunderland

REGISTRATION INFORMATION

Register online at www.montanabar.org, or mail in a registration form. Special group discount offer: When four members pay for a full registration on one order, a fifth member can receive a free full registration. Call 447-2206 to take advantage of this offer.

Bousliman, from page 11

"Brent's spirit of public service not only for the past two years but for his entire professional career not only meets but exceeds the criteria to be recognized as the recipient of the George L. Bousliman Award," Bailey wrote in her nomination letter. "I am grateful that the Past Presidents' Committee has awarded Brent Cromley this distinguished award to be given at our State Bar's 40th Anniversary at Big Sky in September 2014."

In her letter, Bailey noted that Cromley demonstrated his commitment to public service immediately upon his graduation from Dartmouth College when he entered the Peace Corps, serving in India. Since then, he has twice returned to India and was awarded a Distinguished Service Award by the Old Students Association in the village where he taught.

Cromley has served in both the Montana House of Representatives and the Montana Senate, where he served until 2006. He is currently a member of the Billings City Council, where he has been a leading proponent to enact a Non-Discrimination Ordinance for the city.

In addition, he serves on the board of directors for Riverstone Health, the Yellowstone County Solid Waste Disposal Board, the Yellowstone Adult Resource Alliance and the Billings Downtown Business Association.

Bailey pointed out in her nomination letter that Cromley is a past president of the State Bar of Montana — serving in 1998-99 when the namesake of the award he is receiving, George L. Bousliman, was executive director.

Cromley said he enjoyed working with Bousliman and was saddened when Bousliman retired from the State Bar and upon his death last year, and he appreciates being honored with the award named in his honor.

"When you know the person whom the award was named for, it makes it very special," Cromley said.

Haswell, from page 11

was part of a series of articles done over the course of the year by the Health Care Law Section of the State Bar.

"I am humbled and honored to be recognized for one of the Haswell Writing Awards this year," Buckley said. "I owe my sincere gratitude to the leaders of the Health Law Section of the State Bar of Montana who made my published article a reality. Thank you so very much to everyone who made this possible."

Ford was honored for her "Evidence Corner" series of columns. Her columns were published in the November, December-January, March, May and June-July issues of the magazine. Topics were dying declarations; hearsay and exceptions to the hearsay rule; spousal privilege; parent-child privilege; and clergy privilege.

Ford was unable to be reached for comment for this article.

Anti-Trust Issues in Health Care Law webinar set for Oct. 23

The Health Care Law Section's Anti-Trust Issues in Health Care Law webinar CLE has been reschueduled for Oct. 23 at noon.

The first cases to address 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 US District Court in Idaho. The Court recently issued its decision in plaintiffs' favor, confirming the legal framework for assessing future physician group acquisitions.

This program will provide insight into the antitrust issues that will affect hospitals and doctors in light of this changing legal environment.

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

Ettinger is chair of the Antitrust and Trade Regulation Practice Group at Honigman Miller Schwartz and Cohn LLP in Detroit.

The webinar will cost $50 for members of Health Care Law CLE section and $65 for nonmembers.

For more information about upcoming State Bar CLE, please call Tawna Meldrum at 406-447-2206. You can also find more info and register at www.montanabar.org. Just click the calendar in the upper left side of the home page. We do mail out fliers for all multi-credit CLE sessions, but not for 1-hour phone CLE or webinars. The best way to register for all CLE is online.

September

Annual Bankrupcy Section CLE (Missoula)—Sept. 4-5—10.5 CLE, including 1.0 Ethics. CLE is in conjunction with Grizzly Football Game against Central Washington. CLE will start around 1 p.m., Thursday, September 4, at the Holiday Inn Downtown. CLE topics will be Stern v. Marshall Progeny: Executive Benefits Insurance Agency v. Arkison; Bankruptcy 101—a Primer for New Bankruptcy Practitioners; §1305 Claims-Tax Compliance in Active Chapter 13;Extensions for Tax Filings; Setoff and Recoupment, the Automatic Stay, and the use of 363 Sales to Cut Off Successor Liability; Credit Reporting: Issues Impacting Consumers and Bankruptcy; Fair Debt Collection Practice Issues; 15 Dischargeability Litigation: The Challenges of the New Defalcation Standard; Limited Scope Representation; and a Judges Panel Hon. Frank R. Alley, III, Hon. Rosemary Gambardella and Hon. Ralph Kirscher. Registration available soon.

State Bar of Montana Annual Meeting (Big Sky) – Sept. 25-26 - 10.25 CLE credits, including 2.0 Ethics. The State Bar of Montana celebrates 40 years. CLE topics include Lessons from the Bakken: Impact on Practitioners; Protecting Your Clients' Data; Hot Topics in Health Care Law for the General Practitioner; The Five Best Fastcase Features; 30 Tech Tips in 60 Minutes; and Montana Supreme Court Oral Arguments on Masters Group International Inc. v. Comerica Bank.

October

Annual Construction Law Institute CLE (Bozeman) – Oct. 10
Details available soon.

Estate Planning CLE (Missoula) – Oct. 16.
Details available soon..

HEALTH CARE LAW SECTION

Annual Meeting Notice: The Health Care Law Section cordially invites all Section members and any other interested persons to our annual meeting, held in conjunction with the State Bar Annual Meeting in Big Sky Friday, Sept. 26, 2:30 to 5 p.m. We will be reviewing the Section's progress in 2013-2014, voting in new Section Council members for the coming year and planning for 2014-2015 Section-sponsored programs and events. All are welcome to join us.

CLE Notice: Join the Health Care Law Section members at the State Bar Annual meeting during the Friday Hot Topics CLE from 10:15 – 11:40 a.m. Section members will be presenting general practice topics relevant to the highly regulated health care industry, including the status of ACA implementation for employers, best practices related to health care contracting topics faced by many general practice lawyers, best practices for using powers of attorney and related forms used estate planning and end of life planning.

Stay Tuned: Continue to watch for Health Care Law Section articles in the Montana Lawyer over the next year! If you are interested in publishing, please contact our Section or attend one of our Section meetings. If you're interested in joining the Health Care Law Section or have suggestions for additional health care law related topics that you want to see in the Montana Lawyer, please contact Erin MacLean at emaclean@fandmpc.com.

Summarized from Order No. PR 13-0079 and PR 13-0799

On July 22, 2014, the Montana Supreme Court entered orders in the above causes suspending Montana attorney Roy Johnson from the practice of law for three months effective Sept. 1, 2014, and for not less than seven months effective Dec. 1, 2014, respectively.

Johnson asked the Court to alter his suspension dates so that his first suspension will not begin until Dec. 1, 2014.

H avers that he has several pending cases in which his clients are impecunious and would not be able to secure alternate counsel. Johnson represents that all of those matters can be resolved by the end of November 2014.

It is ordered that the motion to alter suspension dates is granted. Johnson's three-month suspension from the practice of law in Montana under this Court's Cause No. 13-0079 shall begin on Dec. 1 2014, and his suspension from the practice of law for no less than seven months under Cause No. 13-0799 shall begin on March 1, 2015.

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.montanbar.org -> For Our Memebers -> Lawyer Referral Service (http://bit.ly/yXI6SB) and forward to the State Bar office. You pay the registration fee and the LRIS will handle the rest.

If you have questions or would like more information, call Kathie Lynch at (406) 447-2210 or email klynch@montanabar.org. Kathie is happy to better explain the program and answer any questions you may have. We'd also be happy to come speak to your office staff, local Bar or organization about LRIS or the Modest Means Program.

State Bar welcomes three new employees to its staff

The State Bar of Montana has recently welcomed three new employees: Erin Farris-Olsen, Tawna Meldrum and Joe Menden.

Farris-Olsen takes over for Janice Doggett as the Equal Justice Coordinator in September.

She is a graduate of Carroll College and the University of Oregon School of Law. Her studies included international, environmental and Indian law — with a focus on public access to legal information and resources.

After graduating from law school, Farris-Olsen returned to Montana and served as a law clerk to former Justice William Leaphart and Justice Beth Baker. For the last three years she has been administering the Montana Supreme Court, Court Help Program, and working to foster a sustainable model for providing legal information to self-represented litigants across Montana. Having observed the magnitude and complexity of unmet legal needs, Erin naturally began to question the role attorneys might play in maintaining meaningful access to the legal system. Accordingly, Erin received recognition in 2014 for her participation in developing the First Judicial District Limited Scope Pro Bono Advice Clinic in her hometown of Helena.


Farris-Olsen


Meldrum


Menden

She is motivated to join the State Bar as Equal Justice Coordinator because she views the transition as an important opportunity to bridge bench and bar efforts to address access to justice challenges in Montana. She is specifically looking forward to start this position by getting to know State Bar membership concerns and ideas. In addition to working for the Bar, Erin maintains a private public interest environmental law practice, active pro bono case load, and enjoys spending whatever time she has left exploring Montana's streams and wild places with her husband and chocolate Labrador retriever.

Menden started as the Bar's communications director and editor of Montana Lawyer magazine in June, taking over for Peter Nowakowski.

Menden is a 20-year veteran of the newspaper industry, having worked most recently as a copy editor for the Helena Independent Record.

A native of Toledo, Ohio, Menden has lived in Montana for 15 years. He and his wife, Jenny Kaleczyc, an attorney with the Office of the State Public Defender, have two children: Annie, 10, and Will, 8.

In his free time, he likes playing tennis, skiing, enjoying the outdoors with his family and playing guitar.

He is excited to tell the stories of the great things Montana's lawyers do and communicate with members the benefi He welcomes any story ideas. Contact him at 406-447-2200 or jmenden@montanabar.org.

Meldrum is the State Bar's new events coordinator, taking over for Gino Dunfee, who is now in charge of the Fee Arbitration program.

Before joining the Bar, Meldrum worked as accounts manager for Strategies 360, project manager for Symphony Under the Stars and executive director of the Helena Symphony.

She has three children — Reilly, 19, Maia, 16, and Taylor, 10 — and enjoys spending time with her family, watching her kids in all of their activities, reading and cooking.

The *Montana Law Review* presents

2014 BROWNING SYMPOSIUM

OCTOBER 2–3, 2014

University of Montana | UC North Ballroom

THE FUTURE OF FEDERALISM: WHAT WILL BE RETAINED, AND WHAT SURRENDERED?

OCTOBER 2, 2014 – School of Law Room 101

Opening Keynote | 6:00pm | Professor Ilya Somin, George Mason University School of Law

October 3, 2014 – UC North Ballroom

Panel 1 | 10:20am–12:00pm | Cooperative (and uncooperative) federalism at federal, state, and local levels

Panel 2 | 1:00pm–2:30pm | Federal and state conflicts: preemption and commandeering

Panel 3 | 2:45pm–4:15pm | Commerce, taxing, spending, and coercion after *NFIB v. Sebelius*

Closing Keynote | 4:30pm | Professor Roderick Hills, Jr. , New York University School of Law

6.5 CLE CREDITS

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UNIVERSITY OF MONTANA SCHOOL OF LAW

BOONE KARLBERG P.C. ATTORNEYS AT LAW

MONTANA INNOCENCE PROJECT

A trip down legal memory lane

Learn about the colorful history of Montana's state constitution at your State Law Library

By Lisa Mecklenberg Jackson

Are you a fan of early Montana political history? If so, the State Law Library has some very interesting links and information on its website that might be of interest to you. Most of us know that the Territory of Montana was established on May 26, 1864, when the United States Congress passed the Organic Act (http://courts.mt.gov/content/library/docs/organic.pdf).

But did you know that the first constitution of Montana was written in 1866 but it was lost on the way to the printer and was never voted on by the citizens of Montana? That's crazy! But wait—it gets better. A second constitution was written and ratified by the people in 1884 (http://courts.mt.gov/content/library/docs/1884const.pdf). However, Congress failed to take any action on Montana's admission to the Union at that time.

For political purposes, perhaps?

Regardless, five years later, Congress passed the Enabling Act (http://courts.mt.gov/content/library/docs/enablingact.pdf) which finally permitted the people of Montana to be admitted to the Union upon the adoption and ratification of a new state constitution. A third constitution was written and ratified by the people later that year (http://courts.mt.gov/content/library/docs/1889cons.pdf). [NOTE: The State Law Library has the 1889 Montana Constitutional Convention proceedings available in print as they are too delicate to be scanned].

On Nov. 8, 1889, Montana was the 41st state admitted to the Union by the presidential proclamation of Benjamin Harrison (http://courts.mt.gov/content/library/docs/proclamation). This 1889 Montana Constitution survived until 1972, when a new constitutional convention was held.

The 1972 Constitution (http://courts.mt.gov/content/library/docs/72constit.pdf) was adopted by the 100 delegates to the Constitutional Convention on March 22, 1972, and was ratified by the citizens of Montana on June 6, 1972, through Referendum No. 68. The full Constitutional Convention proceedings are online at http://courts.mt.gov/library/montana_laws.mcpx#constitutional. Volumes I and II include information on delegates, convention rules, and delegate and committee proposals. Volumes III through VII include a full transcript of the convention.

After all that, the current version of the Montana Constitution can be found at http://leg.mt.gov/bills/mca_toc/CONSTITUTION.htm.

As you can see, Montana has quite a colorful and interesting political history, and you can be privy to all the original documents just by going to the State Law Library webpage. What a deal for all early Montana political history buffs!

Want to comment on dissolution forms? Here's your chance!

The Access to Justice Standing Committee on Self Represented Litigants is in the process of revising the dissolution with children forms commonly used by self-represented litigants and we need your help. The standing committee is asking for your review of the proposed forms. Substantive suggestions, formatting, readability and grammatical comments are welcome. The proposed forms are available at http://courts.mt.gov/supreme/boards/self_represented_litigants/proposed_forms/default.mcpx.

Comments may be sent to scsrl@mt.gov by Oct. 17, 2014. Thank you for your critical perspective.

Don't know everything?

If you are in need of a quick overview of a legal topic, take note that the State Law Library has a very large selection of nutshells and "quick" reference materials on a variety of legal topics such as land use, Indian law, etc. If you are in need of a quick overview of a particular legal topic that you don't work with every day, search our law library catalog at http://mtsc.sdp.sirsi.net/client/MT-LAW for these very helpful resources. Several recent additions in this area include:

- "Banking and Financial Institutions Law in a Nutshell," William A. Lovett, Michael P. Malloy, 2014.
- "Nolo's Encyclopedia of Everyday Law: Answers to Your Most Frequently Asked Legal Questions," Shae Irving, 2014.

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

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who work in small towns and smaller firms doing the day-to-day work for common folk. Puts a smile on yer face to know there's still the shop downtown where folks walk in, get an answer and keep their scalp. Local deputy Ken Connors claims that the 3rd District's best asset is its professional courtesy. I saw that — a bunch of riders who care as much for the reputation of the entire ranch as their own agenda. We could take a lesson.

August 8-9 – National Conference of Bar Presidents, Boston

My last annual conference; this one in Boston. This conference hosts instructional and leadership sessions for two days. Several were worth watching:

■ **Future of Legal Education**

Traditional law school isn't working. This is an oft-repeated topic at national conferences. We're more than seven years out from the disaster of plummeting jobs for graduates, record high student loan debt and a near 50 percent drop in applications to law school. The University of Montana's Law School has much better numbers, but everyone shares the concern. The ABA's Task Force on Legal Education last year recommended sweeping changes in law school education — reducing credits, emphasizing practical skills, revising tenure, experimenting with apprenticeship-type programs and limiting student debt. Some ideas were a little surprising:

Iowa's Bar recommends reinstating the diploma privilege. Iowa, like Montana, went to the Uniform Bar Exam, but its critics claim it does nothing to test students on Iowa law, so why have it? Rather, give graduates an immediate opportunity to start work upon graduation to meet legal needs and address their debt. Such grads, they reason, are more likely to serve the needs of moderate to low-income clients — exactly where legal needs are the greatest. Students desiring the diploma privilege would have to opt in upon admission to school for specific course work to obtain the privilege. Kinda brings us full circle to Montana's diploma privilege, discarded in 1983.

■ **Transitioning out of Practice with Grace and Dignity**

A frequent topic at conferences — likely because it shot us in the leg a couple miles back and we're just now noticing. We're all getting older and some of us don't know when or how to retire. North Carolina created their Transitioning Lawyer Commission (TLC) and innovated their "Retiring with Dignity" plan, which is a model for other states. New York has a caretaker rule, allowing for any bar member to seek appointment of a caretaker in a pending case where opposing counsel may have a disability. The trail work's been done; but we need a better program and, as Allen Head (N.C. executive director) observed, "A kinder, gentler manner of treating our members with dignity." Best presentation I heard all year.

August 19 – District Judges Substitution and Mediation

Back on the ranch, the District Judges Association petitioned to significantly amend the rules on peremptory disqualification. This issue's been debated for more than a few years.

Meet up with 3rd Judicial District, Anaconda

19th Judicial District (Libby) attended a 3 hour ethics CLE & State Bar update with the Chief Deputy.

The State Bar proposed a fireside chat rather than guns at 20 paces. Everyone liked the idea, and judges, trial lawyer associations, MLSA and public defenders gathered to talk Aug. 19. Some important concerns and ideas on both sides. If lawyers and judges can't meet and visit, what do we tell others? This is our finest day and I look forward to our next meetings.

August 19-20 — District CLE and Meet

Out to the northwest quarter, I met the Libby group and shared a CLE on how technology's affecting our offices, competence and confidentiality, aging out and retirement. Sadly, my last trail ride until our September convention. Come join us now, OK?

> *As Allen Head (N.C. executive director) observed, "A kinder, gentler manner of treating our members with dignity." Best presentation I heard all year.*

Doctor, Doctor, Mr. M.D.: Dr./Patient privilege in MT

"I was feeling so bad
I asked my family doctor just what I had,
I said 'Doctor, Doctor, Mr. M.D.,
Can you tell me what's ailing me?'"

— "Good Lovin'" by the Young Rascals

Any doctor worth her salt would need to know a bit more before providing an answer to the question (diagnosis) and a solution (prescription). The necessary additional information comes, at least in part, from the patient's own description of the symptoms and their inception. The "history" component of the patient's visit reflects the doctor's notes about what the patient told her, and often contains extremely sensitive information that may help the physician discern and/or fix the medical problem.

Doctors and patients generally assume that the patient's disclosures are confidential and intend to keep them that way. The law has a different understanding of the situation, and in many cases can compel both production of the written medical record and oral testimony about what was said in the "privacy" of the doctor's office. Thus, the doctor-patient privilege differs significantly from the attorney-client and spousal privileges.

As I have discussed in earlier columns, every assertion of privilege necessarily deprives the fact-finder of valuable information. The Legislature's extension of privilege to communications between parties to certain relationships reflects the judgment that society will benefit more from candid discussions in those relationships than it will lose from disclosure of those discussions. A doctor-patient privilege encourages patients to provide doctors with full information, and thus allows the doctors to make accurate diagnoses and optimal treatment. However, as I develop below, the doctor-patient privilege is not a sure bet, and the many limitations on it should cause a patient to be wary of full disclosure of unfavorable information to his treating physician. In turn, that rational wariness on the part of the patient may prevent the ultimate aim of the privilege in the first place: getting the patient better.

A. Medical Ethics Favor Confidentiality

Can the doctor voluntarily disclose what the patient told her? The American Medical Association says no, as a matter of medical ethics:

Opinion 5.05 - Confidentiality

> The information disclosed to a physician by a patient should be held in confidence. The patient should feel free to make a full disclosure of information to the physician in order that the physician may most effectively provide needed services. The patient should be able to make this disclosure with the knowledge that the physician will respect the confidential nature of the communication. The physician should not reveal confidential information without the express consent of the patient, subject to certain exceptions which are ethically justified because of overriding considerations.[1]

The AMA acknowledges the possibility that the law may have a different view of the confidentiality of patient communications, and instructs a doctor in this situation to first inform the patient, presumably to allow the patient's lawyer to analyze the legal situation and try to prevent the disclosure if possible:

> When the disclosure of confidential information is required by law or court order, physicians generally should notify the patient. Physicians should disclose the minimal information required by law, advocate for the protection of confidential information and, if appropriate, seek a change in the law. (III, IV, VII, VIII).[2]

B. The Legal Landscape

The question now becomes whether and when the law will require, and a court order, a physician to testify or provide records reflecting communications made by a patient. The answer depends on what court system is involved, and within that court system, on what kind of case. Federal courts do not recognize any doctor-patient privilege in federal criminal and federal question civil cases, although one may occur in diversity cases. On the other hand, Montana state law recognizes a doctor-patient privilege in civil cases but not in criminal cases, and even in those civil cases, provides for ready waiver of the privilege.

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1 http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion505.page, last accessed 8/11/2014. The exceptions listed by the AMA are two: where the patient threatens serious bodily injury to himself or another, and where a court orders disclosure.

2 Id.

Montana's Statutory Doctor-Patient Privilege

Montana state law provides an evidentiary privilege for communications from a patient to his doctor. M.C.A. 26-1-805, first enacted in 1867, provides:

> **26-1-805. Doctor-patient privilege.**
>
> Except as provided in Rule 35, Montana Rules of Civil Procedure, a licensed physician, surgeon, or dentist may not, without the consent of the patient, be examined **in a civil action** as to any information acquired in attending the patient that was necessary to enable the physician, surgeon, or dentist to prescribe or act for the patient. A communication described in 45-9-104(7) is not a privileged communication. (Emphasis added)

A. There is no doctor-patient privilege in Montana criminal actions

First and foremost, this privilege applies only in civil cases: "in a civil action" means "not in a criminal action." Thus, there is no doctor-patient privilege in criminal cases in Montana state courts. The Montana Supreme Court so held, basing its opinion on the express language (bolded above) in the statute, in its single case on the subject, *State v. Campbell*, 146 Mont. 251, 405 P.2d 978 (1965).

Campbell was convicted of murdering his fiancée as she ended her waitressing shift early one morning in Twin Bridges. The admitted evidence against him included a bullet taken from the defendant's own body (he apparently shot himself a couple of times after he shot the victim, to make it look like a third person had assaulted both). The doctor who treated Campbell removed and kept the bullet at Campbell's request, "until turning it over to law enforcement, pursuant to a court order."[3] After rejecting Campbell's argument that the removal of the bullet amounted to unconstitutional search and seizure, the Court went on to deny his doctor-patient privilege argument:

> Also in connection with the admission of the bullet and X-rays, appellant urges that the physician-patient privilege was violated. We hold with the great weight of authority that this **privilege is not available to appellant in a criminal prosecution.** See Anno.: 45 A.L.R. 1357, superseded in 2 A.L.R.2d 647. The applicable statute in Montana is R.C.M.1947, § 93–701–4, which provides in part:
>
> 'There are particular relations in which it is the policy of the law to encourage confidence and preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:
>
> * * *
>
> '4. A licensed physician or surgeon cannot, without the consent of his patient, be examined in a *civil* action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.'
>
> R.C.M.1947, § 94–7209, provides:
>
> 'The rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided in this code.' Section 94–7209, by its language, incorporates into criminal procedure all that is applicable of Title 93, the Code of Civil Procedure. The one qualification is 'except as otherwise provided by this code.' Section 93–701–4 sets forth five privileged relationships in addition to that of physician-patient. Only in the case of the physician-patient (sub-section 4) and one other relationship (sub-section 6) is the qualifying language 'in a civil action' used. This would seem to be the kind of language limiting a rule to civil procedure alone as was contemplated in the Provision in Section 94–7209, 'except as otherwise provided in this code.' Such a construction is consistent with that given to essentially the same statutes by the State of California. See *People v. West*, 106 Cal. 89, 39 P. 207; *People v. Dutton,* 62 Cal. App.2d 862, 145 P.2d 676. (Emphasis added)
>
> *State v. Campbell*, 146 Mont. 251, 260-61, 405 P.2d 978, 984 (1965).

B. There especially is no doctor-patient privilege in criminal cases for fraudulently obtaining prescriptions for dangerous drugs.

The last sentence of Montana's doctor-patient privilege states: "A communication described in 45-9-104(7) is not a privileged communication." M.C.A. 45-9-104 is part of Title 45, entitled "Crimes." The subject of the title's Chapter 9 is "Dangerous Drugs." The specific statute, 45-9-104, deals with "the offense of fraudulently obtaining dangerous drugs;" subsection (7) says:

> (7) knowingly or purposefully communicating false or incomplete information to a practitioner with the intent to procure the administration of or a prescription for a dangerous drug. A communication of this information for the purpose provided in this subsection is not a privileged communication.

Because no doctor-patient privilege exists in criminal cases, the two corollary sentences in the privilege and dangerous drug statutes are technically unnecessary. Anything the patient said to the doctor is admissible in any criminal prosecution (if relevant, etc.), regardless of the patient's innocent or criminal purpose in providing the information. Both of these sentences were added to the Code by 2011 Montana Laws Ch. 194 (S.B. 210), perhaps with the simple idea of making it clear that there really, really, really is no privilege in these cases, really.

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3 146 Mont. at 257, 405 P.2d at 984.

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C. In civil cases, Rule 35 waives doctor-patient privilege when the patient's condition is in controversy, either as a claim or a defense, and when the patient requests a copy of the other party's Rule 35 examination report.

The first phrase of the doctor-patient privilege is "Except as provided in Rule 35, Montana Rules of Civil Procedure." M.R.Civ.P. 35 (oh, how I love this intersection of Civil Procedure and Evidence), part of the discovery section of the rules, covers physical and mental examinations. As you recall, a party may obtain (by agreement or court order, not automatically) a physical or mental examination of a person whose condition is "in controversy."

The opponent and the person examined are entitled, upon request, to a copy of the examiner's report. Rule 35 appears to impose, as a cost to such a request, the loss of the person's doctor-patient privilege:

> (b) (4) Waiver of Privilege.
>
> By requesting and obtaining the examiner's report, by deposing the examiner, or by commencing an action or presenting a defense which puts a party's condition at issue, the party examined waives any privilege it may have — in that action or any other action involving the same controversy — concerning testimony about all treatments, prescriptions, consultations, or examinations for the same condition. The waiver of any privilege does not apply to any treatment, consultation, prescription, or examination for any condition not related to the pending action. On a timely motion for good cause and on notice to all parties and the person to be examined, the court in which the action is pending may issue an order to prohibit the introduction of evidence of any such portion of any person's medical record not related to the pending action. (Emphasis added).

The examined party—usually, but not always, the plaintiff—who exercises his or her right to a report from or deposition of the Rule 35 examining physician has no "privileged" objection to a discovery request for information from the plaintiff's treating or litigation physicians about the same condition(s). In fact, this "price" of is illusory, because the Rule then adds (out of chronologic order) that waiver is also triggered by "commencing an action or presenting a defense which puts the party's condition at issue."

Under M.R.Civ.P. 35, a plaintiff who sues for damages, alleging a physical or mental injury, waives any doctor-patient privilege with regard to that injury when he files the complaint, and thereafter must upon request provide the defense with all medical records relating to the condition. The defendant may also depose a treating doctor, and may require the doctor to recount exactly what the patient told her about the condition, including its origin. The legal effect is twofold: first, there really is no doctor-patient privilege in personal injury cases (or other civil cases where a physical or mental condition is grounds for either a claim or defense); second, a plaintiff should always request the report and/or depose the Rule 35 examiner, because she has already "paid" for the right.

Callahan v. Burton, a 1971 case, was the first case to apply the Rule 35 waiver to a plaintiff who put her own medical condition into controversy when she filed a personal injury action. The case involved a claim of medical malpractice against an ophthalmologist for alleged failure to diagnose malignant melanoma in the plaintiff's eye. The defense took the deposition of one of the plaintiff's treating physicians, and then sought private interviews with him and another of the plaintiff's doctors. The trial judge applied the then-new Rule 35, and granted the motion for the interviews, reasoning that the plaintiff had waived all privilege when she sued. The Montana Supreme Court affirmed, and in so doing explained the genesis of the waiver-by-filing component of Rule 35:

> The so-called physician-patient privilege is not a creature of the common law but is solely a creature of statute. Only approximately two-thirds of the states of the United States have adopted a privilege-communication statute. *Hague v. Williams,* 37 N.J. 328, 181 A.2d 345, 348; 8 Wigmore, Evidence, s 2380 (McNaughton rev. 1961).
>
> Montana did so in 1867 by enacting Section 93-701-4, R.C.M.1947…
>
> The physician-patient privilege is an anachronism which has come under considerable criticism and attack as the great volume of personal injury suits increased. 8 Wigmore, Evidence, s 2380a (McNaughton rev. 1961); McCormick on Evidence, s 108.
>
> The Montana Supreme Court notified all licensed attorneys in the state of Montana that an amendment had been proposed to Rule 35, M.R.Civ.P., which would abolish the privilege whenever a plaintiff commenced 'an action which places in issue the mental or physical condition of the party bringing the action * * * regarding the testimony of every person who has treated, prescribed, consulted or examined or may thereafter treat, consult, prescribe or examine such party in respect to the same mental or physical condition * * *.'
>
> After notice of the proposed amendment was sent to all counsel, attorneys were given to and including May 25, 1967, within which to prepare, serve and file memoranda in opposition or in support of the proposed rule change. In addition, 16 lawyers were given permission to appear in oral argument at a hearing to be held on the proposed change June 9, 1967. Certain modifications of the proposed amendment were submitted. One proposed that the testimony of any treating and attending physician be reduced to writing at pretrial deposition. Another suggested amendment proposed that treating and attending physicians' testimony should not include diagnosis, prognosis or expert opinion or expert testimony but should be limited solely to the facts

within the personal knowledge of the person. Neither of these amendments was adopted when the Supreme Court ordered the rule to be amended Sept. 29, 1967, and proclaimed its effective date as Jan. 1, 1968.

Judge McClernan's order of April 28, 1970, [allowing defense counsel to interview plaintiff's doctors alone and in addition to the deposition] accorded with the new rules and with these concepts.

Callahan v. Burton, 157 Mont. 513, 521-23, 487 P.2d 515, 518-20 (1971) overruled by *Jaap v. Dist. Court of Eighth Judicial Dist., In & For Cascade Cnty.,* 191 Mont. 319, 623 P.2d 1389 (1981).

Ten years later, in *Jaap*, the Court reversed Callahan's result, although it continued to find that the plaintiff had waived her doctor-patient privilege when she filed her personal injury complaint. The difference between the two cases lies solely in the effect of that waiver. The *Jaap* court reasoned that the defendant was conducting discovery and thus was governed by, and limited to, the discovery provisions of the Rules of Civil Procedure, which allow for interrogatories depositions but contain no provision for court-compelled private interviews of treating physicians:

> There is no question but that under Rule 35(b)(2) M.R.Civ.P., as the same is promulgated in Montana, Julie Jaap, by commencing an action for damages for her personal injuries which placed in issue the mental and physical condition arising from the accident, waived any physician-patient privilege as to her mental or physical condition in controversy. Accepting as a premise that the physician-patient privilege has been waived, may the District Court, by way of discovery, order that defense counsel may engage in informal, private interviews with the physicians treating Julie Jaap for her alleged injuries?
>
> Put another way, granting that plaintiff has waived any physician-patient privilege relating to her mental and physical condition in controversy, what limits, if any, circumscribe the power of the District Court in authorizing and enforcing discovery under the Montana Rules of Civil Procedure?
>
> Although we agree with that portion of the District Court order which stated that once the physician-patient privilege has been waived, the physician is to be considered as any other witness, we conclude that the District Court does not have power, under the rules of discovery, to order private interviews between counsel for one party and possible adversary witnesses, expert or not, on the other. We derive this conclusion from an examination of the Rules of Civil Procedure relating to discovery.
>
> The methods by which discovery may be obtained, under the Montana Rules of Civil Procedure, are set out in Rule 26(a)…
>
> Obviously a private interview of an adversary witness is not one of the "methods" of discovery for which the Rules of Civil Procedure provide….
>
> It is obvious, that if a method of discovery such as a private interview is ordered by the court, the sanctions and protections which are available under the Montana Rules of Civil Procedure for ordinary methods of discovery become unavailable for private interviews….
>
> We conclude therefore, that a District Court, in allowing and enforcing discovery in litigation before it, must relate the discovery to one of the methods provided in Rule 26(a), M.R.Civ.P. Any attempt to enforce a method of discovery not provided by the Montana Rules of Civil Procedure is outside the power of the District Court. We hold that the Court is without power to order a private interview. To do so would defeat open disclosure, a prime objective of the Rules of Discovery.
>
> *Jaap v. Dist. Court of Eighth Judicial Dist., In & For Cascade Cnty.,* 191 Mont. 319, 322-324, 623 P.2d 1389, 1391 (1981). [4]

Because doctors are forbidden by their own duty of confidentiality from disclosing patient information without permission of the patient or legal process, they generally will refer any requests for private interviews to the patient, and thus to the patient's attorney. Thus, as a practical matter, defense counsel can certainly invoke the waiver provisions of Rule 35, but can only get access to the desired information through formal discovery or by agreement with opposing counsel, on stipulated conditions.

The Court again affirmed its allegiance to the Rule 35 waiver-by-filing provision in a case where a mother sued for injuries to her minor child, asserting that the mother also suffered mental injuries as a result of the accident. The defense sought discovery of the mother's prior medical records to test her claim as to inception and causation of her mental condition. The mother refused to provide full copies of the records, instead allowing her own doctors access to them and having them testify that there was no causal relationship. The trial judge denied the defendants' motion to compel discovery. The Supreme Court found this to be an abuse of discretion:

> ¶ 36 Medical records are private and "deserve the utmost constitutional protection." *State v. Nelson* (1997), 283 Mont. 231, 242, 941 P.2d 441, 448. Article II, Section 10, of the Montana Constitution guarantees informational privacy in the sanctity of one's medical records. *Nelson,* 283 Mont. at 242, 941 P.2d at 448. However, "[w]hen a party claims damages for physical or mental injury, he or she places the extent of that physical or mental

4 In *Ostermiller v. Alvord,* 222 Mont. 208, 720 P.2d 1199 (1986), the Court distinguished its holding in Jaap that a trial court cannot compel private interviews between a plaintiff's doctor and defense counsel from the situation in that case, where during trial plaintiff's counsel indicated he was not going to call plaintiff's treating dentist and the court then denied plaintiff's objection to a defense interview, with plaintiff's counsel present, of the dentist to prepare him for testimony in the defense case.

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injury at issue and waives his or her statutory right to confidentiality to the extent that it is necessary for a defendant to discover whether plaintiff's current medical or physical condition is the result of some other cause." *State ex rel. Mapes v. District Court* (1991), 250 Mont. 524, 530, 822 P.2d 91, 94. …

¶ 39 In the present case, Kristin commenced an action for damages for her personal injuries which placed in issue her mental and physical condition arising from the accident. …In doing this, she waived any physician-patient privilege as to a mental or physical condition in controversy. *Jaap,* 191 Mont. at 322, 623 P.2d at 1391; Rule 35(b)(2), M.R.Civ.P. This includes testimony her physicians may have provided concerning her prior mental condition. Kristin did not produce records from before Hunter's accident because the records were "sensitive and personal." She did produce redacted medical records for the period after Hunter's accident which she determined were relevant. The State did view the redacted portion of Kristin's medical records. However, the State sought all Kristin's mental and medical health records from ten years before Hunter's accident (1985) through time of trial.

¶ 40 Kristin claims that because she provided her doctors with complete copies of the disputed medical records, and her doctors stated the records showed no causal correlation between any previous injury or condition and her current injuries, this ends the inquiry into the medical records. Kristin argues that the State should be denied access to the records because it did not present any expert medical opinion that her alleged injuries were more probably than not caused by some factor other than witnessing Hunter's fall. The fallacy in this argument is that there was no way that the State *could* have provided this opinion because it was denied access to the very records which would have enabled it to make this determination. The court's denial of these records only allowed for one-sided review of the medical records by Kristin's physicians.

¶ 41 The State was prejudiced when it was denied the right to defend itself in an informed manner. It had the right to discover evidence related to prior physical or mental conditions possibly connected to Kristin's current damages. *State ex rel. Mapes,* 250 Mont. at 530, 822 P.2d at 94. The State is not entitled to unnecessarily invade Kristin's privacy by exploring totally unrelated or irrelevant matters. *State ex rel. Mapes,* 250 Mont. at 530, 822 P.2d at 95. However, because Kristin presented her entire medical records file to her treating physicians and asked for their expert medical opinions, which were at least in part based on the records which were denied to the defense, she waived her statutory right to confidentiality but *only to the extent* that it is necessary for the State to discover for itself whether Kristin's current medical or physical condition is the result of some other cause. *State ex rel. Mapes,* 250 Mont. at 530, 822 P.2d at 94. The State thus has a right to review Kristin's medical records to determine whether her present condition is attributable to some preexisting cause.

¶ 42 The similarity between Kristin's present claims and those for which she was previously treated shows the possible correlation between her pre-accident records and her present claims. Kristin's claims involve emotional distress, loss of consortium and post-traumatic stress disorder (PTSD). The record indicates that prior to Hunter's accident, she was taking medications which can be used to treat depression, headaches, sleep disorders and anxiety. The connection between Kristin's present claims and her past conditions is not attenuated as it was in *Mix* where access to records was denied. *Mix,* 239 Mont. at 360, 781 P.2d at 756. Accordingly, we reverse the District Court's denial of the State's motion to compel production of the medical records.

Henricksen v. State, 2004 MT 20, 319 Mont. 307, 317-20, 84 P.3d 38, 48-49.

Thus, although Montana's statute does provide a first-line doctor-patient privilege in civil cases, even that privilege is not absolute and may be waived despite the doctor's and patient's intent to maintain confidentiality. A person who has sought medical treatment necessarily must choose between confidentiality and later legal redress for that injury or condition. Further, if the patient does become a plaintiff, she must realize that all of her prior medical records pertaining to her claimed injury will be discoverable and admissible, and might involve having her doctor recount (unwillingly) to a jury everything she told him. The patient does control the waiver, but preserving the privilege may require her to walk away from a legal claim or defense.

D. When doctor-patient privilege does apply in civil cases in Montana state courts, it covers only 'information necessary to enable physician, surgeon or dentist to prescribe or act for the patient.'

Even before Montana was a state, the territorial court invoked the doctrine of strict construction of the privilege between doctor and patient. In *Territory v. Corbett*, 3 Mont. 50 (1877), the male defendant was indicted for his marriage to his half-sister, Sarah Parker, who was called to testify, unwillingly, against him. Two doctors also testified, on the fact of sexual intercourse and the knowledge of the partners of the biological link between them. The Territorial Supreme Court refused to apply any privilege to their testimony:

> The evidence of Doctors Yager and Smith was properly admitted. The statutes of this Territory provide that a physician shall not testify without the consent of the patient as to any information he may have acquired while attending the same. Codified Statutes, p. 125, §

450. Sarah Parker and not John Corbett was the patient, and she gave her consent, and that was sufficient to make them competent witnesses.

Physicians were not exempted at common law from disclosing confidential communications, confided to them in their professional character. Greenl. on Ev., § 247; Phill. on Ev., marg. p. 136. **We are therefore confined strictly to the words of the statute in considering this point, and that, we have seen, limits the confidential communications to those made by the patient to the physician in his professional character, and were necessary to enable him to prescribe for the same.** The communications made to Doctors Yager and Smith by the defendant do not come within the exemption specified in the statutes. (Emphasis added)

Territory v. Corbett, 3 Mont. 50, 59 (1877).[5]

Conversely, when the privilege does exist, its waiver via Rule 35 extends only to the condition in controversy:

Nonetheless, the waiver is not unlimited; the defendant may only discover records related to prior physical or mental conditions if they relate to currently claimed damages. The plaintiff's right to confidentiality is balanced against the defendant's right to defend itself in an informed manner. *State ex rel. Mapes,* 250 Mont. at 530, 822 P.2d at 94. A defendant "is not entitled to unnecessarily invade plaintiff's privacy by exploring totally unrelated or irrelevant matters." *State ex rel. Mapes,* 250 Mont. at 530, 822 P.2d at 95….

¶ 38 A defendant is not allowed unfettered access to all medical records he believes may help his defense. In *State v. Mix,* the trial court refused access to records because the subject matter was irrelevant and too remote to the case. *State v. Mix* (1989), 239 Mont. 351, 360, 781 P.2d 751, 756. In that case, a defendant charged with deliberate homicide sought medical records regarding the victim's asthma condition. *Mix,* 239 Mont. at 360, 781 P.2d at 756.

Henricksen v. State, 2004 MT 20, 319 Mont. 307, 317-18, 84 P.3d 38, 48.

E. The privilege belongs to patient, not doctor

In Hier v. Farmers Mutual Insurance, the deceased patient's estate sued for payment on the fire insurance policy. The insurer defended on the ground that the decedent himself set the fire; the estate claimed that he had been insane at the time, robbing him of the requisite intent to vitiate the policy. The estate called the insured's treating physician at trial, and the insurance company objected. The judge's decision to allow the testimony anyway was affirmed by the Supreme Court:

Dr. Cloud was called as a witness for the administrator and was allowed to detail the facts as to his examinations and treatment of Temmel at times previous to the fire. He was also allowed to state his opinion as to his sanity. Strenuous objection was made to the admission of his testimony on the ground of statutory privilege as contained in section 10536, subdivision 4, Revised Codes, which has to do with the disability of a physician or surgeon to testify without the consent of his patient in any civil action as to information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient. In considering this matter we must have in mind the fact that **the object of the statute, and of all such statutes, is not to absolutely disqualify a physician from testifying, but to enable a patient to secure medical aid without betrayal of confidence.** 28 R.C.L. p. 542. The same authority states: "The patient may therefore waive objection and permit the physician to testify. In other words, **the privilege is the privilege of the patient and not of the physician; and by the great weight of authority, if the patient assents the court will compel the physician to answer.** *** The physician cannot waive the statutory privilege and testify against the wishes of his patient." In this case it must be understood that the statute could only apply on behalf of the patient, Temmel. It could not be asserted by the physician, and we fail to see wherein the Insurance Company had any right to assert the privilege as against the plaintiff in this case. **It was never intended that such a claim of privilege could be asserted by an adverse party to defeat the proof of an alleged ailment which was a necessary element to the plaintiff's cause of action.**

We may assume all of the other facts of this case without the death of the insured and then assume that the insured lived to recover his sanity and thereafter brought suit upon the insurance policy. Unquestionably, he could have waived the privilege proposition and could have called upon the doctor to testify in the matter. In 5 Jones Commentaries on Evidence, p. 4194, it is said: "By the weight of authority, however, it is held that since the patient may waive the privilege for the purpose of protecting his right, the same waiver may be made by those who represent him after his death, for the purpose of protecting rights acquired by him**."** (Emphasis added)

Hier v. Farmers Mut. Fire Ins. Co., 104 Mont. 471, 67 P.2d 831, 836-37 (1937). (The insurance company also argued that there was no "formal waiver" in the record, but the Court held that the tender of the doctor's evidence sufficed.)

Federal Treatment of the Doctor-Patient Privilege

The federal doctor-patient privilege is very different: there

5 The territorial version of the privilege statute apparently covered criminal as well as civil cases, but I have not gone the extra step to actually research this.

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is none in federal criminal cases or in federal civil cases where state law does not provide the rule of decision. The Federal Rules of Evidence approach privilege on a common-law basis. When the Advisory Committee first promulgated the FRE and the Supreme Court sent its draft to Congress, Article V on Privileges contained nine specified evidentiary privileges. (None, however, covered communications between a physician and a patient). Congress rejected this approach and instead whittled Article V down to a single rule, 501. The current version of FRE 501, virtually unchanged since the inception of the FRE in 1975, states:

> **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.

Setting aside the last sentence of FRE 501 for now, the question becomes whether the federal courts, in "light of reason and experience," hold that the communications between a doctor and her patient are privileged in non-diversity cases tried in federal court. The answer is a resounding "No." The Supreme Court, in a case which established a psychotherapist[6]-patient privilege for federal court, differentiated psychotherapy from treatment by a physician:

> Like the spousal and attorney-client privileges, the psychotherapist-patient privilege is "rooted in the imperative need for confidence and 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.

Jaffee v. Redmond, 518 U.S. 1, 10, 116 S. Ct. 1923, 1928, 135 L. Ed. 2d 337 (1996). The Court recognized the psychotherapist-patient privilege there, but has never gone on to protect communications between physicians (who are not psychiatrists) and patients. See also, *Wei v. Bodner*, 127 F.R.D. 91, 97 (D.N.J. 1989)("there is no physician-patient privilege as a matter of federal common or statutory law."); *Hutton v. City of Martinez*, 219 F.R.D. 164 (N.D.CA., 2003)(" The **physician-patient privilege** is not recognized by federal common law, federal statute, or the U.S. Constitution.")

As the last sentence of FRE 501 states, however, a federal court applies state law as to the doctor-patient privilege, in federal cases where state law is used to determine liability. This provision is used largely but not exclusively in diversity of citizenship cases in federal court under 28 U.S.C. 1332. It also governs privilege under federal statutes which explicitly refer to state law, such as the Federal Tort Claims Act, 28 U.S.C. 2671, 2674.

Federal Rule 35 Waiver of Doctor-Patient Privilege is Different

The current Montana version of Rule 35 was meant to mirror the federal version. The Montana Commission Comment to the 2011 version of M.R.Civ.P. 35 states:

> The language of Rule 35 has been amended as part of the general restyling of the Civil Rules to make them more easily understood. The changes also have been made to make style and terminology consistent throughout these rules and to conform to the recent changes in the Federal Rules.
>
> The Committee has adopted Federal Rule 35 in its entirety with one addition in Rule 35(b)(4) adapted from previous Rule 35(b)(2), limiting the waiver of doctor-patient privilege in instances where treatment, consultation, prescription, or examination relates to a mental or physical condition "not related to the pending action."

Notwithstanding the stated intent of the Montana Commission to mirror F.R.Civ.P. 35, the federal version of Rule 35 relating to privilege currently is, in fact, quite different from M.R.Civ.P. 35. F.R.Civ.P. 35(b)(4) provides for a waiver of the privilege if the examinee requests a copy of the examination report or deposes the defense examiner, but does **not** further provide for waiver simply by filing a complaint or answer putting the condition into controversy:

> (4) *Waiver of Privilege.* By requesting and obtaining the examiner's report, or by deposing the examiner, the party examined waives any privilege it may have—in that action or any other action involving the same controversy—concerning testimony about all examinations of the same condition.

The 1970 federal Advisory Committee Note to Rule 35(b)(3) states:

> The subdivision also makes clear that reports of examining physicians are discoverable not only under Rule 35(b) but under other rules as well. To be sure, if the report is privileged, then discovery is not permissible under any rule other than Rule 35(b) and it is permissible under Rule 35(b) only if the party requests a copy of the report of examination made by the other

6 Per *Jaffee*, the federal privilege covers communications between a patient and: a licensed psychiatrist; a licensed psychologist; and a licensed clinical social worker.

party's doctor. *Sher v. De Haven*, 199 F.2d 777 (D.C. Cir. 1952), *cert. denied* 345 U.S. 936 (1953). But if the report is unprivileged and is subject to discovery under the provisions of rules other than Rule 35(b)—such as Rules 34 or 26(b)(3) or (4)—discovery should not depend upon whether the person examined demands a copy of the report.

The key to understanding this apparent discrepancy between the Montana and federal Rules 35 regarding waiver of the privilege is in the privilege itself. Because there generally is no doctor-patient privilege in federal court, there generally is nothing to waive. In federal criminal cases and in most federal civil cases (except where state law provides the rule of decision), the opponent is entitled to discovery and admission of the patient's medical information, including the substance of his communications with his doctor, even over the objection of both the doctor and the patient. No action by the patient can establish a privilege, nor can any inaction (e.g., deciding not to sue) save the privilege.

The language in the 1970 Note "if the report is privileged" applies only to federal civil cases (primarily diversity or Federal Tort Claims cases) where state law governs the substantive issues. Thus, in these cases, the plaintiff may be able to sue and still maintain privilege over her communications with her doctor unless and until she asks for a copy of the defense physical examination report. THERE IS A HUGE CAVEAT HERE!!! Remember *Erie v. Tompkins Ry.*?[7] Holding generally that in diversity cases, under the Rules of Decision Act,[8] federal courts are supposed to apply state substantive law and federal procedural law? The very reason Congress inserted the last sentence into FRE 501 was to resolve any substance/procedural debate with regard to privilege. It did not, however, specify, whether the state's discovery and other procedural rules regarding a privilege would also trump the F.R.C.P. provisions.

In *Benally v. U.S.*, 216 F.R.D. 478 (2003), a patient sued the Indian Health Service for medical malpractice during a Caeserean section. The Court, in ruling on a defense motion for ex parte interviews with the plaintiff's treating doctors, applied Arizona state law not only to the existence of a privilege but also to the discovery procedures involving those doctors:

> There is no physician-patient privilege under federal statutes, rules or common law. *See Gilbreath v. Guadalupe Hospital Foundation, Inc.,* 5 F.3d 785, 791 (5th Cir.1993).
>
> Under the Federal Tort Claims Act, 28 U.S.C. § 2671, state law dictates federal liability. *See* 28 U.S.C. § 2674. Under Rule 501 of the Federal Rules of Evidence, "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State or political subdivision thereof shall be determined in accordance with state law." Fed. Evid. Rule 501. The state of Arizona recognizes the physician-patient privilege. *Duquette v. Superior Court,* 161 Ariz. 269, 778 P.2d 634 (Ariz.App.1989)….
>
> Under the circumstances presented here, where the state law provides the rule of decision, and Arizona law of physician-patient privilege expressly prohibits *ex parte* interviews of treating physicians as a matter of public policy and to preserve the integrity of the privilege, this Court declines to allow the *ex parte* interview by counsel for the United States of Plaintiff's treating physicians.

Benally v. United States, 216 F.R.D. 478, 479-81 (D. Ariz. 2003). See also, *Hampton v. Schimpff,* 188 F.R.D. 589 (D. Mont. 1999), where Judge Donald Molloy applied the Montana Supreme Court's *Jaap* holding in a federal diversity case, without as much analysis of F.R.E. 501 as occurred in *Benally*. Of course, these are both federal trial court orders, which merely reflects one of two possible approaches to this issue. The U.S. Supreme Court has not yet taken a case that would resolve this wrinkle in privilege law, and such a case could develop from the difference between the Montana and federal Rules 35 regarding waiver of the doctor-patient privilege.

Bottom Line: Much Uncertainty

Montana recognizes a privilege for doctor-patient communications in civil cases only, but not in criminal cases. In Montana civil cases, the privilege is easily waived if litigation involves the condition for which the communication was made. The federal courts do not recognize any doctor-patient privilege, but will apply a state privilege if the case is ultimately to be decided through state substantive law. When the federal courts do recognize the privilege, it is not clear whether the state or the federal version of Rule 35, with its waiver language, will apply. Of course, each tribal court also has its own law about doctor-patient privilege (which I simply do not have room to lay out here). Could you pass a pop quiz on the status of the doctor-patient privilege? Or even a true/false test question: "There is a doctor-patient privilege in Montana"? And you are a lawyer, with three years of law study and some actual legal practice. What is a non-lawyer to do?

The purpose of every privilege is to encourage full and frank communication between the parties to the specified relationship, to achieve some societally desirable end. That end, where the doctor-patient privilege is recognized, is full information to the physician so that the patient's medical health can be optimized. Unfortunately, when the patient avails herself of medical advice, she usually can't predict if there will be litigation involving the condition and if so, in which court system and which type of case. Without this information, it is impossible to predict whether or not her statements to her doctor can be discovered and used against her.

In ruling that the federal courts should recognize a psychotherapist-patient privilege, the U.S. Supreme Court observed that a large majority of states had such a privilege and that fact was relevant to the Court's decision:

> In addition, given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not

7 304 U.S. 64, 58 S.Ct. 817 (1938).

8 28 U.S.C. 725.

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be honored in a federal court.[12] Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.

Jaffee v. Redmond, 518 U.S. 1, 13, 116 S. Ct. 1923, 1930, 135 L. Ed. 2d 337 (1996).[9]

The Court also stressed the need for certainty as to the existence and extent of any privilege, at the time the communication is made:

> As we explained in *Upjohn,* if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." (Citation omitted).

518 U.S. at 18, 116 S.Ct. at 1932. The current situation with regard to the doctor-patient privilege in Montana, despite a nominally simple privilege statute, is exactly what the Supreme Court prophesied: functionally uncertain, even though it may purport to be certain. It is "little better than no privilege at all" because it does not provide any clear guidance to the beneficiary of the privilege at the time she must decide what to communicate.

Lessons for the patient

The doctor-patient privilege is much more limited than most patients, and perhaps doctors, realize. Although the doctor intends to keep confidential what her patient tells her, she cannot do so:

- where the patient is involved in a criminal proceeding in Montana state court;
- where the patient later bases a legal claim or defense on the condition in a civil proceeding in Montana state court;
- where the patient is the subject of a Rule 35 examination in Montana or federal court, and requests a copy of the report of, or deposes, the examiner;
- where the patient is involved in any proceeding, civil or criminal, in federal court, except the relatively few cases where state law provides the rule of decision.

Neither the doctor nor the patient is likely to know at the time of the appointment which type of court proceedings, and thus whether in fact any privilege will protect the communications made in the appointment. Given this situation, the patient should assume there is no doctor-patient privilege at all, and thus that anything she says to her doctor may be used against her by her adversary in some future court proceeding.

***Cynthia Ford** is a professor at the University of Montana School of Law where she teaches Civil Procedure, Evidence, Family Law, and Remedies.*

9 Justice Scalia's dissent on this point is characteristically caustic: "This is a novel argument indeed. A sort of inverse pre-emption: The truth-seeking functions of *federal* courts must be adjusted so as not to conflict with the policies *of the States.* This reasoning cannot be squared with *Gillock,* which declined to recognize an evidentiary privilege for Tennessee legislators in federal prosecutions, even though the Tennessee Constitution guaranteed it in state criminal proceedings. *Gillock,* 445 U.S., at 368, 100 S.Ct., at 1191. Moreover, since, as I shall discuss, state policies regarding the psychotherapist privilege vary considerably from State to State, *no* uniform federal policy can possibly honor most of them. If furtherance of state policies is the name of the game, rules of privilege in federal courts should vary from State to State, à la *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)."
Jaffee v. Redmond, 518 U.S. 1, 24-25, 116 S. Ct. 1923, 1935, 135 L. Ed. 2d 337 (1996)

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a shock to Pat, his brothers say no one is more deserving.

"He's devoted his life to representing people who might not have a voice in our courts," Thomas said. "He certainly is not afraid to pick up the argument for people who might not have a voice. That is in the finest tradition of our profession.

"When he told me about the award, I said, 'Well deserved. And maybe a little bit overdue."

When asked what he has been most proud of over the course of his career, Pat McKittrick said it is being able to be of service to the working men and women of Montana.

"I'm very proud of representing the working person throughout my entire career and being able to help quite a few of the working people throughout the years," Pat said. "It's been a wonderful career. That feeling of accomplishment of helping people in their time of conflict and need has been very rewarding."

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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MJF announces 2014 grant awards

The Montana Justice Foundation (MJF) annually awards grants to nonprofit organizations that provide civil legal services to eligible persons; promote knowledge and awareness of the law; and/or facilitate the effective administration of justice. In May 2014, MJF approved $234,000 in operating and special project grant awards to 12 organizations for the award year ending June 30, 2015. Since 1986, the MJF has contributed over $5 million to Montana access to justice programs. More information about the grant process, application deadline and descriptions of current grantees is available at www.mtjustice.org.

CASA FOR KIDS, INC. KALISPELL
$6,000 Operating
Jamie C. Campbell, Executive Director

The CASA program in Flathead County is committed to ensuring that every child in need of an advocate to represent their best interests will have one. Their dedication to this goal is expressed by active recruitment and rigorous training for advocates.

CASA OF LAKE AND SANDERS COUNTIES
$3,500 Operating
Ann Marie McNeel, Executive Director

The CASA program of Lake County, which provides trained volunteer advocates for neglected and abused children, will expand to meet the same needs in Sanders County. A marketing initiative will raise awareness in the community and help to recruit new volunteers.

CASA OF MISSOULA, INC.
$4,000 Operating
Kirsten Vorreyer, Interim Executive Director

Through independent, trained volunteers, CASA of Missoula provides consistent, long-term advocacy for children who are at risk or have experienced abuse and neglect in Missoula and Mineral counties.

COMMUNITY MEDIATION CENTER
$7,000 Operating
Connie Campbell, Executive Director

The Center provides quality, affordable dispute reso-lution services and education using trained, volunteer mediators. The CMC's Low-income Family Media-tion Program serves clients in the Eighteenth and Sixth judicial district courts.

SAFE HARBOR
$4,000 Operating
DeeAnn Richardson, Executive Director

Safe Harbor provides assistance to victims of domestic abuse in Lake County and on the Flathead Indian Reservation with a variety of civil legal needs, ranging from representation at Order of Protection hearings to complex family law, housing, and immigration issues.

EASTERN MONTANA CASA/GAL INC.
$9,200 Operating
Cherie LeBlanc, Executive Director

Eastern Montana CASA/GAL serves twelve counties in Eastern Montana by providing the Seventh and Sixteenth judicial district courts with trained volun-teers to represent the best interests of a child or chil-dren in neglect and abuse court proceedings.

HAVEN
$4,000 Operating
Jennifer Bain, Co-Executive Director

Erica Aytes Coyle, Co-Executive Director Through its Legal Advocacy Program, HAVEN as-sists victims of domestic or sexual violence in seek-ing Orders of Protection and provides information and referrals for other civil law matters.

MONTANA FAIR HOUSING
$8,000 Special Project
Pam Bean, Executive Director

Montana Fair Housing offers a broad range of ser-vices to identify and combat discrimination in hous-ing across Montana, including the state's most rural areas. Montana Fair Housing works to further fair housing through outreach, providing educational op-portunities for housing providers and consumers, and pursuing meritorious claims to address discriminatory housing practices. Montana Fair Housing's special project will address housing violations prohibited by state or local laws.

MONTANA INNOCENCE PROJECT (MTIP)
$3,000 Operating
Keegan Flaherty, Executive Director

MTIP provides legal assistance to indigent Montan-ans with credible, evidence-based claims of wrongful conviction. Legal assistance is provided through the Innocence Clinic, affiliated with the University of Montana Schools of Law and Journalism. Client services for post-conviction civil legal matters are provided through a small staff assisted by pro-bono attorneys and student interns.

MONTANA LEGAL SERVICES ASSOCIATION (MLSA)
$150,000 Operating
$28,800 Special Project
Alison Paul, Executive Director

MLSA provides statewide free legal services to low-income Montanans in the areas of family, housing, consumer, and public benefits law. In addition to direct representation, MLSA provides community legal education, coordination and support for pro bono resources, and legal advice and referrals. Special project funds will support an economic impact study designed to produce a rigorous dollars-and-cents analysis of the contribution of civil legal aid to the overall Montana community.

YELLOWSTONE CASA, INC.
$6,500 Operating
Angela Campbell, Executive Director

Yellowstone CASA trains volunteers to provide a voice for abused and neglected children in the Yel-lowstone County court system. CASA volunteers promote children's best interests and advocate for safe, permanent homes.

Montana Law Student Pro Bono Service Award

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

Eligibility criteria for the award are:

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

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

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

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

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

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

Nominee Name_____

Nominee phone_____ Nominee email_____

Your name_____ Your phone or email _____

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Questions?

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

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Opinion, from page 3

And, from the *Koch Brothers* report:

> The Washington D.C. based Republican State Leadership Committee (RSLC) is the first national party organization which is focusing on electing judges; it was the biggest spender in North Carolina's May Supreme Court primary elections. This same group, assisted by the State Government Leadership Foundation (SGLF) and the Koch brothers affiliate, Americans for Prosperity (AFP), attempted to unseat three of Tennessee's justices in an August election. Koch Industries is one of the biggest donors to the RSLC. The RSLC recently announced its "judicial fairness initiative" to "educate" the public about judicial candidates. 1.5 million dollars was spent in the Tennessee election; $500,000 of that, mostly for attack ads, expended by two affiliates of the RSLC. Pro-business and conservative groups accounted for 7 of the top 10 spenders in 2010 elections. The RSLC President has predicted his organization will spend north of $5 million on judicial elections this year; it spent $27 million on state-level political races in 2012. The group has already raised twice the money in the first half of 2014 than it did at the same point in 2010. RSLC's problem is that conservative legislative agenda are running into a hard stop with "out of touch" judges — hence the campaign to elect judges that are in step and in touch with the RSLC's political agenda. As in Tennessee and North Carolina, independent money dominated the May Arkansas Supreme Court election as well. The race was overwhelmed by dark money from undisclosed donors and was replete with attack ads. The targeted candidate lost. In all three of these states justices ran for office in nonpartisan elections. Notwithstanding, national conservative groups, mostly headquartered in Washington D.C., are inundating these nonpartisan judicial elections with partisan cash. In Alabama, most judicial campaign cash came from big corporations funneled through local chambers of commerce or political parties. Money from the Alabama chapter of the U.S. Chamber of Commerce accounted for 40 percent of all contributions to that state's Supreme Court candidates in 2010. National partisan groups are politicizing nonpartisan judicial races by dumping huge amounts of cash into these elections — all to the end of insulating conservative legislatures' agendas from constitutional and other legal challenges.

Several organizations, Justice at Stake, the Brennan Center for Justice, and the National Institute on Money in State Politics report that outside campaign cash will soon dwarf money that individual judicial candidates raise and spend. Indeed, independent expenditures are increasingly playing a crucial, and often determinative, role in judicial races. Moreover, the politicization of these races and the candidates will only intensify. Keep in mind that Big Money knows that, to control the government for its own benefit, it has to have all three branches in its pocket. And that, in a nutshell, is the object of the exercise.

Think it won't happen in Montana? Don't kid yourself. It can — it did a century ago — and it may very well happen again.

This November's election will likely be the first where the full mischief of *Citizens United* will be seen in Montana judicial races. Remember, money is now speech; and those with the most money can buy the most speech to promote a judicial candidate or, more likely, to launch a barrage of attack ads to defeat a candidate. There are no limits on how much speech one of these individuals or dark money organizations can buy. The individual candidate cannot even hope to compete with the mountains of dark cash available from undisclosed sources. Voters will likely be inundated with misinformation, innuendo and outright lies in a fusillade of attack ads.

For every attorney, every judge and every justice who cares about Montana's civil justice system and its judicial elections, the *Justice at Risk* and *Koch Brothers* reports are must reads. Thanks to the SCOTUS and *Citizens United* — and, as Justice Stevens predicted in his dissent — state judiciaries are now on the auction block; Justice and the rule of law truly are at risk!

So let me end where I began: When you get the inevitable question this year — "which judicial candidate should I vote for?"— you might want to consider elaborating on your stock answer. Certainly, give your best recommendation based on your insight and experience; yours will likely be the only trustworthy outside information the voter gets. But you might go further and also explain that organizations and people who have absolutely no interest in maintaining a fair and impartial civil justice system in Montana are trying to buy our judicial elections to promote their own self-interest — a.k.a. their own bottom line. You might note that the judicial candidates may sincerely (or self-righteously) disavow the mega bucks spent to promote them or destroy their opponent, but those protestations account for nothing. Money is speech; corporations, PACS and special interests can spend what they want and say what they want with impunity — a candidate's demurs (or posturing) to the contrary, notwithstanding. Hopefully, and most importantly, you will also stress the importance of a fair, impartial and independent judiciary to every Montanan and the fact that no person or business wants to wind up in a court where the fix is in because the justice or judge is beholden to the organization or person who spent him or her onto the bench. And, you might want to suggest that the voter ignore the TV dog and pony show and pass on your recommendation to others — ask them to spread your word. It is personal; it is local; and coming from you, it will be golden.

Finally, get involved in your recommended judicial candidate's campaign. The profession we all respect and serve, and most importantly, our fellow Montanans' fundamental right to open courts and a remedy for injury are at stake. Every Montanan will lose if our judicial elections and our civil justice system are high-jacked by the "dark side".

The default — doing nothing— is simply unacceptable. If Montanans don't elect our justices and judges, you can bet that, given the opportunity, dark money from undisclosed sources surely will purchase them.

Jim Nelson is a retired justice of the Montana Supreme Court and presently serves on the legal advisory board of Free Speech for People.org

Gerald David 'Jerry' Williams

HAMILTON — Gerald David "Jerry" Williams of Hamilton passed away five days shy of his 81st birthday on Tuesday, Aug. 5, 2014, of natural causes. He was born Aug. 10, 1933, in Carrier Mills, Illinois, son of the late Dr. and Mrs. Emery Williams.


Williams

He spent his school years in Marion, Illinois, and attended the University of Arizona, where he met his wife, Judith Drachman of La Grange, Illinois. He graduated from the University of Illinois Dental School in Chicago in 1957.

Jerry served as an officer in the Navy and was stationed in Alameda, California, and Barbers Point, Hawaii, before settling in Denver, where he practiced dentistry for 20 years and raised his family. He then returned to the UI dental school as a faculty member and associate dean. At age 51, he could not resist moving to Montana, where he attended the University of Montana Law School and began his second career as a lawyer. He practiced law in Hamilton as a public defender, deputy county attorney and justice of the peace.

Jerry was an avid horseman and all-around outdoorsman. He loved being on a mountain on his beloved horse, Ben, or skiing with friends at Lost Trail. He was a member and past president of the Hamilton Lions Club and served on the boards of Cross Roads Chemical Dependency and Ravalli Services.

He was preceded in death by his son David in 1994 and brother Joseph Williams of Marion.

He is survived by Judy, his wife of 59 years; daughters, Leslie Williams and Gail Cluff (Chris) of Hamilton; son Paul Williams (Julie) of Evergreen, Colorado; six grandchildren, Leanne and Joe Williams, Kate and Charlie Cluff, Grant and Paige Williams and his sister, Vera Follmer (Mack) of Eugene, Oregon.

There will be a memorial service Sept. 6, time and place to be announced, to celebrate Jerry's life. Condolences may be left for the family at dalyleachchapel.com.

In lieu of flowers, the family suggests memorials to Bitterroot Youth Home, St. Labre Indian School (stlabre.org), Special Olympics or charity of choice. Jerry's family wishes to thank the staff of The Remington for their loving care. Jerry was a loyal family man and will be deeply missed.

Lloyd Ingraham

RONAN — Lloyd Ingraham, 88, passed away on Sunday, Aug. 10, 2014, not far from his birthplace where his pioneer grandparents put down roots a century ago. He died of complications following a tractor accident while tending his golf course on Terrace Lake Road east of Ronan.

Frank Lloyd was born Oct. 28, 1925, to Anna and Hugh Ingraham in Pablo. Lloyd was an "up-from-the-bootstraps-man." He graduated from Ronan High School at age 16. His first job was at the Dupuis Sawmill, but using his hard work and intellect, he became a "country lawyer" who took a case all the way to the U.S. Supreme Court. In 1948 he married his wife of 66 years, the former Irma May "Peggy" Frisbie. They raised a family of six children and traveled the world. Lloyd lived life to its fullest and was an inspiration to many, but his most cherished role was that as patriarch of a large family. Although scattered across the country, his family visits frequently and all still call Montana home.


Ingraham

Lloyd often recounted a boyhood memory of rising at 3 a.m. to do early milking chores so he could walk the six miles to view the opening ceremony for Kerr Dam. As one of the "fighting Ingrahams" of Pablo, he won the Golden Gloves Championship and went on to pro boxing. From there he went to the Air Transport Corps and later helped form the Peruvian International Airways, based in Lima.

Lloyd met and married Peggy in Los Angeles in 1948. After starting their family, Lloyd and Peggy returned to Ronan, where Lloyd operated Texaco's bulk oil distribution business and built and leased three gasoline stations. His next vision was to buy and develop an island on Flathead Lake now known as King's Point. It was that calculated risk that gave him the resources to attain his dream of becoming a lawyer. At age 38, Lloyd moved back to Los Angeles with Peggy and their six children (ages 1 through 14) to attend law school. A year before he graduated, he traveled to Helena to undertake the unusual challenge of sitting for and passing the Montana Bar Examination, and then returned to complete his degree. He began his legal practice in Lake County with the firm that became Christian, McCurdy, Ingraham and Wold. He later began his own private practice in Ronan where his son, Greg, joined the firm in 1985. Lloyd's hard work was directed toward achieving one of his personal triumphs – ensuring that all six of his children graduated from college. He retired from full-time practice in 1989 but remained "of counsel" with the Ingraham Law Office for the remainder of his life.

Lloyd also owned and developed Schwartz Lake in the beautiful snowcapped Mission Mountains where he taught his family to fish, hike, camp and snowmobile. He frequently led his grandchildren in campfire sing-alongs, which always included his favorite ballad, "The Streets of Laredo."

He and Peggy traveled extensively but always relished their return to their Montana home. Lloyd found ways to reflect the places they visited in the landscaped gardens he built on his golf course using stone he hauled from Whisky Trail Ranch.

Lloyd is survived by Peggy, as well as daughters Glenda Pate (Gordon), Cheryl Hughes (Stan), Nancy Hadley (Tony), Marla Lango (Steve), Jill Curtis (Peter) son Greg (fianceé Linda Foust); 11 grandchildren and four great-grandchildren. He is preceded in death by his parents, Hugh and Anna, and his five siblings, Lee Opal, Elmer, Johnny, Fred and Gene, who was killed at Normandy during World War II.

Lloyd engraved the following on a stone in one of his many lush gardens: "Observe the plan, the grand design, what hint of heaven in the heavens: With galaxies of life, the countless patterns of eternity. All this, and more, an accident? Without cause or reason, or lack of proof? Hardly."

There will be a memorial celebration of Lloyd's life on Tuesday, Sept. 2, at 11 a.m. at the Ingraham home east of Ronan. For those who wish to honor Lloyd's memory, his family suggests donations be made to the Montana Historical Society, P.O. Box 201201, Helena, MT 59620.

Michael Gene McLatchy

MISSOULA — Michael Gene McLatchy of Missoula, died Thursday, July 3, 2014, surrounded by his family, at the University of Washington Medical Center of brain cancer. Gene was a 50-year member of the Montana Bar, with public service in the County Attorney's Office, for the state of Montana, and private practice in Missoula. After serving in the U.S. Air Force, Gene taught English at Stevensville High School, earned a Master of Arts in history and a Bachelor of Law, both from the University of Montana.

A graduate of Helena High School, Gene was born June 19, 1931, at Mammoth Hot Springs, Yellowstone Park. He was preceded in death by his parents James H. and Imogene Grey McLatchy and a brother, Lt. James I. McLatchy, U.S. Army Air Corps, World War II MIA, and by a sister-in-law Beverly Roland McLatchy. Gene is survived by two brothers, Larry McLatchy, of Choteau and Patrick McLatchy (wife Esther Polette McLatchy), of Mount Vernon, Washington; six nieces and several grand- and great-grand nieces and nephews.

Memorial donations may be made to the Humane Society of Western Montana or the Bob Marshall Wilderness Foundation. At Gene's request, no services will be held.

Divorce, from page 9

authorizing a guardian to initiate a divorce action on behalf of a person under guardianship, general guardianship statutes do not give a guardian such authority.[29]

CONCLUSION

That terminating marriage is an intensely personal decision is not in question for any jurisdiction. The question lies in whether such a personal decision is within the discretion of a guardian when the ward is adjudicated incapable. Guardians inherently make personal decisions on behalf of the ward, including those of such intimately personal nature as medical care and treatment. Courts have held that guardians may make such decisions absent specifically enunciated grant of such power. Courts should likewise recognize the guardian's duty to hold primacy of the ward's values in determining whether to file for divorce. Upon a showing of clear and convincing evidence that the best interest is served, a guardian should have the authority to initiate a dissolution proceeding on behalf of a ward.

Penelope Oteri is a third-year law student at the University of Montana School of Law. She submitted this article as part of her clinic with the Western Montana Chapter for the Prevention of Elder Abuse."

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[1] *Nelson v. Nelson*, 118 N.M. 17 (N.M. App 1994).

[2] *In re Marriage of Denowh ex rel. Deck*, 2003 MT 244, 317 Mont. 314, 78 P.3d 63.

[3] A. Kimberley Dayton, Julie Ann Garber, Robert A. Mead, and Molly M. Wood, *The Significance of State Law*, 3 Advising the Elderly Client § 34:2 (2014).

[4] Peter Mosanyi, II, *A Survey of State Guardianship Statutes: One Concept, Many Applications*, 18 J. Am. Acad. Matrim. Law. 253 (2002).

[5] *Nelson,* 118 N.M. at 22.

[6] *Denowh* ¶ 5.

[7] *Id*. at ¶ 6.

[8] *Id*. at ¶¶ 7, 9.

[9] *Id*. at ¶ 13.

[10] *Id*. at ¶¶ 15-16.

[11] Mont. Code Ann. § 40-6-234(2) (2013).

[12] *Id*. at. § 72-5-306.

[13] *Denowh*, ¶ 18.

[14] Darlene Payne Smith, Divorce Court- *What's a Nice Elder Law Attorney Doing in a Place Like This?*, Divorce and Annulment in the Elderly, Nat'l. Acad. Of Elder L. Attorneys, Inc. (2010).

[15] *In re Burgess* at 812, 236 Ill. Dec. at 284, N.E.2d at 129 citing *In re Marriage of Drews, (1986) 115 Ill.2d 201, 208, 104 Ill. Dec. 782, 503 N.E.2d 339*.

[16] *In re Marriage of Burgess*, 189 Ill.2d 270, 244 Ill. Dec. 379, 725 N.E.2d 1266 (2000).

[17] *Id*. at 273, 244 Ill. Dec. at 381, 725 N.E.2d at 1268 (citations omitted).

[18] *Id*. at 281, 244 Ill. Dec. at 386, 725 N.E.2d at 1273.

[19] *Karbin v. Karbin ex rel. Hibler*, 2012 IL 112815, 364 Ill. Dec. 665, 977 N.E.2d 154.

[20] *Luster*, 128 Conn. App. at 264.

[21] *Id*. at 268, 271.

[22] *Id*. at 281.

[23] *Nelson*, 118 N.M. at 22, citing N. M. S. A. 1978, § 45-5-312.

[24] *Id*.

[25] *In re Marriage of Ruvalcaba*, 174 Ariz. 436, 439 (Ariz. App. Div. 1 1993).

[26] *Id*. at 444.

[27] *Samis*, ¶ 5.

[28] *Id*. at ¶ 10

[29] *Id*. at ¶ 14

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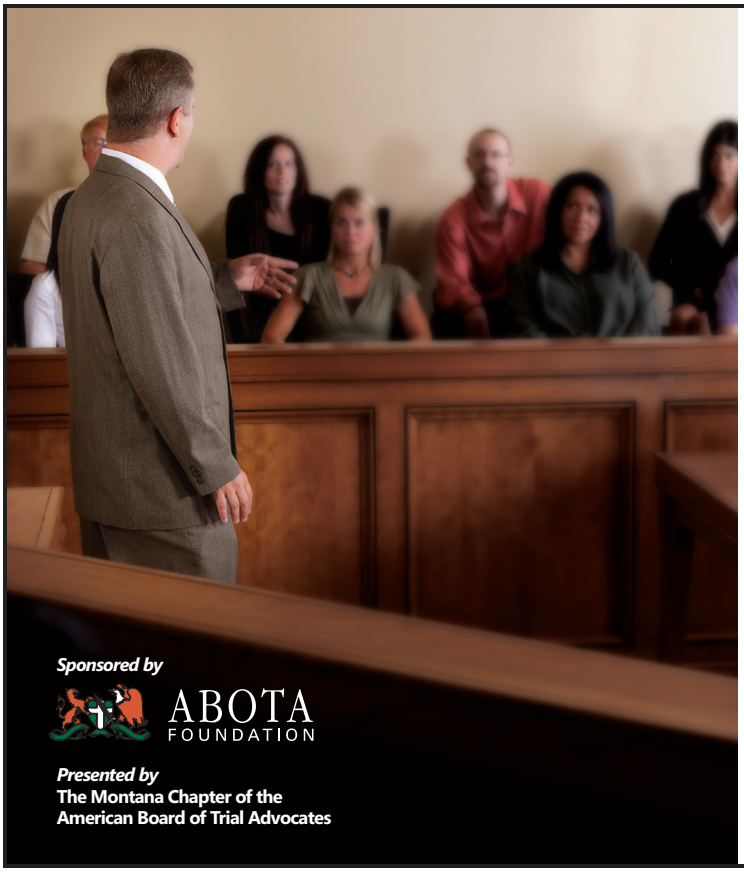

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