MONTANA LAWYER

State Bar of Montana

September 2016 | Vol. 41, No. 10

ANNUAL MEETING GREAT FALLS

CLE THEME: LAW OFFICE PRACTICALITIES

Details on pages 20-21

SNOWBERGER WINS 2016 PRO BONO AWARD

See story on page 18

Also in this edition

> Analysis of outside influence in Montana judicial elections by Professor Anthony Johnstone

> Trends in Environmental law by the State Bar's Natural Resources, Energy & Environmental Law Section

> Are insurance bad faith recoveries taxable?

> Resolution proposed on hearing for Supreme Court nominee

> Bar launches online Career Center

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.
E-mail: jmenden@montanabar.org

Montana Lawyer Staff
Publisher | *Christopher L. Manos*
Editor | *Joe Menden*
406-447-2200; fax: 442-7763
e-mail: jmenden@montanabar.org

Subscriptions are a benefit of State Bar membership.

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

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

INDEX
September 2016

Feature Stories

Regular Features

My hopes for Bar's future, as presidency winds down

"At a time when our politics have sought to encourage anger and distrust ... it is important to step back to appreciate that the unified bar is the one organization that allows all attorneys to work together and speak as one for the rule of law."

State Bar of Montana President Matt Thiel is an attorney in Missoula whose practice focuses mostly on personal injury and labor law. He is an appointed member of the Montana Facility Finance Authority and the Montana Insurance Guarantee Association.

While serving as President this year has been a challenge at times while maintaining a practice, I am better for it and it has been an honor to serve with the other Officers, Trustees, staff and volunteers who make our Bar work. This past year the Bar has worked hard to meet its many missions and mandates to maintain the administration of justice, improve access to justice and protect the public interest. The Bar is in good hands with the incoming President and Trustees and I leave with the following hopes for our Bar:

That attorneys will trust that their intellect and wisdom are the keys to preserving their relevance in the face of disruptive changes in the practice of law brought on by rapid changes in technology. The telegraph, typewriter, telephone, telefax, television, computer, internet and mobile technology have all imposed varying degrees of change and challenges on the profession over the decades. But the core role and value of the legal profession have not changed since the founding of our Nation. The human connection and common-sense experience of the counselor at law, the strategy and advocacy of the legal planner and trial lawyer, and the insights and effective communication of the legal writer will transcend the changes in the delivery of legal services brought on by rapid changes in technology. Knowing this we can embrace change and leverage it to improve our cost effectiveness and increase access to justice for all Americans. If we accept and embrace change, the lawyer as counsel and problem solver will remain relevant in the face of changes in the delivery of legal services brought on by the Internet economy. The profession can thrive economically while keeping its focus on increasing access to justice and protecting the public interest by leading on policy relevant to changes in the profession.

That we remind ourselves and the public that we must actually work to preserve respect for the rule of law. This will not happen without the efforts of the State Bar of Montana and the ABA on a national level. "God won't do the day- to-day work in an earthly system of justice, won't take the bench or enter the jury box." (David Mellinkoff, "The Conscience of a Lawyer"). To a large extent it is the organized bar that manages the daily grind of assisting the judicial system to support the rule of law and educate the body politic on what the Supreme Court has referred to as this Nation's "historic commitment to the rule of law." *U.S. v. Nixon*, (1974). The rule of law is our common concern, regardless of our practice area or political philosophy. Inherent in the rule of law is our belief in our legal system and the importance of ensuring an independent judiciary regardless of whether we win or lose our case. At a recent ceremony celebrating his 20 years on the federal bench, Judge Donald W. Molloy said, "And I know that we often talk about the rule of law as if it is a rule, but it's really, I think, the way we all work together."

At a time when our politics have sought to encourage anger and distrust toward government and even the judiciary, it is important to step back from our busy practices to appreciate that the unified bar is the one organization that allows all attorneys to work together and speak as one for the rule of law, and the reason and respect that it requires, regardless of the politics of the day. Even when we are too busy managing our caseload and wondering what that Bar has done for us today, the Bar is at work maintaining the profession and protecting the public interest.

Finally, thank you to all those who volunteer their time and resources to participate in their Bar and its committees, commissions, sections and service and education programs doing the ground work that brings life to the rule of law through policy, education and public service. You are not paid and too often under-recognized but I want you to know you are appreciated. You make the Bar matter.

Raucci appointed to national mediators, arbitrators panel

Francis (Hank) Raucci is of counsel with Hattersley Walter, PLLP, and he serves as an arbitrator and mediator in a wide variety of employment and labor matters.

Raucci has been appointed to the national panel of mediators and arbitrators for the Asbestos Personal Injury Trust Fund which administers a $32 billion fund for the adjudication of asbestos related claims. He is a Fellow of the National Academy of Distinguished Neutrals, and serves as an Early Neutral Evaluator for the U.S. District Court, appellate Mediation Panel of the Supreme Court of Montana, Court Appointed Special Masters, and the national panels of the American Arbitration Association for commercial law, ERISA, labor and employment law, and the Affordable Care Act both as an arbitrator and mediator.


Raucci

He has participated in over 500 labor agreements, handled scores of arbitrations, and managed over 200 labor and employment litigation cases.

Until recently he served as trustee on Taft-Hartley health and pensions with combined assets in excess of $10 billion. Raucci may be contacted at P.O. Box 1731, 33 S. Last Chance Gulch, Helena, MT; 406-444-8746; and email fjssraucci@aol.com.

Limited-scope, sliding-scale practice opens in Kalispell

Integrative Law Solutions (ILS) is a newly created law practice in Kalispell providing legal services for clients on a limited-scope, flat-fee and sliding-scale basis. ILS gives clients access to legal services when they do not qualify for Montana Legal Services Association aid yet cannot afford an up-front large retainer based on standard fees for legal services.

ILS also serves self-represented through self-help seminars taught by licensed attorneys and paralegals with the added benefit of document review and the option for one-on-one consultation with licensed attorneys throughout the process.

Serving clients in the Flathead Valley and beyond, including remote consultations when appropriate, ILS provides seminars and assists clients on legal matters related to guardianships, parenting plans, adoptions, immigration, IP/trademark, entertainment, technology, business law and estate matters. Contact ILS at IntegrativeLawSolutions@gmail.com or call 406-250-9256 for more information.

Holland & Hart Billings office has 12 on Best Lawyers list

The Best Lawyers in America has selected 12 Billings-based Holland & Hart lawyers for inclusion in the 2017 edition which recognized 187 attorneys firm wide.

Additionally, Jeanne Matthews Bender was named 2017 "Lawyer of the

Year" for Employment Law - Management in the Billings area. She was among 20 Holland & Hart attorneys named the Best Lawyers 2017 "Lawyer of the Year" in their respective markets and practices areas. Only a single lawyer in each practice area and designated metropolitan area is honored as the "Lawyer of the Year."

Newly recognized in 2017 is Michael Manning.

Other attorneys from Holland & Hart's Billings office recognized were Kyle Gray, Shane P. Coleman, Charles W. Hingle, W. Scott Mitchell, Michael Monson, Lawrence W. Peterson, Jason S. Ritchie, Robert L. Sterup, Elizabeth A. Nedrow, and Michele M. Sullivan.

AG: Missoula County fully compliant in prosecution of sex assault cases

The Missoula County Attorney's Office is in full compliance with an agreement made two years ago to improve the way its prosecutors handle sexual assault cases, Montana Attorney General Tim Fox announced on Aug. 17.

The agreement was signed after the AG's Office intervened in and settled the legal dispute between the Missoula County Attorney's Office and U.S. Department of Justice.

Fox said his office's oversight of the issue has ended.

"Missoula County Attorney Kirsten Pabst and her team are to be commended for their diligent work," Fox said. "In the time since this agreement was signed, the Missoula County Attorney's Office has worked very hard alongside our prosecutors and a special technical advisor to evaluate and improve all aspects of how sexual assault cases are handled and how victims are treated."

"I am extremely proud of our Special Victims Unit program which we've built from the ground up to enhance community safety and utilize best-practices to better serve victims of crime," Pabst said· "With the support of our local administration, we've overcome institutional barriers to unveil a truly innovative and comprehensive program that is the first of its kind."

According to the AG's Office, the Missoula County Attorney's Office has: taken the following steps since the agreement:

- Developed clear policies and guidelines for prosecuting sexual assault cases.
- Participated in special training for sexual assault investigation, prosecution, and victim treatment.
- Hired a victim-witness coordinator, investigator and trauma counselor to assist with sexual assault cases and address the effects of secondary trauma on staff.
- Formed a Special Victims Unit, with five dedicated attorneys and a paralegal.
- Improved communication and coordination with law enforcement agencies and community partners.

Resolutions proposed on U.S. high court nominee, MLSA

A resolution calling for the U.S. Senate to hold confirmation hearings on the nomination of Judge Merrick Garland for U.S. Supreme Court justice is among several proposed for vote by the State Bar of Montana membership at the 2016 Annual Meeting.

President Barack Obama nominated Judge Garland after the sudden death of Justice Antonin Scalia in February. The Senate has refused to hold confirmation hearings, arguing that they should not confirm a new justice during an election cycle for president.

The proposed resolution was put forward by Active Attorney members Shane Vannatta, Beth Brennan and Mae Nan Ellingson, and Senior Attorney member Bob Knight, all of Missoula.

It is one of three resolutions that have been proposed for members to vote on at the Annual Meeting.

The resolution reads, in part, "… the Senate has never before refused to engage in the process of providing its 'advice and consent.' Regardless of whether the Senate holds public hearings, closed hearings, hearings at which the nominee testifies, or hearings at which the nominee does not testify, it has taken some steps to confirm or reject every judicial nominee not otherwise withdrawn from consideration."

Other resolutions

Two other resolutions have been proposed for members to vote on at the Annual Meeting.

One of the proposals calls on the bar to strongly urge the U.S. Congress to increase federal funding for legal services programs nationwide and strongly urge all members of the State Bar of Montana to participate in pro bono programs established by the State Bar, local bar associations, Montana Legal Services Association and various other entities to assist in providing legal services for those unable to pay.

Another proposed resolution is to thank the members of the Cascade County Bar Association for their generous contributions of time and talent for the 42nd Annual Meeting.

The resolutions, if approved by the State Bar's Past President's Committee at its Resolution Meeting, will be voted on during the Bar's business meeting from noon to 2 p.m. on Thursday, Sept. 22, at the Great Falls Holiday Inn.

The resolution meeting will be held on Wednesday, Sept. 21, from 2 to 4 p.m. at the Great Falls Holiday Inn.

Read proposed resolutions online

The proposed resolutions are posted online at montanabar.org

Attention firms: Get in the Montana Firm Directory

Firms that would like to continue or add a listing in the State Bar of Montana's Firm Directory in the annual Lawyers' Deskbook must send in their information by Monday Oct. 17.

Listing in the Firm Directory is only $40 and gives your firm exposure to attorneys, law-related organizations, and other legal professionals. A logo and website can be included at no extra charge. Please provide logos as a vector file or a high-resolution image sized 300 ppi or larger.

Contact Jill Diveley at jdiveley@montanabar.org or mail to State Bar of Montana, P.O. Box 577, Helena, MT 59624. Be sure to include the following information:

- firm name
- address
- phone number
- fax
- website
- affiliated staff.

Get your changes in now for 2017 Lawyers' Directory

Now is the time to verify your listing for the 2017 Lawyers' Deskbook & Directory. All changes to your contact information are due by **Monday, Oct. 17**.

There are three ways to update your information:

1. Email: Jill Diveley at jdiveley@montanabar.org

2. Update online: Log in at montanabar.org and Edit your bio (under Manage Profile.

3. Fax: 406-442-7763

For verification purposes you MUST include your Bar number or date of birth.

Fastcase tip of the month: Copy Citation function

Don't let the tedious process of copying down case citations sidetrack your research project. Instead, use the Copy Citation function in Fastcase to automatically copy and paste the citation of the case you are quoting into the document you are working on. Here's how it works:

Step 1: Access the case that you want to cite. Make sure that you are in the full case text view and not on the results screen.

Step 2: Select Copy Citation from the Document menu.

Step 3: Open the document (or e-mail) that you want to paste the citation into. Put your cursor in the appropriate spot in the document and press Ctrl + V.

Voila! The case citation will be pasted into the document.

MONTANA DEFENSE TRIAL LAWYERS

ANNUAL CLE SEMINAR • NOVEMBER 18, 2016

7 CLE credits requested *(INCLUDES 1 HOUR ETHICS)*

Doubletree by Hilton Missoula Edgewater

Missoula, Montana

A limited block of rooms has been reserved for MDTL program participants. Call 406.542.4611 and ask for the MDTL room block rate. For full schedule and additional information, visit www.mdtl.net.

▶Caging Reptile Lawyers

Matthew Moffett, Esq.; Gray, Rust, St. Amand, Moffett & Brieske, LLP (GRSMB), Atlanta, GA

Matthew Moffett is the immediate past president of the Georgia Defense Lawyers Association and defends wrongful death and serious injury cases in state and federal courts. Several years ago, Matthew tried to a defense verdict a wrongful death case, opposite the author and creator of the Reptile trial strategy. Since then, Matt has presented across the country to defense lawyer organizations, industry associations and for DRI on how to counter and prevail against this strategy, both in discovery and at trial.

▶Email and Smartphones and Clients, Oh My!

Communication and the Practice of Law in the 21st Century

Mark Bassingthwaighte, Esq., Risk Manager, ALPS Corporation, Missoula

This program will address ethical, malpractice, and risk management issues associated with email and the use of mobile devices by both attorneys and their clients during the course of representation. Topics covered will include setting boundaries, file documentation, responsible use, maintaining confidentiality, and cyber security. If you're living in the Land of Oz and have no idea what the "Don't Do Stupid" warning is all about, this program's for you.

ALSO FEATURING…

▶Changes to Federal Rules

Chief Judge Dana L. Christensen of the United States District Court for the District of Montana; and Jeanne Loftis, Esq., Bullivant Houser Bailey, PC, Portland, OR; Moderator, Jordan Crosby, Esq., Ugrin, Alexander, Zadick & Higgins, PC, Great Falls

▶In re Rules Revisited—Panel Discussion

Gary Zadick, Esq. and Bob James, Esq., Ugrin, Alexander, Zadick & Higgins, PC, Great Falls; and Ward "Mick" Taleff, Esq., Taleff Law Offices, PC, Great Falls; Moderator, Carey Matovich, Esq., Matovich Keller Murphy, PC, Billings

▶"New" View from the Bench—*Tentative*

▶Reception: Hosted by the Alexander Blewett III School of Law at the University of Montana

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
Judiciary/Law Clerks	*Complimentary*	*Complimentary*

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

Join now and save! www.mdtl.net

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_____

Send registration form to: MONTANA DEFENSE TRIAL LAWYERS
36 South Last Chance Gulch, Suite A • Helena, MT 59601
Phone 406.443.1160 • **Fax** 406.443.4614
sweingartner@rmsmanagement.com • www.mdtl.net

ABA's Executive Director praises Thiel as tech leader

State Bar of Montana President Matt Thiel received praise from the Executive Director of the American Bar Association for being a leader in technology issues.

The ABA's Jack L. Rives made his remarks in a speech before the ABA House of Delegates Aug. 8. In the speech, Rives asked ABA members to embrace today's challenges, adopt technological change and show relevance and become an organization of the 21st Century.

He cited Thiel's articles over the past year in the Montana Lawyer on how the legal profession should respond to disruptions caused by technology.

"This is a man who gets it," Rives said. "He knows that technology is here to stay. He embraces change, and that's what our best leaders do, they understand the need to move forward."

To see video posted online of Rives' speech before the House of Delegates, visit http://bcove.me/ui8jj936. His comments on Thiel begin about 10 minutes, 45 seconds into the speech.

State Bar of Montana launches new online Career Center

The State Bar of Montana announces its newest offering to its members — a career center that connects job seekers with prospective employers in the legal industry. The new career website can be found at jobs.montanabar.org. Access is available to State Bar members and nonmembers alike.

"The State Bar promotes legal industry knowledge, networking and excellence," said Chris Manos, State Bar of Montana president. "Launching an online career center for legal professionals in Montana is a natural extension of that mission."

The State Bar's career center distinguishes itself from generalist job boards in a number of ways. These include:

- a highly targeted focus on employment opportunities in the Montana legal industry;
- anonymous resume posting and job application — enabling job candidates to stay connected to the employment market while maintaining full control over their confidential information;
- an advanced Job Alert system that notifies candidates of new opportunities matching their own pre-selected criteria;
- access to industry-specific jobs — and top-quality candidates — often not seen on the mass job boards.

To visit the Career Center, log onto the State Bar of Montana website www.montanabar.org and click on the Career Center logo on the right rail of the home page. Once there you can immediately post your resume or a job opening. For additional information, please contact the State Bar at 406-447-2200 or jmenden@montanabar.org.

The site was built by Your Membership Careers, which powers career centers that serve niche audiences nationwide.

'Making a Murderer' attorney to speak in Missoula Oct. 7

A Wisconsin attorney who came to national prominence in the hit Netflix documentary series "Making a Murderer" will speak at the University of Montana next month.


Strang

Attorney Dean Strang will participate in a moderated discussion on Friday, Oct. 7, at the University of Montana's Dennison Theatre. The conversation will begin at 8 p.m. and will center on many of the implications of the Steven Avery case, featured in "Making a Murderer," as well as the systemic failures of the criminal justice system.

Prior to his engagement at the Dennison Theatre, Strang will be the featured speaker at the Montana Innocence Project's annual open house at the Alexander Blewett III School of Law. The Montana Innocence Project's open house will be from 5:30-7:30 on Oct 7 in the law school atrium. Strang, a supporter of Innocence Projects nationwide, will speak at 6 p.m.

The Montana Innocence Project is a statewide nonprofit organization dedicated to exonerating the innocent and preventing wrongful convictions.

In addition to his work as one of Avery's trial lawyers Strang is also known for his first book "Worse than the Devil: Anarchists, Clarence Darrow and Justice in a Time of Terror."

He also worked five years as Wisconsin's first federal defender, is a shareholder in three of the state's leading criminal defense firms and co-founded StrangBradley, LLC.

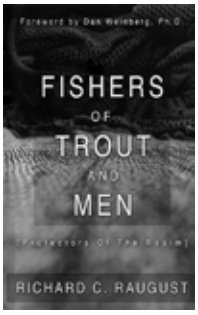
He is an adjunct professor at Marquette University Law School, the University of Wisconsin Law School and University of Wisconsin's Division of Continuing Studies. He is a member of the American Law Institute and serves on several charity boards, including the Wisconsin Innocence Project. His second book will be published in early 2018.

Tickets for the moderated discussion are $25 for the general public and $15 for UM students with a valid Griz Card. They are on sale at all GrizTix locations, including The Source in the University Center, Southgate Mall, Worden's Market and MSO Hub. They also can be purchased online at http://www.griztix.com or by phone at 406-243-4051 or 888-MONTANA.

Freed former MTIP client releases book of poetry

A former client of the Montana Innocence Project whose murder conviction was overturned in 2015 has released a new collection of poetry honoring the struggle of soldiers.

"Fishers of Trout and Men: Protectors of the Realm" is a collection of poems written by former MTIP client Richard Raugust. Raugust, an ex-infantry soldier who served in the U.S. Army from 1984-1986, calls his book a "spirit-inspired tool designed to thwart and tamper with the monster we call suicide in our military and civilian populations." It is available on Amazon.



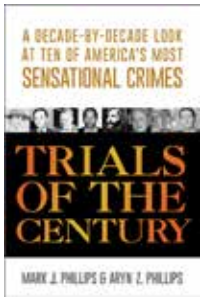
In 1998, he was convicted for the murder of his best friend, Joseph Tash. In 2015, District Court Judge James Wheelis reversed his conviction on the grounds that Raugust's constitutional rights were violated when eyewitness testimony that corroborated his alibi was withheld from his defense at the time of trial. Judge Wheelis ordered a new trial and released Raugust on his own recognizance pending a new trial.

The Montana Attorney General's Office initially appealed Judge Wheelis' ruling, but in August, the office moved to dismiss that appeal, the Associated Press reported. The AP asked Sanders County Attorney Robert Zimmerman by email if he planned to refile the murder charge, but he had not responded as of press time.

Book highlights high-profile trials of 20th century

There were many murder trials in the 20th century that captivated national attention and at the time earned the title "trial of the century. A new book by a California attorney and his Harvard grad student daughter chronicles 10 of these cases.

"Trials of the Century," by Mark Phillips and Aryn Phillips, released on July 26, has received praise from authors, commentators and lawyers like. It is available in paperback and Kindle editions.



Starting with the murder of famed architect Stanford White in 1906 and ending with the O.J. Simpson trial of 1994, the authors recount 10 compelling tales spanning the century. Other well-known cases in the book include the Lindbergh baby kidnapping, the Sam Sheppard murder trial ("The Fugitive"), the "Helter Skelter" murders of Charles Manson.

"For trial junkies—and who isn't?—these riveting accounts of ten 'trials of the century,' one from each decade, are a must-read. The stories tell us as much about the history of each decade as they do about the trials themselves," said law professor and best-selling author Alan Dershowitz.

The authors conclude with an epilogue on the infamous Casey Anthony ("tot mom") trial, showing that the 21st century is as prone to sensationalism as the last century.

Applicants sought for Gallatin County District judge

The Judicial Nomination Commission is accepting applicants for Gallatin County District Court judge.

The Honorable Mike Salvagni will resign his position effective Dec. 31.

Any lawyer in good standing who meets the qualifications for district court judge may apply for the position. Applications will be accepted until Wednesday, Sept. 21, at 5 p.m. Application forms are available electronically at the Judicial Nomination Commission's web page (http://courts.mt.gov/supreme/boards/jud_nomination).

The public is encouraged to comment on applicants during the public comment period, which will be Thursday, Sept. 22, through Monday, Oct. 24. The commission will forward the names of three to five applicants to Gov. Steve Bullock for appointment.

The person appointed by the governor is subject to confirmation during the 2017 legislative session, and must win election in 2018. The successful candidate will serve the remainder of Judge Salvagni's term, which expires in January 2021.

Annual salary for the position is $126,132.

Judge Salvagni announced his retirement on his 69th birthday, Aug. 1, after 20 years as District Court judge.

Judge Salvagni was elected Gallatin County Attorney in 1982. He held that post until he was elected District Court judge in 1996.

Judge Salvagni has been a member of the State Bar of Montana since 1973. He began practicing in Gallatin County in 1976, first contracting as a public defender, before winning election as Gallatin County Attorney in 1982. He held that post until he was elected District Court judge in 1996.

Panel does not recommend judicial redistricting proposals

A state legislative commission won't recommend redrawing any of Montana's judicial districts as a way to ease the Montana court system's growing caseloads.

The Judicial Redistricting Commission on Aug. 16 approved its final report to the state Legislature. The panel considered and rejected six proposals to reshape the state's 22 judicial districts.

The commission determined that redistricting is not necessary and is not the appropriate way to address the need for more judges.

The commission determined that redistricting is not necessary and is not the appropriate way to address the need for more judges.

In all, 46 district judges now handle more than 56,000 cases. The commission report says models found six districts need at least one additional judge.

Court officials say it would cost about $250,000 a year to add one new district judge.

The seven-member commission is made up of judges, attorneys, legislators and county officials.

APPOINTMENTS

Court reappoints Manos to Commission on Technology

The Supreme Court of Montana has reappointed State Bar Eecutive Director Chris Manos or his designee to the Court's Commission on Practice. Manos' previous term on the commission expired in April.

The new three-year term will expire on April 1, 2019.

Justice Michael Wheat chairs the 11-member commission. Other members include the clerk of the Supreme Court, the Supreme Court administrator, a clerk of District Court, a District Court judge, the chair of the Commission of Courts of Limited Jurisdiction Automation Committee; a judge of a court of limited jurisdiction; a member of the Legislature; the state law librarian; and a member of the public.

Supreme Court to hear oral argument at Annual Meeting

Friday, Sept. 23, Holiday Inn, Great Fall; Introduction at 10:45 a.m., oral argument at 11:15 a.m. — *United States Bureau of Land Management v. Barthelmess, et al.* A group of Bureau of Land Management permittees challenge a Water Court determination that six stock water claims on a Milk River Basin tributary in Phillips County are owned by BLM. The Water Court determined the existence of the permittees' senior instream rights neither defeats BLM's claims based on five reservoirs BLM has constructed nor provides legal grounds for declaring the BLM reservoir rights to be owned by the permittees. The permittees object to the determination that BLM is the owner of the claims, because the permittees or their predecessors in interest have been the actual user of the water. The permittees also object to the Water Court's determination that BLM has validly reserved water rights in a pothole lake—they argue that genuine issues of material fact exist as to the size and recordation of the pothole lake.

Professor Michelle Bryan of the University of Montana's Blewett School of Law will give an introduction to the case starting at 10:45 a.m.

Wednesday, Sept. 28, Courtroom of the Supreme Court, Helena, 9:30 a.m. — *West v. USAA*. USAA Insurance appeals a $1.464 million judgment from Great Falls District Court that USAA acted in bad faith in refusing to settle a claim. USAA argues that the District Court made several errors in relation to a Tricare lien that USAA says it had a reasonable basis in law to protect.

Montana judicial elections: Does the past hold lessons for future?

By Anthony Johnstone
University of Montana's Alexander Blewett III School of Law

Montanans never much liked outside influence in their judiciary, and their first line of defense was judicial elections. This may strike us as odd now, in our *Citizens United* era of unlimited outside money and even national party politics entering our Supreme Court campaigns. Yet the outsider problem and our electoral solution are older than statehood itself. After seeing record amounts of money spent on court candidates in the last campaign, and with three seats on the ballot this fall, it is worth considering where we've been and where we're headed on Montana's judicial campaign trail.

Judicial elections arose two centuries ago as a democratic solution to the problem of political influence on judges. Under the traditional model still used by the federal government and a few states, judges owed their appointments to the executive and legislative branches. In such a system, the composition of the judiciary is neither independent of the political branches—witness the present gaming of the United States Supreme Court vacancy—nor directly accountable to the people. Most states have taken the alternative path of judicial elections. Today, with about 90 percent of state judges subject to election, judicial elections are not going away anytime soon.

A history of Montana's judicial elections

The origins of judicial elections in Montana date back 150 years to a suspicion of the political appointees who staffed the territorial courts. In the gold rush that opened Montana's territorial history, customary miners' courts and the storied vigilantes dispensed civil and criminal justice. Acting Gov. Thomas Meagher, a Union Democrat, chafed against federal influence over the new territory. He pushed for statehood in 1866 with a constitutional convention and two extraordinary legislative sessions. When a two-member majority of the territorial court, both Republicans, declared the acts of the extraordinary sessions null and void, the state legislature redistricted those justices to the wilderness. The Republican U.S. Congress retaliated by nullifying all laws enacted in the extraordinary sessions, revoking the legislature's judicial districting power, and raising the territorial judges' salaries by $1,000.

Once the territorial government settled in, Montana courts developed a reputation for efficiency. Yet residents still resented the courts' lack of democratic legitimacy. On the eve of the second Montana constitutional convention in 1884, one newspaper editorial captured the popular complaint that

> [t]he President has nominated another carpetbagger for Associate Justice of the Supreme Court of Montana. Seventy-five thousand people in the Territory to make laws for themselves, and a Hoosier sent out from Indiana to tell us what we have done. How long, oh Lord; how long!

The proposed 1884 Constitution reflected this suspicion of outside influence. In its memorial to Congress, the convention sought statehood to redress "the policy which has so long prevailed of sending strangers to rule over us and fill our offices." The convention's address to voters devoted more lines to grievances against the appointed judiciary than it devoted to the legislative and executive branches combined:

> The present system is manifestly wrong again; by it the people have no voice in selecting the judges. They are sent to us from the far off East, probably in deference to the traditional idea that it was from thence all of the "wise men" came. . . . The character of our litigation is such that, however learned in the law our eastern judge may be, he will find himself much embarrassed in his new field.

In the proposal, justices would be "elected *by the people*" for six-year terms, and would be "required to have resided in the State or Territory at least two years prior to their election." The 1889 Constitution retained both provisions.

With statehood, Montana's judiciary transitioned from federal appointees unfamiliar with mining law to state elected officials all too familiar with corporate overreach and corruption. In what came to be known as the War of the Copper Kings, William A. Clark, Marcus Daly, and F. Augustus Heinze engaged in a decades-long struggle for domination of Butte's "richest hill on earth," and incidentally, for control of the state's government—including its courts. The Montana Supreme Court later recounted the broad history of "[t]hose tumultuous

Editor's note

This is an abridged version of A Past and Future of Judicial Elections: The Case of Montana, 16 J. App. Practice & Process 47 (2015), and is reprinted by permission of the publisher. The full article is available for download at: http://ssrn.com/abstract=2660514. The author served as counsel for the State of Montana in *Citizens United v. Federal Election Commission* and *American Tradition Partnership v. Bullock*.

years . . . marked by rough contests for political and economic domination primarily in the mining center of Butte, between mining and industrial enterprises controlled by foreign trusts or corporations."

Some of those rough contests played out before elected state judges. Heinze waged litigation in state courts to hold the rival Amalgamated Copper Company at bay while he, sometimes literally, mined ore out from under the company's feet. One of the judges hearing Heinze's case, William Clancy, "found in Heinze's favor with monotonous regularity" in what the historian K. Ross Toole memorably termed "a burlesque of judicial dignity." In 1903, after two devastating blows in Judge Clancy's court, Amalgamated shut down its operations until winning the enactment of a "Fair Trials" law allowing the peremptory substitution of a district judge. (A descendent of the "Clancy Rule" remains in effect today.) Heinze sold out to Amalgamated after Clancy lost re-election. Yet the War of the Copper Kings left lasting scars, as the Anaconda Company consolidated power over state government in Montana.

It took the one-person one-vote revolution, and reapportionment of the state legislature in 1965, to dethrone Anaconda. The new legislature moved toward constitutional reform and a more accountable state government. As with the earlier constitutions, judicial selection emerged as a central concern. In a 1967 "Blueprint for Modernization," Professors David Mason and William Crowley offered a variant of the "Missouri Plan" of merit panel selection, a reform that had failed five times in Montana since 1945. When the Constitutional Convention delegates met in early 1972, Sandra Muckelston's detailed commission report explained that "[t]he major criticism of the elective system of judicial selection, be it partisan [as Montana's system was before 1935] or non-partisan, is that voter knowledge of candidates and their qualifications is insufficient to form a basis for a rational choice." A judicial candidate also might "depend upon contributions from 'friends,' which may affect his impartiality just us much as those judges who receive financial support from party coffers." One Montana justice estimated that he spent nine months of an election year campaigning for office.

These studies set the stage for an unusually deliberative discussion of judicial selection by the 100 elected delegates of the Constitutional Convention. The 24 lawyer-delegates carried on most of the debate among themselves. The delegates' consideration of the judicial article was among the longest and most divided at the convention. The Judiciary Committee divided five-to-four on the issue of judicial selection. Despite the convention's general atmosphere of bipartisanship, the Judiciary Committee's votes divided largely along party lines. Democrats in the majority would retain judicial elections, while the predominantly Republican minority noted it was "especially apprehensive of the future political character of [Montana's] judges," and proposed merit selection.

Although the Montana Bar Association and leading judges supported a merit selection plan, the Judiciary Committee's poll of nearly 500 lawyers in the state found that a slight majority favored judicial elections; over 100 members of the Montana Trial Lawyers Association favored elections by more than a two-to-one margin. Delegate John M. Schiltz, a former legislator and an unsuccessful candidate for chief justice in 1970, made a case for judicial elections based on personal and political history. In Montana, he explained, "we have strong corporate influence; where, if I can elect a Governor, and through that office nominate and appoint the district and the Supreme Court judges, I can run this state. . . . I can own it." Noting how the Anaconda Company and its former affiliate the Montana Power Company could dominate appointment processes, including the Constitutional Convention Commission itself, he concluded

> you cannot pick a committee in the State of Montana that will be totally free of that kind of influence. And I am afraid of it, and if I have to choose between one or the other, I'm going to the electorate every time, because I had a chance . . . to be elected. With another few bucks, I might have made it.

Noted lawyer-delegate James C. Garlington argued for judicial appointment. "There is clear agreement on the part of all that we do need good judges," he noted, "[t]he question is how to recruit them." He suggested that campaigns make judicial office unattractive for many good lawyers because the judicial candidate "must sever himself completely from the private practice of law."

In a series of divided votes the delegates rejected both the majority and minority proposals and adopted Article VII, section 8, whose original text suggests its complicated origins in both the minority and majority proposals. The result was the maintenance of contested judicial elections, but with a merit plan of appointment by nominees from a selection committee in case of vacancies. Based on a campaign that noted, revealingly, "[c]ontested election of judges is not changed," the people narrowly ratified the 1972 Constitution, including the new judicial article.

Reformers were discouraged by the implementation of the compromise judicial article. Delegate Mason Melvin regretted that "the Legislature tossed the mechanics of the appointment of judges right into the political kettle" by giving the governor the power to appoint the majority of the nominating commission. Delegate Jean Bowman observed the Constitution "bungles the method of selection process," because it "provides for neither pure election nor merit selection and, at best, constitutionalizes uncertainty in the constitution in the method of selection." The judge for whom Delegate Bowman later clerked, Justice John C. Harrison, reached a harsher judgment: the "worst judiciary article in fifty states." The legislature and voters appear to agree that the convention left room for improvement.

About the Author

Anthony Johnstone is an Associate Professor at the University of Montana's Alexander Blewett III School of Law. He teaches and writes about Federal and State Constitutional Law, Election Law, Legislation, and related subjects.

The judicial article is among the most frequently amended articles in the Montana Constitution, with voters approving all four constitutional referenda amending the article.

Notably, the convention delegates also debated an innovative plan for public financing of judicial campaigns. The Judiciary Committee proposed a section requiring the legislature to "appropriate funds for the contested general election campaign expenses of candidates for the offices of justices of the supreme court and district court judges." Unlike the judicial selection proposal, the public-financing proposal enjoyed broad support on the committee. It recognized "the same problems we have always had" with judges running for office, including "the necessity that the judge demean himself and his position by seeking campaign funds," the influence of lawyers' contributions, and "the fact that the appearance of justice suffers in the process."

The committee's solution to these problems prompted a prescient discussion of campaign finance in judicial elections. Delegate Schiltz opened the debate on the public-financing provision, noting that the cost to taxpayers of financing judicial elections was a "pittance in view of the benefits," including an "independent Judiciary" and assurance "that one man was not buying the job." Looking toward a future of big-money campaigns, he warned that "this is going to come to Montana, and I can think of no other, better place to start as an experiment for a very small amount of money than on the Judiciary." The delegates gave the public-financing proposal preliminary approval by a narrow margin, but voted later that day to reconsider the proposal. Delegate William Burkhardt reported that a lawyer friend wrote to him that he hoped it would be "well debated before its death." So it was.

Several lawyers spoke in support of public financing. Delegate Wade Dahood argued "only the so-called 'big boys' can afford to support [candidates] with enough campaign funds," and "subconsciously, at least, it has an effect upon their decision." Delegate and Convention President Leo Graybill asked whether the delegates were "going to let the Judiciary continue to get its money to run for contested Supreme Court offices by getting it from big . . . corporations and concerns who have a lot of litigation in the Supreme Court." To the criticism that public financing would simply relieve lawyers from funding judicial campaigns, Delegate Graybill continued by asserting that "[t]he people that it's going to relieve is the common people who have to go to that Supreme Court occasionally against some major interest who is there constantly."

Opponents, however, doubted that the legislature would provide sufficient funding, and asked why only the judiciary should receive public campaign financing. Delegate Joe Eskildsen, originally a proponent of the proposal, argued that "when you look for political office, then you got to expect to find your own campaign funds and to finance it yourself." Delegate Garlington raised free speech concerns, worried that the measure would "inhibit the rights of citizen groups to take an interest in" judicial elections. Delegate William Swanberg, another lawyer, raised concerns about circumvention: "[T]he state will be on the [hook] for the basic campaign expenses, and some candidate will find some way of getting around it." The delegates then voted to delete the provision.

Two weeks later, Delegate Rick Champoux returned to the proposal, arguing "if we don't provide the expenses for these judges, somebody else will, and that other group will be, in the main, large companies that come before this court, whether they do it directly or indirectly." In response, the delegates suspended the rules to reconsider the proposal, but only as applied to Supreme Court justices. This time, the delegates adopted the proposal by 55 votes to 32. All that remained was final consideration of the judicial article. The convention adopted the first 13 sections — including the compromise judicial-selection section — by wide margins. But in a final vote, the public-financing proposal fell short. What would have been a major reform of state judicial elections failed by just two votes.

The new normal of judicial elections in Montana

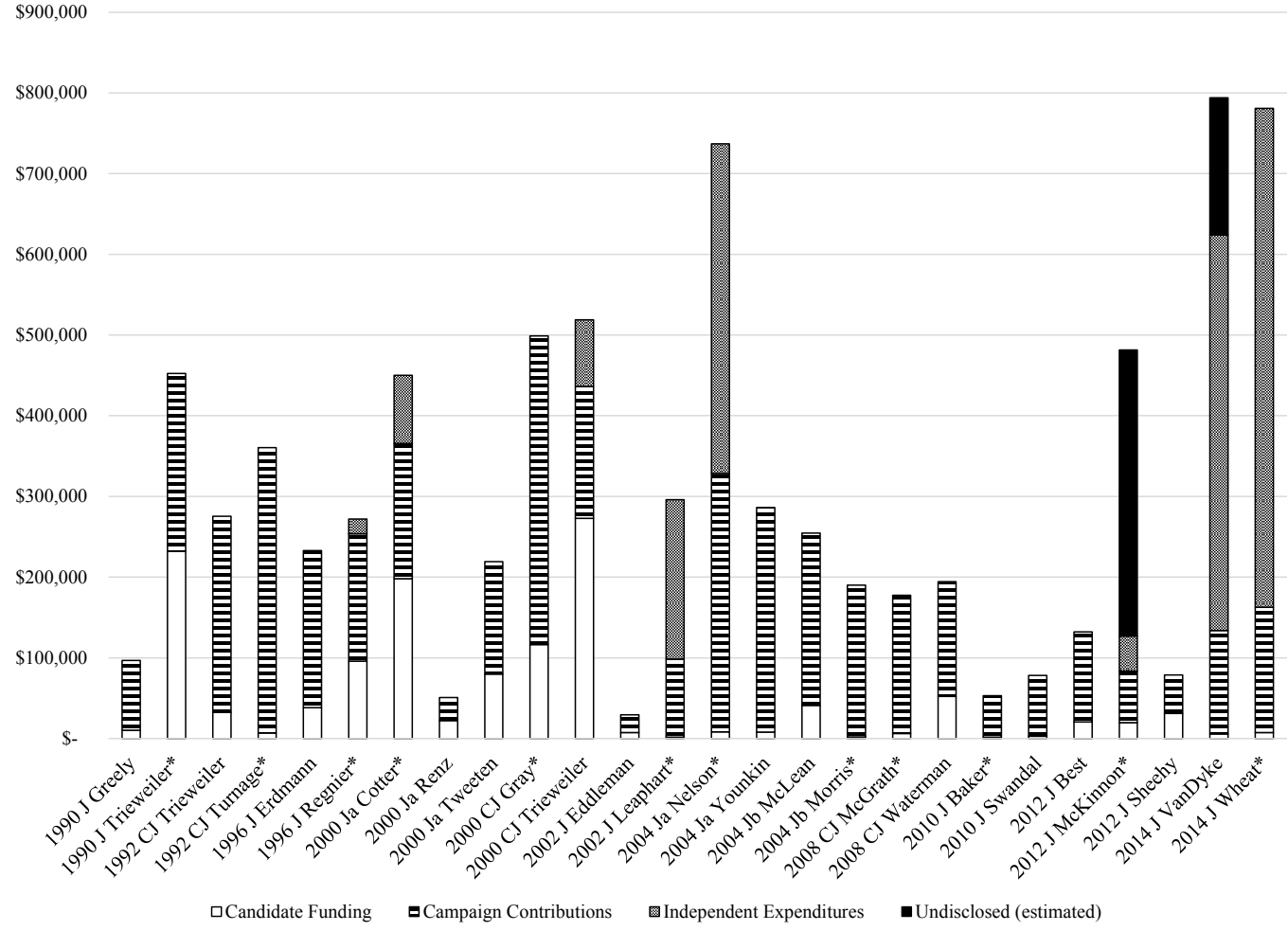
The failure of the public financing proposal left open the door to increasingly expensive privately funded judicial campaigns. This, in turn, exposed judicial elections to the eventual deregulation of campaign finance that culminated with *Citizens United v. Federal Election Commission* in 2010. Although that case is associated with corporate speech rights — an idea already established in constitutional doctrine — it primarily holds that unlimited campaign spending cannot corrupt the political process as long as the money is not contributed directly to a candidate. The Montana Supreme Court took a lonely stand against the case in *American Tradition Partnership v. Bullock,* trying to distinguish Montana's campaigns, including judicial campaigns, from the presidential campaign at issue in *Citizens United.* Yet Montana drew a quick rebuke from the Supreme Court. As a result, many of the legal and ethical constraints on judicial campaign speech and finance, once a realm of electoral exceptionalism respecting the distinct office of a judge, have fallen alongside their political-campaign analogues.

Following *Citizens United*, political parties now are as free to endorse nonpartisan judicial candidates as they are to endorse partisan political candidates. Corporations and unions now are as free to spend unlimited amounts in judicial campaigns, just as they may in political campaigns. Contributors now are free to choose their preferred levels of disclosure by selecting among candidate campaigns, super PACs, or less transparent vehicles. Careful contributors may enjoy significant influence in candidate campaigns — judicial or political — without triggering either a disqualifying conflict or even the obligation to identify themselves. Even campaign contribution limits, not at issue in *Citizens United* itself, have been lifted by a recent constitutional challenge in Montana.

Meanwhile, state courts remain important players in increasingly polarized debates concerning state law and politics. One-party state legislatures and executive branches, encouraged by historically large legislative margins, test state courts with contentious laws and constitutional questions. In states where a balance of power once encouraged political compromise, the losing party now may resort to litigation. The same moneyed interests that help set the legislative agenda also loom over state courts. Those judges and justices must decide the high-stakes and politically charged cases that follow, knowing their decisions may set the course for their next election campaigns. A moderate judge who does not line up neatly with moneyed interests risks electoral defeat. Case by case, issue by issue, term

Financing of contested Montana judicial campaigns

The chart below shows contested Supreme Court candidate financing since 1990, in 2014 dollars. Fully disclosed candidate contributions accounted for the majority of judicial campaign spending from 1990 — the earliest existence of detailed campaign finance records in Montana — until the U. S. Supreme Court's 2010 Citizens United decision.



* denotes winner

by term, the polarization of the political branches runs to the courts. This is the new normal in judicial elections.

Until *Citizens United*, fully disclosed candidate contributions accounted for the majority of judicial campaign spending. (See Chart 1.) Since 1990, the earliest extent of detailed campaign-finance records in Montana, the average Supreme Court candidate raised about $139,000 overall, and $212,000 in a contested election (all figures are in 2014 dollars). The largest source of campaign contributions in Supreme Court elections, not surprisingly, is lawyers and lobbyists, who account for nearly a third of campaign contributions. Next are the candidates themselves, accounting for nearly a quarter of the total. On average less than six percent of campaign contributions have come from out-of-state sources. Before the rise of independent expenditures after *Citizens United*, Montana's most expensive judicial campaign was the 2000 race between Justices Karla Gray and Terry Trieweiler for chief justice, which neared one million dollars.

Independent campaign expenditures are less transparent. Significant outside money first appeared in the competitive 2000 campaigns for chief justice and associate justice, nearly all of it from the Montana Trial Lawyers Association affiliate the Montana Law PAC. This PAC, like most PACs, fully disclosed its contributors, who are almost entirely Montana lawyers. In the 2000 and 2002 Supreme Court campaigns, the Montana Law PAC spent around $150,000 total on multiple candidates. In the bitter 2004 race between Justice James Nelson and state Rep. Cindy Younkin, the PAC spent as much as $409,000, the highest amount of independent expenditures prior to *Citizens United*. Several races from 2006 through 2010 either were uncontested or did not appear to involve significant independent expenditures. As the Montana Trial Lawyers Association executive director later told the New York Times, "[i]n 2006, 2008, '10, '12, we didn't spend

anything—nothing, zero."

The first Montana Supreme Court campaign waged entirely after *Citizens United* came in 2012, when independent expenditures raised new questions about so-called dark-money groups. Justice Nelson announced his retirement in early 2011, noting that judicial campaigns "are expensive, time consuming and increasingly partisan." An organization called the Montana Growth Network, founded by Republican state Sen. Jason Priest, criticized candidates Elizabeth Best and Ed Sheehy for past campaign contributions to Democrats and praised candidate Laurie McKinnon as "the only non-partisan choice for Supreme Court justice." Judge McKinnon disavowed the outside attacks, saying "[m]udslinging diminishes the prestige of our highest court." In 2015, an investigation by Montana's Commissioner of Political Practices revealed the group raised $878,000 in largely undisclosed funds, including several six-figure donations from out-of-state individuals (and their companies) with Montana property affected by then-pending stream access litigation.

The 2014 contest between Mike Wheat and Lawrence VanDyke marked the full fruition of *Citizens United* in a Montana judicial campaign. Justice Wheat had been appointed to the seat in 2010, weeks before *Citizens United* was decided. In his 2014 campaign, Justice Wheat criticized *Citizens United* and echoed traditional concerns about "outside influences" in judicial races, explaining that "[w]e Montanans have an independent attitude and we don't want outside corporations or special interest group[s] telling us how to run our affairs." In his challenge, former State Solicitor General Lawrence VanDyke highlighted Justice Wheat's partisan political background. "My problem with Mike Wheat is not that he's a liberal Democrat," VanDyke told a reporter, "[m]y problem is he judges like a liberal Democrat." Both candidates emphasized experience, and each criticized his opponent for a lack of it. VanDyke also won a challenge to his qualifications as a lawyer "admitted to the practice of law in Montana for at least five years," a constitutional provision rooted in historical concerns about outsiders.

With the field set, the candidates and allied advocacy groups began what would become a million-dollar judicial campaign of national note. Surprisingly, however, the amount of campaign contributions raised by both candidates was below average for a Montana Supreme Court race. VanDyke raised $132,999 from about 700 contributors, 22 percent of whom were lawyers. Thirty percent of VanDyke's contributions came from outside Montana, the highest rate of out-of-state contributions for any Supreme Court candidate on record. Justice Wheat raised $161,662 from more than 900 contributors, 53 percent of whom were lawyers. Three percent of Justice Wheat's contributions came from outside Montana.

As state and national advocacy groups spent hundreds of thousands of dollars on attack ads, the candidates' campaigns became bit players. On Justice Wheat's side, the trial lawyers' Montana Law PAC raised more than $161,483 from trial lawyers and law firms. It transferred most of its money to a new political committee called Montanans for Liberty and Justice ("MLJ"), also primarily funded by lawyers, with smaller contributions from the MEA-MFT union PAC. In total, including in-kind contributions from the Montana Law PAC, MLJ spent $519,840 of independent expenditures on behalf of Mike Wheat. The contributions to MLJ, erroneously called a "dark money" group by the VanDyke campaign, were disclosed in nearly all cases down to the individual level. A third outside group, Montana Lawyers for Experienced Judges, did spend an undisclosed amount to run an online attack ad against VanDyke.

Mr. VanDyke's side saw the unprecedented entry of a national political party in a Montana Supreme Court race. The Republican State Leadership Committee ("RSLC") formed the Judicial Fairness Initiative Montana PAC to spend $430,263 supporting VanDyke. Unlike the trial-lawyer groups, the RSLC PAC was funded almost entirely by lump-sum transfers from its parent organization in Washington, D.C. Americans for Prosperity ("AFP"), which reportedly spent about $170,000 on television advertising alone, did not register with or report to the Montana Commissioner of Political Practices. Implausibly, it maintained its exemption from disclosure by purporting to be an issue ad, asking the viewer to "call Mike Wheat and tell him to keep his partisan politics out of our Supreme Court," and providing the court's phone number as if to invite *ex parte* public comment on cases before the court. A late entrant on VanDyke's side was Montanans for a Fair Judiciary, led by a former executive director of the Montana Republican Party, which disclosed spending about $60,000 raised from a handful of mostly out-of-state donors.

By the time the candidates met for a forum in September 2014, questions of campaign finance had taken center stage. Justice Wheat opened by framing his perspective on "what this race really is all about. . . . how our court may be under attack from out-of-state money, from out-of-state corporations who want to come into this state and influence who's going to be on the court." VanDyke responded that voters should have their "hypocrisy filter on," saying that "[t]he issue is whether or not the trial lawyers are going to be the only ones who are spending money." For VanDyke this was an issue of "free-speech rights of organizations to say what they believe." Justice Wheat, on the other hand, criticized *Citizens United*, siding with his colleague and fellow candidate Justice Jim Rice, who argued that "[t]he state of Montana has a compelling interest in protecting and preserving a fair and impartial judiciary."

As negative advertising by independent-expenditure groups increased late in the campaign, the VanDyke campaign responded to so-called "dark money groups" funded by "the same group of wealthy trial lawyers who have poured buckets of money into Montana Supreme Court elections for decades." It criticized "shadowy groups supported by Montana trial lawyers," claiming that "94 percent of money supporting Mike Wheat is from trial lawyers," and that "83 percent of Mike Wheat's lawyer donors have recently had cases in front of him." Justice Wheat's campaign also attacked independent expenditures, characterizing them as "[t]hese out of state corporations . . . distorting the truth about me and my record." Criticism of his opponent was secondary to "the Koch brothers and others who want to buy my seat on the Supreme Court for an inexperienced lawyer." His closing argument asked voters to "tell these corporations that neither your vote nor my seat are for sale."

By the end of the campaign, estimates put total spending at

around $1.6 million, making it the most expensive judicial race in state history. Justice Wheat had $780,981 spent on his side, including $162,658 in direct contributions. Nearly all of these funds were disclosed and originated in-state, mostly from lawyers. VanDyke had approximately $794,081 spent on his side, including $133,818 in direct contributions. While the ultimate source for most of the outside spending in support of VanDyke was not disclosed, presumably it originated almost entirely from out of state, given the dominant national funding sources for the RSLC and AFP campaigns. After nearly $300,000 in candidate contributions and $1.3 million in independent expenditures, the money race ended in a draw. Justice Wheat won the general election with 59 percent of the vote, with VanDyke gaining just three points since the primary election.

Lessons from the past for the future

What most distinguishes the VanDyke-Wheat campaign from other campaigns is the extent to which the candidates and their allies openly aired usually subliminal questions of campaign finance, partisanship, and related issues. There is reason to believe that campaign finance is an especially salient issue to Montana voters. The colorful history of corporate corruption in Montana at the turn of the 20th century, which remained a powerful force shaping the 1972 Constitutional Convention, reemerged after *Citizens United*. In 2012, Montanans overwhelmingly approved Initiative 166, a symbolic rejection of *Citizens United*, by a margin of nearly three to one. This history makes Montana a particularly uninviting target for what Montanans might consider to be out-of-state dark-money groups. Beyond this history, however, Montana's recent experience may hold policy lessons for future judicial campaigns and elections.

After *Citizens United*, any reforms to judicial elections must address the primacy of independent expenditures. For example, if a latter-day Copper King wanted to elect a latter-day Judge Clancy, there would be no need for direct contributions or even corporate independent expenditures. A direct intervention, such as an independent expenditure of $1 million by a single litigant, may require recusal under the 2009 case of *Caperton v. Massey*. Instead, the Copper King could run his corporation's treasury funds into a trade organization, through a like-minded national party committee, and into a state affiliate, thus avoiding disclosure. The Copper King also could hedge his bets with contributions to a single-candidate Super PAC, signaling his interest in the campaign to related committees that might then double down on the race, and also signaling his support to the candidate. These maneuvers are likely to satisfy ordinary recusal standards, given the nature of "independent" expenditures and the aggregation of any one donor's contributions with others.

Because *Citizens United* opens new channels for unlimited campaign spending in judicial and political campaigns alike, there are common responses to it. These include more disclosure for big-money groups, less disclosure of smaller individual campaign contributions, and public financing for judicial campaigns. Eliminating judicial campaigns, a solution proposed by many frustrated with recent campaign finance developments, may not resolve the most important concerns about political influence in judicial selection. The trend toward increased spending in judicial campaigns presents the challenge of undue influence, but it also presents an opportunity to revisit the ways in which campaign finance reform can mitigate, or at least not aggravate, that trend.

First, *Citizens United* actually endorsed broader campaign finance disclosure. This enables states to require more transparency from conduit organizations like the Republican State Leadership Committee's Montana-based PAC, which disclosed little more than a massive contribution from its parent organization's aggregation of corporate funds. Improved disclosure is important not because it enables recusals at the courthouse—though it may in extreme cases—but because it enables rejoinders on the campaign trail. On both sides of the VanDyke-Wheat campaign, the candidates and even the Super PACs used campaign-finance disclosure to make each side's financial supporters a central issue in the campaign. At the other end of the money race, higher disclosure thresholds for small donors could boost the influence of constituents and practitioners who know the candidates best. Judicial candidates already start with relatively narrow donor bases, leaving campaigns dependent on outside spending by a few large donors. In a million-dollar campaign, an anonymous contribution of a $100 poses little risk of corruption, but enough of them will go a long way toward countering outside spending.

Second, one of the most important ideas to come out of Montana's 1972 Constitutional Convention, in concept if not in law, is limited public financing of judicial elections. Any new proposal for public financing must take care not to limit expenditures or penalize candidates who self-fund or benefit from independent expenditures. It also must minimize the risk of strategic exploitation. Preserving an independent judiciary, an original purpose of judicial elections, may justify the public expense necessary to finance judicial candidate campaigns. As delegates argued in 1972, there are significant distinctions between judicial campaigns and other political campaigns; these differences might draw even those generally opposed to public financing to support it for judicial elections. While a million dollars of outside money looks expensive compared to prior judicial campaigns in Montana, a million dollars of "inside money" in the form of public funding could be a bargain if it helps secure judicial independence.

There is a final option that would be unthinkable for other public offices: abolish judicial elections by constitutional amendment. It has been decades since voters in any state surrendered their power to elect judges. In light of the origins of judicial elections as a response to political appointees, abolitionists might be careful what they wish for. A critic of *Citizens United* — on grounds that undue influence is far more pervasive than the U.S. Supreme Court acknowledged — also must recognize that appointive selection concentrates that influence on the appointer. The federal model of executive appointment and legislative confirmation for life terms only raises the political stakes. The stakes would be even higher for state judges whose general jurisdiction and common law powers allow them a greater impact on state electorates than their federal counterparts. Moreover, merit selection still requires retention elections that threaten to compromise judicial independence, such as the

Judicial, page 36

Snowberger honored for her 'tireless' commitment to pro bono, equal justice

By Joe Menden

Michele Snowberger has long been recognized as one of Montana's fiercest advocates for access to justice issues.

Snowberger, the former longtime Belgrade Municipal Judge, will be recognized for her efforts with the State Bar of Montana's 2016 Neil Haight Pro Bono Award.

She will receive the award at the Awards Luncheon and Business Meeting during the State Bar of Montana's 42nd Annual Meeting in Great Falls Sept. 22-23.

"I'm really honored," Snowberger said. "It was such a great surprise. I do appreciate it, but I'm just one person who's working in this arena. I feel really fortunate to have so many colleagues who also feel it is important."

One of those colleagues is former State Law Librarian Judy Meadows, who nominated Snowberger for the award. Meadows was the chair of the former Supreme Court's Commission on Self-Represented Litigants, which Snowberger served on from 2004 until the commission was folded into the Access to Justice Commission several years ago, on which she continued to serve.

Snowberger worked with Meadows and others to create programs, train clerks of court, edit forms, and brainstorm on how to make access to the courts more understandable for low-income people who do not qualify for public defenders.

She also found time to keep a pro bono caseload, all while serving in the full-time judge position.

"She was tireless with the time she contributed, and never commented when cases would drag on," Meadows wrote in her nomination letter. "For someone who was already fully committed on so many other levels of access to the courts she should be acknowledged and admired, as I do."

This is the second time that Snowberger has been honored by the State Bar for her commitment to equal justice issues, having previously received the 2010 Karla M. Gray Award for Equal Justice Award, which goes to a judge from any court who has demonstrated dedication to improving access to Montana courts.

Snowberger said that there is no end to the work that needs to be done in the access to justice community. The fact that the Access to Justice Commission is an all-volunteer group makes the challenge even more daunting.

Michele Snowberger, a longtime advocate for access to justice issues in Montana, is the 2016 Neil Haight Pro Bono Award winner.

> **She was tireless with the time she contributed, and never commented when cases would drag on. For someone who was already fully committed on so many other levels of access to the courts she should be acknowledged and admired, as I do.**
>
> Judy Meadows, from her nomination letter for Michele Snowberger

"There's always a need," she said. "There's always a list, a very long list. We're doing a pretty good job right now. We could do a better job if there were a full-time person."

Over the years, the 1988 Pepperdine University School of Law graduate has always found ways to contribute to increasing access to justice for lower-income people going back to her first job out of law school as a public defender in Cook County, Illinois.

After moving to Montana in 2000, she became Belgrade Municipal Judge in 2002 and quickly became involved in the access to justice arena.

As a member of the Limited Scope Committee, she was instrumental in the process of modifying the ethics rules to allow limited scope practice in Montana. She said she personally finds limited scope to be helpful in her practice, allowing her to discuss with a client how to file paperwork for a parenting plan or preparing the client for a parenting plan mediation.

Through her work with the Access to Justice Commission, she helped secure funding for the Montana Self Help Centers.

"The need for that is pretty significant," she said. "When you think about if something is not handled well at those initial cases, an individual could spend years trying to recover from it. It can have a very long-term effect on that family, particularly if one party is represented and one is not. To be able to have a little bit of information and to know this is what happens at a hearing, and here's a form that will help you goes a long way.

"I think we're improving the lives of Montana families who are going through a very difficult time," she added.

Snowberger has spent the last three years working on a major rewrite of dissolution forms as part of the Standing Committee on Self-Represented Litigants, which she expects to be a major improvement.

She also has volunteered her time working on State Bar publications that further public understanding of the law, such as the "Guide to Turning 18" and "Guide to the Courts."

Snowberger recently moved from the bench to her current position in state government as Driver Services Bureau Chief for the Montana Department of Motor Vehicles. In the position, Snowberger handles all motor vehicle license credentialing and manages 93 employees in bureaus across the entire state.

The new responsibilities have required her to step back a bit from her work in the access to justice community. She is no longer a member of the Access to Justice Commission, and she says she is not technically a member of the Standing Committee on Self-Represented Litigants.

But she will continue to stay involved in finding solutions to Montana's access to justice issues, she said, and she continues to take on a pro bono caseload.

"We're not going to be able to do everything, but we can do things that will help people," she said. "I just am excited about where we are and where we can get to. It's a good time to be a lawyer."

HOT TOPICS CLE SCHEDULE

THURSDAY, SEPT. 22: 8-11:40 A.M., 2-5 P.M.; FRIDAY, SEPT. 23: 8 A.M. TO 12:15 P.M.

THURSDAY, SEPT. 22

8:00 to 8:45 a.m.	**Supreme Court Update Part I — Supreme Court Rule Changes** *Beth Brennan, Brennan Law & Mediation*
8:45 to 9:30 a.m.	**Federal Rules Changes You Need to Know, Even if You Practice Only in State Court** *Brian Carl Smith, Smith Law*
9:30 to 9:40 a.m.	**Break**
9:40 to 10:10 a.m.	**Supreme Court Update Part II,** *Beth Brennan*
10:10 to 11:40 a.m.	**We've Made Pro Bono Easier — Here's How** *Michelle Potts and Angie Wagenhals,MLSA*
10:40 to 11:40 a.m.	**What Do You Do When You Goof (Ethics),** *A vignette by the State Bar of Montana Professionalism Committee*
11:40	**Break in the Exhibitor Hall**

Noon to 2 p.m. — Awards Lunch/Business Meeting — See details, on facing page

2:00 to 3:15 p.m.	**Security Breach Primer: What to Do in the Event of a Breach (Ethics)** *Dana Hupp, Worden Thane; and Sherri Davidoff, LMG Security*
3:15 to 3:30 p.m.	**Break**
3:30 to 4:15 p.m.	**Transitions: Responsibilities When Changing or Closing a Firm** *Robert Phillips, Garlington, Lohn & Robinson*
4:15 to 5:00 p.m.	**State District Courts Year in Review** *The Honorable Kim Christopher*

FRIDAY, SEPT. 23

8:00 to 8:45 a.m.	**Tax Reform and the Presidential Candidates' Plans** *Presented by Professor J. Martin Burke, Blewett School of Law*
8:45 to 9:30 a.m.	**Wealth Planning: Maximizing Tax Advantages of Charitable Giving and Endowments. What You Should Be Telling Your Clients. What You Should Be Doing Yourself** *John Mudd, Blewett School of Law; and Bjarne Johnson, Church, Harris, Johnson and Williams*
9:30 to 10:00 a.m.	**Indian Country and the New Era of Trust Reform** *Presented by Deb DuMontier, U.S. Dept. of Interior*
10:00 a.m.	**Break**
10:15 to 10:45 a.m.	**Supreme Court Oral Argument Introduction** *Professor Michelle Bryan, Blewett School of Law*
10:45 to 12:15 p.m.	**Supreme Court Oral Argument** *Claimant: United States of America, (Bureau of Land Management) Objectors: Barthelmess Ranch Corporation; et al.*

Highlights

Local Bar Reception — ***Wednesday, Sept. 21, 5:30 p.m., The Celtic Cowboy, 116 1st Avenue South.*** Enjoy an evening of camaraderie hosted by the members of the Cascade County Bar Association.

Awards Lunch/Business Meeting — ***Thursday, Sept. 22, Noon, Holiday Inn Ballroom.*** We will honor Michele Snowberger, winner of the 2016 Neil Haight Pro Bono Award, and winners of Distinguished Service Awards.

President's Reception
Thursday, September 22, 5:30-6:30 p.m., Holiday Inn. Join us for a reception and listen to the sweet sounds of the Great Falls Symphony's Cascade Quartet. Free to all Annual Meeting attendees.

Note: The site of the President's Reception and the banquet have been changed.

Awards Banquet, ***Thursday, September 22, 6:45 p.m. at the Holiday Inn Ballroom*** — We will honor the winners of the the William J. Jameson Award, Robert M. Carlson; the George L. Bousliman Award, Gary Bjelland and Ed Higgins; and the Frank I. Haswell Award, Shaun Thompson; along with a special presentation honoring 50-Year Membership.

Supreme Court oral argument, ***Introduction at 10:15 a.m., argument at 10:45 a.m., Friday, Sept. 23, Holiday Inn Ballroom*** — The Supreme Court schedules approximately 30 cases per year for oral argument. Once again this year, one of those cases will be argued at the Annual Meeting. Attend the introduction and argument to earn CLE credit. The case this year is: *United States Bureau of Land Management v. Barthelmess Ranch*. In this case, a group of Bureau of Land Management permittees challenge a Water Court determination that six stock water claims on the Beaver Creek tributary of Milk River Basin in south Phillips County are owned by BLM.

IMPORTANT MEETINGS

Wednesday, September 21
(All meetings at the Great Falls Holiday Inn)

1 to 3 p.m.	Executive Committee Meeting
3 to 5 p.m.	Board of Trustees Meeting
2 to 4 p.m.	Past Presidents Committee Resolutions Meeting

Thursday, September 22

Noon to 2 p.m.	Awards Lunch/Business Meeting

FREE FASTCASE WORKSHOPS

Get the most out of your **FREE** Fastcase legal research member benefit by attending a training workshop during the Annual Meeting.

- One-on-one, hands on training from experienced Fastcase users
- Try out your own research task while we guide you and answer questions
- An official trainer from Fastcase will be on hand to answer your toughest questions
- Get a sneak preview of Fastcase 7
- More than one-third of State Bar of Montana members already use Fastcase's comprehensive, trusted legal research tool. You can too. **Free. No strings attached.**

Workshops are available the following times: Thursday, September 22– 8:30 to 11:30 a.m. and 2:00 to 5:00 p.m.; Friday, September 23 – 8:00 to 10:00 a.m.

Minimizing liability when purchasing potentially contaminated property

By Mac Smith

Imagine this – a client comes to you to review some paperwork. The client says she just found a "great deal" on a piece of property that could be used to expand the family manufacturing business. The property was used as an industrial site in the past. Some bells should go off in your head – this property may not be as great of a deal as it appears, as it may be polluted with the residue of its industrial past. But that does not mean your client should just walk away. Purchasing a property like this can reduce the purchase price significantly, and revitalizing properties helps make Montana a better place to live. As an attorney you will need to explain the risks of the purchase and manage potential liability should your client purchase the property.

Liability under CERCLA and CECRA

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) is otherwise known as the Superfund law. The Ninth Circuit aptly called CERCLA "a black hole that indiscriminately devours all who come near it."[1] This is because liability under CERCLA is strict; joint and several; and has been applied retroactively.[2] There are four types of potentially responsible parties under CERCLA:

1) a current owner or operator;

2) an owner or operator at time of disposal of hazardous substance;

3) someone who arranged for treatment or disposal of hazardous waste;[3] and

4) someone who transported hazardous waste.

In other words, even if your client had no role in causing the contamination, the client may be liable as the "current owner or operator" of the contaminated site. This could include being on the hook for some or all of the cleanup costs, as well as the associated costs of defending against litigation to facilitate the cleanup. The policy for this seemingly harsh rule is that the cleanup should be borne by those tied to the site, rather than the taxpayers.[4]

The same general four classes of responsible parties exist under Montana's state version of the Superfund law, the Montana Comprehensive Environmental Cleanup and Responsibility Act (CECRA).[5] CECRA is a statutory mechanism for remediating hazardous substances at sites not addressed by federal Superfund, and has its own priority list of properties the state seeks to clean up.[6] While CECRA is similar to CERCLA in many ways, there are particular differences in the language of each Act, as well as the application of each Act; for example, "arranger" liability is more broadly construed under CECRA than CERCLA.[7] Also, petroleum is a hazardous substance that can trigger superfund liability under CECRA but not CERCLA.[8] And while CERCLA and CECRA are the focus of this article, keep in mind that other federal and state environmental statutory and common laws may apply to a transaction such as this.

How to minimize liability

If there is suspected contamination at the site, the first step

Natural Resources, Energy & Environmental Law Section: Trends in Environmental Law

Earlier this year, the State Bar of Montana's Natural Resources, Energy & Environmental Law Section held its annual CLE in Helena entitled "Trends in Environmental Law."

The CLE brought together attorneys from various backgrounds to discuss current and emerging issues in the practice of environmental law in Montana. Some of the authors have since volunteered to summarize their talks in the articles contained here for practitioners who did not attend the CLE.

The articles on these pages discuss the following topics:

- Minimizing liability when purchasing contaminated property, by Section Chair Mac Smith (see article on this page).
- New developments in water discharge permitting, by Vicki Marquis of Crowley Fleck in Billings (see article on page 24)
- Innovations in the Endangered Species Act in Montana, by Zach Zipfel, Caroline Sime, Martha Williams and Sonya Germann (see article on page 25).

For course materials or more detailed notes you may contact the author.

1 *Long Beach Unified School Dist. v. Dorothy B. Godwin California Living Trust*, 32 F.3d 1364, 1366 (9th Cir. 1994).

2 Id.

3 42 USC § 9607(a).

4 Long Beach at 1369.

5 Mont. Code Ann. § 75-10-715(1)

6 Mont. Code Ann. § 75-10-705, *et seq.*

7 Compare Mont. Code Ann. § 75-10-715(1)(c) with 42 USC § 9607(a)(3); see also *State ex rel. Dept. of Environmental Quality v. BNSF Ry. Co.*, 2010 MT 267, 358 Mont. 368, 246 P.3d 1037.

8 *Montana Petroleum Tank Release Compensation Bd. v. Crumleys, Inc.*, 2008 MT 2, 341 Mont. 33, 174 P.3d 948.

is to conduct due diligence on the property conditions. A little money and time spent up front can potentially save a great deal of money and headaches later on. The proper first step is to conduct a Phase 1 Environmental Site Assessment (ESA) that meets the All Appropriate Inquiry (AAI) Standard promulgated by the EPA. Look to 40 CFR Part 312 and ASTM Standard 1527-13 for the specific standards required for an AAI. Some of these regulatory requirements include conducting the inquiry within a year prior to the property acquisition; using an "environmental professional," as defined in 40 CFR § 312.10(b); interviewing past and present owners, operators, and occupants; searching for recorded environmental cleanup liens; reviewing government records; and visually inspecting the property; among various other requirements.[9] If the Phase 1 ESA detects potential contamination, you may consider a Phase 2 ESA, which includes sampling and laboratory analysis, such as taking soil samples or groundwater monitoring.

Essentially, an environmental review acts as a snapshot in time. It can help alert the parties to the various issues that need to be addressed before closing. It can also provide a baseline if there is a later dispute over site conditions. Even more importantly, it can help form a basis for liability protection under CERCLA and CECRA. For example, two of the requirements for obtaining CERCLA protections as a "bona fide prospective purchaser" are that the disposal occurred prior to acquisition, and the buyer made all appropriate inquiries into previous ownership and uses of the facility in accordance with the regulatory standards.[10] Likewise, under CECRA, to obtain innocent landowner protections a person must show that he or she did not know and had no reason to know about the contamination at the time of acquisition.[11] In turn, establishing this lack of knowledge requires an "all appropriate inquiry" into the previous ownership and uses of the property.[12] When advising your client, you should read these statutes and become familiar with the requirements for establishing these defenses, along with other available defenses, to CERCLA and CECRA.

Sometimes the EPA or DEQ may provide assurances prior to the purchase. EPA may be willing to issue assurances that it will not take further action at the property, but such an assurance often carries caveats. DEQ may be willing to negotiate a Prospective Purchaser Agreement, limiting the client's potential liability after the purchase. There is also a formalized process under Montana law to encourage voluntary cleanup of property whereby a party may develop a cleanup plan in exchange for liability protections.[13]

When negotiating the purchase contract with the seller, there are other ways to minimize liability. Obviously, the client should seek a reduced price for the property. The client may request that the seller remedy the issues prior to the closing or that the property boundaries be adjusted so that the client is not buying the contaminated portion of the property. The buyer may also want to purchase the property through a limited liability corporation or other entity, rather than personally, or through its existing corporate entities. While Superfund liability is onerous, it does not in and of itself "pierce the corporate veil."

There are some specific provisions the client may try to negotiate into the contract. A buyer will want to allocate responsibility for any known and unknown conditions at the site to the seller. The buyer will want warranties, including that the seller disclosed documents and site conditions; that there are no pending legal actions against the seller for conditions at the site; that the seller is complying with any permits and can transfer them, if applicable; that the property is not on the national or Montana CECRA priority list; and that there was no historic storage or release of hazardous waste on the property. The seller will have different interests, so the parties will need to negotiate until they both feel comfortable with the transaction.

You may try to negotiate an indemnity provision requiring the seller to assume a legal defense and reimbursement of costs if there is contamination. But bear in mind that an indemnity from an insolvent seller is of little value. On the other hand, the seller may try to negotiate an "as is" clause or a release. An "as is" clause may limit the buyer's rights to later sue the seller under the contract, but it does not eliminate the seller's statutory liabilities under CERCLA and CECRA should the buyer become insolvent – that is, parties may allocate Superfund liability amongst themselves, but the state and federal agencies charged with enforcement of CECRA and CERCLA are not bound by those private agreements.

One other general mechanism for shifting environmental liability is insurance. While older insurance policies may provide coverage for pollution, newer commercial general liability policies usually contain an "absolute pollution exclusion." As such, there is likely little or no insurance coverage for pollution issues. Still, there are some insurance products the client can purchase. One would be a pollution legal liability policy (PLL), which in Montana is generally a surplus line product negotiated specifically to the insured's needs. PLLs can be tailored to cover the specific risks to which your client may be exposed. For example, PLLs can cover property damage, pollution events, defense costs, and property remediation costs. Another PLL product is a cost-cap policy, which can cover cleanup cost overrun.

Conclusion

Buying a potentially contaminated property can be a scary and uncertain proposition for your client. But with your careful assistance and consideration of the general issues above, you can help minimize the client's exposure while assisting on such a transaction.

Mac Smith is a partner at Doney Crowley P.C. in Helena. His practice focuses on civil litigation, particularly in the areas of environmental/natural resources, real property, and business law.

9 40 CFR §§ 312.20 – 312.31.

10 42 USC § 9601(40).

11 Mont. Code Ann. § 75-10-715(6)(a)

12 Id. § 75-10-715(6)(c).

13 See Montana Voluntary Cleanup and Redevelopment Act, Mont. Code Ann. § 75-10-730, et seq.

Many technical, legal factors work together in water discharge permitting process

By Vicki Marquis

Most industries have to handle and get rid of water in some manner – whether it is process water, cooling/heating water, waste water or just stormwater run-off. When water or waste is discharged from a discernible, confined, and discrete place — such as a pipe or a ditch into state waters or into a place where it will reach state waters, it is called a point source discharge. Such discharges are subject to Montana Discharge Pollutant Elimination System (MDPES) permits issued by the Montana Department of Environmental Quality (DEQ). This article discusses some of the regulatory pieces of MDPES permits and highlights the importance of technical and legal perspectives working together throughout the process.

Technology based effluent limitations (TBELs)

Most often, TBELs come from federal rules adopted by Montana (See Mont. Code Ann. § 75-5-305), but they can also come from the Board of Environmental Review (Board) or from the DEQ permit reviewer. TBELs are industry specific and apply to both existing and new discharges. Notably, TBELs also apply to discharges that do not directly enter a water body, but instead first pass through a treatment facility, such as a municipal wastewater treatment system or other publicly owned treatment Works. TBELs specify numeric limits and narrative requirements that are based on Best Practicable Technology, Best Conventional TechnologyBest Management Practice, Best Available Technology, or Best Professional Judgment. See 40 C.F.R. Chapter I, Sub-Chapter N.

Water-quality-based effluent limitations (WQBELs) from Water Quality Standards

WQBELs are based on the state's water quality standards, which can be numeric or narrative. The Board has classified each water body in the state as supporting specific uses. Those uses then correspond to certain water quality standards. Generally, water bodies classified as supporting more uses are regulated with more water quality standards than water bodies classified as supporting fewer or less particular uses. In all cases however, existing and designated uses must be supported and downstream water-quality standards must be maintained. See Admin. R. Mont. Title 17, Chapter 30, Sub-Chapter 6.

Previously, the only way to change a water body's use classification (and therefore the applicable water quality standards) was through a Use Attainability Analysis — a process that involves significant scientific study and public involvement. New federal regulations and recent changes to Mont. Code Ann. § 75-5-302 have simplified the process in some cases. For the federal primary uses of aquatic use, wildlife and recreation, any reclassification that results in a less stringent water quality standard still requires a Use Attainability Analysis. However, for other uses, including public water supply, agriculture, industry and navigation, the Board can now remove or revise a use through rulemaking, without a Use Attainability Analysis. This allows the Board to create subcategories that may have less stringent standards – for example, agriculture without consumption by livestock or agriculture without irrigation – or create subcategories with more stringent standards for special, unique, or sensitive species or habitats. Additionally, any party, not just the DEQ, can now present information to the Board indicating that a reclassification may be appropriate.

Sonja Langford/Stocksnap

Discharges from a confined and discrete place into state waters are subject to the Montana Discharge Pollutant Elimination System permits. Some of the regulatory pieces of these permits are discussed in this article.

Additional water quality standards

Montana, unlike many other states, has enacted additional standards to address salinity and nutrients. The salinity standards are written in terms of electrical conductivity and sodium adsorption ratio and only apply to specific watersheds in southeast Montana where the soils and water naturally contain elevated levels of saline. Admin. R. Mont. 17.30.670. Nutrient standards are established in rule and in DEQ Circular 12A. Admin. R. Mont. 17.30.631. A variance procedure exists for the nutrient standards, but is primarily designed for municipalities and is subject to periodic review. Admin. R. Mont. 17.30.660, DEQ Circular 12B.

Discharge, page 26

Montana leading the way in many areas of Endangered Species Act innovations

By Zach Zipfel, Carolyn Sime, and Sonya Germann

There can be a perception that the Endangered Species Act is inflexible. Yet in reality, it allows for innovation and encourages emerging conservation practices. The wildlife presentations at the Trends in Environmental Law CLE highlighted areas where Montana leads the way in Endangered Species Act innovation, demonstrating species conservation in creative ways. Mitigation, candidate conservation agreements and habitat conservation plans are three emerging tools that have the goal of conserving species, adhering to the Endangered Species Act, and innovating how it works on the ground for those who live and work in our state.

The ESA has been a powerful tool in conserving threatened and endangered species since its inception. Sometimes, however, the ESA's strengths may serve as a disincentive for private landowners whose property harbors "candidate species" – those species identified by the U.S. Fish & Wildlife Service (Service) as "candidates" for listing. In order to enlist the help of those landowners to conserve candidate species before listing becomes necessary, the Service has created the Candidate Conservation Agreement with Assurances (CCAA).

Tom Koerner,/USFWS

The greater sage grouse was once a candidate for Endangered Species Act protection in the West, before a focus on habitat led to a "not warranted" finding.

A CCAA is an agreement between the Service and a private landowner. In exchange for agreeing to take proactive steps on his or her land to help conserve the species, the Service "assures" the landowner that if the species is listed in the future, the landowner will be protected from additional land-use restrictions that may have otherwise been imposed through the ESA. The landowner may agree, for instance, to forgo logging a section of property or to restore important habitat for the candidate species. The Service provides "assurances" through an "enhancement of survival permit" under section 10 of the ESA.

Montana Fish, Wildlife & Parks has entered a "programmatic" CCAA along the Big Hole River to assist in recovery of Arctic grayling, a candidate species. Through the Big Hole CCAA, FWP biologists work with individual landowners to restore stream flows, enhance riparian areas, and remove instream barriers to fish movement. In its 10 years, the Big Hole CCAA has enrolled over 150,000 acres of private land, resulting in improved riparian health, better stream flows, and more than 60 miles of new habitat.

Once a species has declined to the point where it warrants listing and protection under the Endangered Species Act, flexibility and creativity to address threats and recover species are severely curtailed. The legal and administrative process is fixed. Required mitigation might stem declines or assist recovery, but even then opportunities are constrained.

Mitigation can proactively address and ameliorate threats to at-risk species and the ecosystems upon which they depend before listing is ever warranted. While mitigation is a broad concept, it boils down to taking measures to avoid, minimize, reclaim or restore, and compensate for direct, indirect, or residual impacts to environmental resources prior to project implementation. Compensation involves paying for the benefits derived from ecosystem services in a market-based transaction to replace lost ecosystem services or functions.

Since 2013, seven federal policy initiatives were launched to encourage mitigation (and possibly require it for federal projects).[1] This creates opportunities for and rewards voluntary conservation actions taken before a species is at risk or considered for listing. Federal policy defines the marketplace rules of the road, provides regulatory certainty and predictability, and seeks to spur public-private partnerships by recognizing that natural resources are an asset. Policies seek to attract private capital to create or support mitigation markets that facilitate permitting and landscape-scale conservation. Specifics may vary, but all compensatory mitigation models are transactional in some way. Biological capital, social

Endangered, page 31

1 Sec. Or. 3330, Improving Mitigation Policies and Practices of the Department of the Interior (Oct. 31, 2013) (available at: https://www.doi.gov/sites/doi.gov/files/migrated/news/upload/Secretarial-Order-Mitigation.pdf); J.P. Clement, et al, A strategy for improving the mitigation policies and practices of the Department of the Interior. A report to the Secretary of the Interior from the Energy and Climate Change Task Force, Washington, D.C. (Apr. 8, 2014) (available at: https://www.doi.gov/sites/doi.gov/files/migrated/news/upload/Mitigation-Report-to-the-Secretary_FINAL_04_08_14.pdf); 79 Fed. Reg. 42525 (July 22, 2014) (Draft Policy Regarding Voluntary Prelisting Conservation Actions); U.S. Department of Interior, 600 DM 6 Departmental Manual on Implementing Mitigation at the Landscape Scale (Oct. 23, 2015) (available at https://www.doi.gov/sites/doi.gov/files/uploads/TRS%20and%20Chapter%20FINAL.pdf); Pres. Memo., Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (Nov. 3, 2015) (available at https://www.whitehouse.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related); [U.S. Department of] Interior launches Natural Resource Investment Center to support water, species, and habitat conservation, U.S. Department of Interior News Rel. (Dec. 15, 2015) (available at https://www.doi.gov/pressreleases/interior-department-announces-initiative-spur-innovation-investments-support-water); 81 Fed. Reg. 12380 (March 16, 2016) (Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy).

Discharge from page 24

Nondegradation limits for high-quality water bodies

Permit WQBELs may also result from a nondegradation review. Nondegradation, or anti-degradation as it is called in the federal laws and rules, is a layer over all water quality standards. In Montana, if a water body meets a water quality standard for a specific parameter, then it is considered a high quality water body and no degradation, or pollution of any amount, is allowed. This protects a wider set of water bodies than the federal requirement, which only prohibits degradation of water bodies that support the priority uses of protection and propagation of fish, shellfish and wildlife and recreation in and on the water.

Montana has exempted some nonsignificant activities from nondegradation review, including nonpoint source discharges, agricultural use of chemicals in accordance with applicable laws, short-term changes caused by recreation, and other discharges that have a low potential for harm to human health or the environment after consideration of the quantity and strength of the pollutant, the length of time the degradation will occur, and the character of the pollutant. Mont. Code Ann. §§ 75-5-301(5)(c); 75-5-317. Additionally, the Board has established criteria for determining nonsignificance for several parameters, including flow and toxic and harmful parameters. Mont. Code Ann. § 75-5-301(5)(c); Admin. R. Mont. 17.30.715.

The exemptions for nonpoint sources and the application of nondegradation review outside, not inside, of mixing zones have been upheld. *American Wildlands v. Browner*, 260 F.3d 1192 (10th Cir. 2001). However, an exemption for well pump test discharges was held in violation of Montana's constitutional environmental rights because the discharge contained a carcinogen at a level greater than that of the receiving water body. *Mont. Env. Info. Center v. DEQ*, 1999 MT 248, ¶ 79. Further, in *Clark Fork Coalition v. DEQ*, 2008 MT 407, ¶ 38, the court held that the DEQ should have considered a statutorily exempted discharge's duration, volume and treatment needs before concluding that it was nonsignificant.

When the nonsignificance criteria cannot be met, Montana's laws and rules provide an Authorization to Degrade. However, the process has not been used in recent memory. It requires the applicant to prove that there is no economically, environmentally, and technologically feasible way to not degrade the water body, a showing that the economic and social benefit exceeds the costs to society of allowing the degradation, protection of existing and anticipated water uses, and periodic review. Mont. Code Ann. § 75-5-303(3).

Limits for impaired water bodies

For those water bodies that do not meet the water quality standard for certain parameters and therefore do not require nondegradation review for those parameters, compliance with a total maximum daily load (TMDL) is required. TMDLs establish a pollution load allocation for the impaired water body with the goal of eventually bringing the water body into compliance with the water quality standard. Mont. Code Ann. § 75-5-703(1). Much like dividing up a pie, the TMDL allocates some of the pollutant load to point sources, some to nonpoint sources, and leaves some as a margin of safety.

Although the DEQ could previously request an MDPES permit applicant to pay for a needed TMDL, prior to the 2015 Legislature, it was not clear when that needed TMDL would be completed. Additions to Mont. Code Ann. § 75-5-702 now require the DEQ to complete the TMDL within 180 days of receipt of the permit application or provide an alternate timeframe for TMDL completion. The DEQ and the applicant can reach a mutually agreeable timeframe for TMDL completion, or, if the applicant disagrees with the alternate timeframe proposed by the DEQ, the applicant may appeal to the Board.

The No Purer Than Natural and Nonanthropogenic Statutes

Finally, Montana, like other states, recognizes that "it is not necessary that wastes be treated to a purer condition than the natural condition of the receiving stream." Mont. Code Ann. § 75-5-306(1). Further, the 2015 Legislature enacted a new statute requiring that the DEQ "may not apply a standard to a water body for a water quality that is more stringent than the nonanthropogenic condition of the water body." Mont. Code Ann. § 75-5-222. The statute also requires that when the standard is more stringent than the nonanthropogenic condition, the nonanthropogenic condition becomes the standard. However, the standard must still be implemented in a manner such that downstream water quality standards will be maintained. Mont. Code Ann. § 75-5-222(1). The DEQ has recently used modeling based on extensive data collection to determine the natural condition of a proposed receiving water body. Additionally, the DEQ has convened a "SB325 Rulemaking Work Group" to help draft rules that will implement the new "nonanthropogenic" statute. Determination of water quality standards based on these statues is likely to require comprehensive data collection prior to any discharge, as well as complex analysis and modeling.

Conclusion

MDPES permits require consideration of multiple statutes and regulations as well as scientific analysis of both the receiving water body and the proposed discharge. Discharge limits come from both federal and state law and will be based on the type of industry, the estimated quality of the discharge, and the location and existing quality of the receiving water body. Additionally, the permit process may require nondegradation review or adoption of a total maximum daily load. Another consideration may be application of Montana's No Purer than Natural and Nonanthropogenic statutes, which both involve extensive data collection and analysis. To navigate all of these issues, both technical and legal perspectives will be important throughout permit application, issuance, and compliance.

Vicki Marquis is an associate attorney at Crowley Fleck, PLLP, focusing primarily on environmental, mining, oil & gas and water law. Vicki has worked as a chemist in a variety of laboratories, as an enforcement specialist for the Montana Department of Environmental Quality, and as the coordinator for the Missouri River Conservation Districts Council. She earned a B.A. in chemistry from Gonzaga University and received her Juris Doctor with honors from the University of Montana School of Law. She also serves as a Judge Advocate in the Montana Army National Guard.

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

MONTANA CHAPTER

WWW.MONTANAMEDIATORS.ORG

The following attorneys are recognized for

Excellence in the field of Alternative Dispute Resolution

Tracy Axelberg
Missoula

Dee Carestia
Wise River

James Gaitis
Whitefish

Jay Hunston
Whitefish

Michael Lilly
Bozeman

Hank Raucci
Helena

James Regnier
Lakeside

Mick Taleff
Great Falls

William Wagner
Missoula

Gary Zadick
Great Falls

Check your preferred available dates or schedule appointments online, directly with Academy Members - for free.

www.MontanaMediators.org is funded by our members

The National Academy of Distinguished Neutrals is an invitation-only association of over 900 top-rated premier mediators & arbitrators throughout the US, and proud Neutral Database Partner to the national defense (DRI) & plaintiff (AAJ) bar associations. For more info, see www.nadn.org/about

Are insurance bad faith recoveries taxable? Rulings provide no cut-and-dry answers

By Robert W. Wood

Are insurance bad faith litigation recoveries taxable? The annoying answer is that it depends. This answer may be a bit less annoying with a brief description of what a bad faith claim may entail. It may be a tort or a contract claim, depending on the facts and the jurisdiction.

It may be brought against one's own insurance carrier, or sometimes, even against someone else's carrier. A common claim is that the insurance company defendant did not proceed appropriately to pay a claim, thus causing the plaintiff additional damages. In that sense, not unlike a legal malpractice claim against a lawyer, one key question will predate the bad faith case.

That is, what was the underlying issue (which may or may not have been litigated) that gave rise to the insurance claim? Most tax professionals will start to imagine a physical injury accident where the insurance company pays too little too late, and later must pay more for the same injuries via a bad faith claim. That is a useful (and common) example to bear in mind.

2009 IRS Ruling

The most important authority is an IRS private letter ruling that technically is not authority, since letter rulings are nonprecedential. It was a bombshell ruling when it was issued in 2009, and it suggests that some bad faith recoveries are tax free. Some case law, on the other hand, suggests that some taxpayers may be reading the ruling too broadly.

In Letter Ruling 200903073,[1] a plaintiff had been employed as a construction worker, and in the course of his employment, was struck by a drunk driver. The drunk driver managed a tavern, and had served himself liberally while on duty. The plaintiff was severely injured, and sued the driver/manager as well the tavern that had employed him.

The plaintiff received a jury verdict consisting of compensatory damages for his personal physical injuries, medical expenses, pain and suffering, lost earnings, plus punitive damages. After post-trial motions, the jury verdict was reduced to $X in compensatory damages and $Y in punitive damages. The defendants appealed.

Prior to the judgment, the insurer for the tavern (Insurance Company) had rejected an opportunity to settle for policy limits under the tavern's policy. Under state law, the tavern as policy holder had a cause of action against the insurance company if it acted in bad faith in failing to settle the claim. The tavern believed it had a cause of action against Insurance Company.

Thus, as part of an agreement to stay the execution of the plaintiff's judgment, the tavern assigned to the plaintiff its rights to pursue a bad faith claim against Insurance Company. The agreement between the tavern and the plaintiff provided for the assignment of all claims possessed by the tavern and the tavern manager against Insurance Company related to the bad faith claims. Thus, the injured plaintiff ended up with those claims.

The assignment agreement provided that within 30 days of the termination of the litigation against Insurance Company (whether by settlement or judgment), the judgment against the manager and the tavern (relating to plaintiff's personal injury claims) would be marked "satisfied." Eventually, the plaintiff entered into a settlement agreement calling for the insurance company to pay $Z to plaintiff and his attorneys. The settlement agreement provided that upon receipt of payment, plaintiff would cause the bad faith insurance litigation to be dismissed with prejudice, and cause the personal injury judgment against the tavern manager and the tavern to be marked as satisfied.

Underlying Case Tax Free

The IRS starts its analysis in the Letter Ruling with the origin of the claim doctrine. Citing *Raytheon Production Corp v. Comm'r*,[2] the IRS states that the critical inquiry here is in lieu of what damages were awarded. The plaintiff may have recovered against the insurance company, but the recovery had its origin in the settlement of the court cases against the tavern manager and the tavern.

Indeed, the plaintiff was merely trying to collect on the plaintiff's judgment against the manager and the tavern for damages awarded on his personal physical injury claim. "But for" the personal physical injury claim and the plaintiff's rights as an assignee, the plaintiff would be receiving nothing from the insurer for the tavern. Quite literally, the plaintiff was only receiving money from Insurance Company *because* the plaintiff was injured.

Thus, the IRS concluded that the Section 104 exclusion applied. Interestingly, the IRS noted that the exclusion would not apply to any amounts the plaintiff received that resulted

Supreme Court to hear bad faith claim argument

The Montana Supreme Court will hear an oral argument in an appeal of a bad faith insurance recovery claim on Wednesday, Sept. 28. Details on the oral argument in *West v. USAA*, which is not connected to any of the cases discussed in this article, can be found on page 11.

1 January 16, 2009.

2 144 F.2d 110 (1st Cir. 1944), *cert denied* 323 U.S. 779 (1944).

from the *punitive* claims. Punitive damages are always taxable.[3] Letter Ruling 200903073 expresses no opinion on allocating between compensatory and punitive damages.

Contract vs. Tort?

In bad faith insurance cases, there is an underlying cause of action for which the taxpayer is seeking redress. It might be a personal physical injury action or something else. It may be viewed as a contract claim relating to the insurance policy, or as a tort claim related to Insurance Company's operations and its treatment of the plaintiff.

The IRS has usually viewed them as contract actions. Regardless, it is relevant to inquire into the treatment of damages that, at least in part, often relate to the original act producing the underlying insurance claim. Not surprisingly, most bad faith insurance cases relate to the mishandling of insurance claims.

Recent Cases

Perhaps as a result of the 2009 letter ruling, some taxpayers may think "tax free" when they hear "bad faith." For example, in *Ktsanes v. Commissioner*,[4] the taxpayer worked for the Coast Community College District (CCCD) in Orange County, California. In connection with his employment, Ktsanes participated in a group long-term disability insurance program managed by Union Security.

The premiums were paid by Ktsanes' employer, CCCD, and were not included in Ktsanes's income. Ktsanes developed Bell's palsy, which caused him to be unable to continue working for CCCD. He filed a claim for long-term disability with Union Security, which the insurance company denied, saying that Ktsanes was not sufficiently disabled to qualify.

Ktsanes filed a bad faith claim against Union Security. The claim was settled for $65,000. Ktsanes claimed the settlement payment was received on account of a physical sickness (the Bell's palsy), and therefore excluded it from his gross income under Internal Revenue Code Section 104(a)(2).

When the IRS disagreed, he also argued that the group long-term disability insurance program was equivalent to a workmen's compensation payment, so was excludable under IRC Section 104(a)(1). The Tax Court rejected both arguments and found the settlement to be taxable. The Tax Court concluded that Ktsanes' damages were received "on account of" the insurance company's refusal to pay the insurance claim and not the Bell 's palsy that gave rise to the insurance claim. The court reasoned:

"The relief that petitioner sought in his complaint was causally connected (and strongly so) to the denial by Union Security of his claim for long-term disability benefits. Although petitioner's complaint alleged that he became disabled as a result of physical injuries or sickness, this 'but for' connection is insufficient to satisfy the 'on account of' relationship discussed in *O'Gilvie*[5] for the purposes of the exclusion under section 104(a)(2). Petitioner would not have filed his complaint if Union Security had not denied his claim but instead paid him the long-term disability payments that he sought. In other words, petitioner sought compensation 'on account of' the denial of his long-term disability benefits, not for any physical injuries or physical sickness."[6]

On the surface, this reasoning might make it difficult for bad faith recoveries to qualify under IRC Section 104(a)(2). Indeed, when taxpayers claim that bad faith recoveries are excludable from gross income under IRC Section 104(a)(2), the personal physical injury or physical sickness almost always concerns the facts that gave rise to the insurance claim, rather than the denial of the claim itself. Put differently, relatively few bad faith claimants can assert that the insurance company actually caused them physical harm.

But some can claim that the insurance company's delays exacerbated their physical injuries and physical sickness. In that kind of case, the argument for excluding all or part of the eventual bad faith recovery can be strong. In *Ktsanes*, though, the Tax Court concludes the opinion by stating that:

"[t]he $65,000 that [Ktsanes] received in settlement of his suit essentially represented a substitute for what he would have received had his claim been approved. Under these circumstances, no part of that payment is excludable under any subdivision of IRC § 104(a)."[7]

This language, emphasized by its placement at the very end of the opinion, seems to contradict the court's previous language. It looks through the insurance claim to the facts that gave rise to the insurance claim. Moreover, it implicitly asks how the payment would have been taxed had the insurance claim been paid without dispute.

The taxation of an undisputed payment would surely depend on the facts that gave rise to the insurance claim. In *Ktsanes*, the court seems bothered by IRC Section 104(a)(3). Notably, Ktsanes did not raise this subsection as a basis for excluding the settlement payment from his income.

Under IRC Section 104(a)(3), amounts received through accident or health insurance for personal injuries or sickness are excludable from gross income. The key qualifier, of course, is that the premiums for the insurance must not have been paid by the insured's employer as a tax-free benefit to the insured. Ktsanes' long-term disability premiums were paid by his employer, and were not included in his income. Thus, he clearly did not qualify for tax-free treatment under Section 104(a)(3). Had his insurance claim been paid without dispute, it would presumably have been taxable.

Read in this light, *Ktsanes* is much more easily reconciled with the other authorities on bad faith litigation. The Tax Court may have been preventing insurance payments that were income from being made tax-exempt merely because the insurance company only agreed to pay the insurance claim after litigation. Another case decided shortly after the 2009 letter ruling is more troubling.

In *Watts v. Commissioner,*[8] the taxpayer sued her automobile insurer claiming breach of contract after she sustained physical injuries in a collision with an uninsured motorist. The parties settled for an amount in excess of Watts' $50,000 policy limit. Watts excluded the settlement under IRC Section 104(a)(2).

3 *See O'Gilvie v. U.S.*, 519 U.S. 79 (1995); *see also* IRC Section 104.
4 *T.C. Summ. Op 2014-85.*
5 *519 U.S. 79 (1996).*
6 *Ktsanes v. Comm'r*, T.C. Summ. Op. 2014-85 at *8.
7 *Ktsanes v. Comm'r*, T.C. Summ. Op. 2014-85 at *11.
8 *T.C. Memo. 2009-103.*

The IRS disallowed the exclusion, asserting that the breach-of-contract action was not based on tort or tort-type rights. Of course, that requirement (from the *Schleier* case),[9] is now obsolete. Showing a bit of prescience, the taxpayer and the government agreed that the settlement should be analyzed under IRC Section 104(a)(2).

But the Tax Court took a dim view:

"The parties apparently believe that the interposing of a lawsuit between the insured and the insurer in this case causes the payment petitioner received from State Farm to constitute 'damages' that may be excluded from income only by satisfying the requirements of [IRC § 104(a)(2)]. We disagree."[10]

Instead, the Tax Court analyzed the settlement payment under the authorities of IRC Section 104(a)(3), concerning amounts received "through" accident or health insurance "for" personal injuries or sickness. The Tax Court concluded that the settlement payment could be excluded under IRC Section 104(a)(3) up to the policy limits, and were taxable interest or other taxable income to the extent the settlement payment exceeded Watts' $50,000 policy limit.

In *Watts*, as in *Ktsanes*, the Tax Court seemed focused on making sure that in bad faith and breach of contract cases regarding insurers, IRC Section 104(a)(2) does not override IRC Section 104(a)(3). Where the proceeds of bad faith or breach of contract cases would cause payments from insurers to be taxed differently from how the same payments would be taxed if paid by the insurer without dispute, taxpayers might expect the Tax Court to either refuse to apply IRC Section 104(a)(2) altogether (as in *Watts*), or to construe its "on account of" language narrowly to render the subsection inapplicable (as in *Ktsanes*).

Notably, though, Letter Ruling 200403046[11] ruled that legal fees allocable to disability benefits were excludable under Section 104(a)(3). The ruling involved a taxpayer who purchased disability insurance with after-tax dollars. The taxpayer was disabled on the job, but his claim was denied. The taxpayer thereafter filed suit against the insurance company, alleging bad faith and contract damages.

The taxpayer prevailed, but the insurance company appealed. The matter settled on appeal, and the taxpayer recovered attorney fees and costs. The IRS ruled that because the underlying recovery was excludable under Section 104(a)(3), the recovered attorney fees and costs were also excludable.

Hauff v. Petterson,[12] is not a tax case. But it is worth reading even if one is focused solely on the taxes. Instead of analyzing a bad faith recovery to ascertain how it should be taxed, the court uses the taxability of a recovery to determine whether the insurance company acted in bad faith. David Hauff filed a claim with his automobile insurer after he was involved in a collision with an uninsured motorist and sustained physical injuries.

Among other things, he requested compensation for lost wages. Hauff's insurance carrier agreed to pay him an amount of lost wages based on Hauff's wages *net* of the income tax that he would normally have to pay on them. Hauff demanded that his lost wages be calculated based on his *gross* lost wages, and filed suit against his insurer alleging bad faith.

The court determined that amounts received by Hauff for lost wages would be excludable from his income under IRC Section 104(a)(2) as amounts received on account of a personal physical injury or physical sickness. Because Hauff would not have to pay tax on the amounts received from his insurer, the court found that the insurer was acting in good faith by only paying Hauff his *net* lost wages. As a result, the court found for the insurer on summary judgment.

Braden v. Commissioner,[13] pre-dates the 2009 letter ruling, but is interesting nonetheless. Braden received $30,000 from a class-action settlement with his automobile insurance company. The action was a breach of contract bad faith claim, but was related to underlying physical injury claims Braden had made against the insurance company.

Braden excluded the $30,000 from his gross income under Section 104. The IRS disagreed, and the matter went to Tax Court. The IRS moved for summary judgment, arguing that the underlying cause of action was not based on a tort or tort-like rights.

Therefore, the IRS said it could not be excludable under Section 104. The Tax Court, however, denied the motion, stating that the *nature* of the taxpayer's claim controlled. The fact that this lawsuit was for breach of contract did not foreclose the possibility that the taxpayer's claim was for personal physical injuries.

Conclusion

Considering how many claims insurance companies face for putatively bad faith behavior, it is surprising that there are not more tax cases considering the treatment to the plaintiff. Some bad faith plaintiff's lawyers report that they routinely see clients pay tax on the recoveries without complaint. Some plaintiffs may exclude them from income without much thought, and perhaps there are few disputes.

Despite the relative paucity of cases, it seems reasonable to believe that there are an increasing number of bad faith settlements and judgments. Not all involve good arguments for exclusion, but some do. And sometimes the way to get to that position can require some creativity.

Indeed, Letter Ruling 200903073 involved a bad faith claim that was originally owned by the tavern policy holder. The claim was later pursued by an injured plaintiff who recovered "on account of" his injuries.

The assigned bad faith claim enabled the plaintiff to sue the carrier. However, it was the nature of the underlying injury and the plaintiff's claim against the tavern and tavern manager that sparked the assignment. And it was the underlying injury that ultimately led to the recovery.

Robert W. Wood, a member of the State Bar of Montana, is a tax lawyer with www.WoodLLP.com, and the author of numerous tax books including Taxation of Damage Awards & Settlement Payments (www.TaxInstitute.com). This discussion is not intended as legal advice.

9 515 U.S. 323 (1995)

10 T.C. Memo. 2009-103 at *5.

11 January 16, 2004

12 755 F. Supp. 2d 1138 (D. N.M. 2010).

13 T.C. Summ. Op. 2006-78.

Gordon honored for chapter of book she authored

Professor Stacey Gordon was recently notified by the Environmental Law Institute (ELI) that a chapter she authored for the book "What Can Animal Law Learn from Environmental Law" has been selected as the best work published by the ELI Press in the last year.


Gordon

The chapter, "The Legal Rights of All Living Things: How Animal Law Can Extend the Environmental Movement's Quest for Legal Standing for Non-Human Animals," will be included in the July/August Summer Reading Issue of The Environmental Forum, ELI's magazine for the profession.

Additionally, the University of Montana presented Gordon with the Montana Faculty Service Award Friday, April 29, at the UM Employee Recognition Day celebration. According to the Office of the President, the Faculty Service Award is given to an individual who has a "history of providing superior (effective) service that benefits The University of Montana." The University will present 14 additional awards at the celebration to various faculty and staff for their contributions and success.

Smith appointed to Missoula Public Art Committee

In recognition of her expertise in intellectual property law and art law, Professor Cathay Smith was appointed to the Public Art Committee for the City of Missoula on April 25, 2016.

The Public Art Committee consists of nine members serving four-year terms. Members that serve on the committee are selected because of their expertise in historic preservation, visual arts, architecture, or affiliation with a local business association or public entity.


Smith

Smith teaches intellectual property, property, and cultural property law courses at the School of Law. Prior to joining the faculty at the School of Law, Smith represented multinational corporations on intellectual property issues, including litigating infringement cases in federal court, inter partes proceedings in the U.S. Patent and Trademark Office (TTAB), and Uniform Dispute Resolution Proceedings (UDRP) through WIPO. In addition to her litigation experience, she regularly counseled clients on issues involving trademarks, copyrights, and domain names.

The Public Art Committee is responsible for reviewing, advocating, and developing public art projects in the public domain for the City of Missoula. It develops a formal structure in which to create, develop, and maintain public art as well as further public accessibility to the arts.

Part of the committee's mission is to develop a collection of public art that encompasses a broad aesthetic range reflecting the city and the minds of its citizens. It also aims to develop a collection that improves the quality of life in the area, that is accessible to all individuals, and that is a source of pride to all residents.

Smith's appointment to the committee coincides with her forthcoming article, Community Rights to Public Art, in the St. John's Law Review (forthcoming).

Endangered from page 25

capital, and financial capital can work together to achieve conservation objectives and offer private investment strategies.

The greater sage grouse was once a candidate for ESA protection across 11 Western states. Unprecedented collaboration and a focus on habitat conservation led to a "not warranted" finding in September 2015. Montana's Sage Grouse Conservation Strategy emphasizes habitat conservation and incorporates the mitigation hierarchy into the permitting process. Compensatory mitigation for lingering impacts of development in designated sage grouse habitats on public or private lands in Montana will entail conservation banking and/or a habitat exchange.

Montana Department of Natural Resources and Conservation (DNRC) Trust Land Management Division (TLMD) manages over 5.2 million surface acres across the state of Montana to generate over $100 million annually for K-12 schools and other endowed institutions.

Over 500,000 acres of state trust land resides near or in habitat of species listed as threatened under the Endangered Species Act – grizzly bear, Canada lynx, and bull trout. In order to provide long-term assurances for the DNRC forest management program and these species, the DNRC applied for and received an incidental take permit and jointly developed a habitat conservation plan (HCP) with the U.S. Fish and Wildlife Service.

While the process to develop the HCP and the implementation of the negotiated conservation strategies have improved the DNRC's efforts at conservation and understanding of these species, legal assurances provided to the agency may not be matched by its commitment to species conservation. Recommendations to those applying for a permit and HCP include: consideration of investment vs. return of HCPs; investigation of other partnerships or agreements that are more nimble; proactively and pre-emptively manage habitat for species before they are listed; and/or voluntarily develop state-driven management plans that are rigorous and comprehensive.

Zach Zipfel is agency legal counsel for the Montana Department of Fish, Wildlife and Parks. Prior to law school he was a ranger with the National Park Service in Alaska and Arizona. He clerked for Justice John Warner on the Montana Supreme Court and was an assistant attorney general with the Montana Department of Justice

Carolyn Sime graduated from the University of Montana School of Law in 2014 and now leads implementation of Montana's Sage Grouse Conservation Strategy. She worked as a wildlife biologist for 20 years at Montana Fish, Wildlife & Parks where she led efforts to develop the gray wolf program and delist the species from the federal Endangered Species Act.

Sonya Germann is the Forest Management Bureau Chief for the Montana Department of Natural Resources and Conservation, Trust Land Management Division, where she works with over 50 foresters and scientists to manage the State's forested trust lands

Providers' refusal to contract with insurers costing many Montanans thousands

By Todd Lovshin

It is believed that the first patient transport by aircraft happened on the battlefields of World War I, when an open cockpit biplane was used to rescue injured soldiers and bring them to field hospitals. In 1973 the first civil airplanes dedicated to emergency medical services began operations and, ever since, the industry of air ambulance providers has grown significantly. In Montana, we have numerous air ambulance providers that are hospital and non-hospital based operations.

Air ambulance providers offer valuable life-saving services to those in crisis. They are essential to ensure Montanans get the care they need when they need it. The medical and flight professionals who perform these services are top notch and an important part of the emergency medical response teams for our rural state, often making the difference between life and death. Therefore, it is important for insurers to make sure that these providers are in-network and that our members have access to these services.

However, some of these non-hospital-based providers refuse to contract with insurers, leaving many Montanans with thousands of dollars in outstanding bills. During the 2015 Montana Legislative Session, House Joint Resolution No. 29 passed. It charged the Economic Affairs Interim Committee to study membership-based medical services. Given the stories of astronomical bills from air ambulance providers and the urging of the State Auditor's office, the Economic Affairs Interim Committee (EAIC) focused its study on air ambulance providers, and has appointed a working group led by Jesse Laslovich, chief legal counsel to Montana's State Auditor, to provide insight to the committee. This working group made up of consumers, insurers and providers has been meeting and discussing ways in which Montana can craft solutions to this issue. Let me define the issue as I see it: Some non-hospital-based air ambulance providers and insurance companies haven't been able to reach agreement on the reimbursement level for the services provided, leaving consumers with medical bills in the thousands of dollars (if not tens of thousands).

In 2011, the Montana Legislature created an exemption for air ambulance companies from the insurance statutes and allowed them to offer membership programs in Montana (MCA 50-6-320). This allows the company to sell a membership for air transport in case of emergency. Now for the fine print: You are covered only if that company is the one to transport you and they will charge your insurance company – the key here is that they will not balance bill you any amount that the insurer doesn't pay. They accept your membership fee and the standard insurance reimbursement as payment in full. If a different company (of the 14 currently operating in Montana) provides the service, you have no coverage.

The Center for Medicare and Medicaid Services (CMS) has established a fee schedule for air ambulance providers and has adjusted that schedule based upon services offered in rural areas such as Montana. It is the only nationwide benchmark available to judge costs for air ambulance providers. Now, I will be the first to state that the fee schedule by CMS is most likely not adequate for payment. But how much is enough? When examining what air ambulance providers have charged insurers, we see charges that range from 150 percent of the CMS allowable to over a 2,200 percent of the same allowable, according to PacificSource internal data and a Blue Cross Blue Shield of Montana presentation to EAIC air ambulance working group on Aug. 8. One of our recent examples was over $50,000 to fly a patient from Helena to Missoula.

Air ambulance providers justify these charges by stating that the aircraft is expensive equipment to purchase and operate, the 24 hour on-call status of its medical personnel adds costs and that the services are important and life-saving. I agree. Where we part company with some providers is when their costs are out of line with others in the industry offering the same services – many times the average costs or of the CMS allowable.

At PacificSource, we've been able to enter into contracts with the vast majority of air ambulance providers in Montana. The only exceptions are those very few companies offering membership subscriptions. The crux of the argument between insurers and these membership-based air ambulance providers is the amount of reimbursement for services. However, that same provider will accept the insurer's standard reimbursement if and only if the patient has paid a membership fee to the provider.

Is two times the CMS allowable reasonable? When we look at other providers throughout the state and compare the CMS equivalent rate structure and what is the typical insurance contract with them, we find that other providers (primary care doctors, specialists, and emergency room doctors) are contracted to accept 162 percent to 225 percent of the CMS allowable.

What is the solution? Air ambulance providers are not regulated by the states. Instead they fall under the purview of the Federal Aviation Administration. Specifically, they are regulated by the Air Carrier Operations Branch of the FAA under the same section that regulates airlines like Delta and Alaska. Therefore, there are very limited instances where the state can create its own regulations for these providers.

The EAIC Air Ambulance work group referenced above has been discussing some potential legislation around

Air Ambulances, page 34

ROADSHOW
Billings

Friday, October 14
Big Horn Resort
9 a.m. to noon

3 FREE ETHICS CLE!

- **Spoliation, ESI, Discovery & Technology Checklists**
- **Confidentiality & Conflicts**
- **What to Do When You Goof**

REGISTER AT MONTANABAR.ORG
QUESTIONS? mcaprara@montanabar.org

Health Care Powers of Attorney CLE in Billings Sept. 9

Attorneys can learn about changes in federal and state regulations on Health Care Powers of Attorney at a CLE in Billings on Sept. 9.

This half-day CLE will review both proposed long-form and proposed short form Powers of Attorney for Health Care. The speakers will discuss applicable Montana and Federal law regulations including: Montana statutes, Federal statutes, including HIPAA, Montana Supreme Court decisions, U.S. Supreme Court decisions, POLST, recent developments regarding physician Aid in Dying, and competency determination issues.

The program's presenters are:

Lawrence D. Johnson, a sole practioner in Hamilton whose areas of practice include Trusts and Estates, Health Care, Nonprofit, Business and Real Estate Law;

Megan D. McCrae, an associate with Crowley Fleck in the firm's Billings office who regularly advises hospitals, critical access hospitals, federally qualified health centers, physician practices, long-term care facilities, home health and hospice providers, and dental practices on a broad range of operational issues;

Charles W. "Chuck" Willey, an Adjunct Professor of Law at the University of Montana School of Law from 2004 through 2012 who was Chair of the State Bar's Business, Estates, Trusts, Tax and Real Estate (BETTR) Section for 10 years.

The CLE is approved for 2.75 CLE credits. Cost is only $75, or $50 for attorneys practicing less than five years and members of the Paralegal Section.

The program is a joint presentation of the State Bar of Montana's Health Care Law Section and BETTR Section.

Upcoming State Bar-sponsored CLE

Friday, Sept. 9 — New Health Care Powers of Attorney — Billings, Crowne Plaza. 2.75 CLE credits. Online registration available at montanabar.org.

Thursday-Friday, Sept. 22-23 10 CLE (2 ethics) — State Bar of Montana Annual Meeting — Great Falls. Online registration available at montanabar.org. See details on pages 20-21

Friday, Oct. 7 – Eastern Montana CLE, details TBA — Miles City

Friday, Oct. 14 — Road Show, 3 FREE Ethics CLE! — Billings. Online Registration open!

Friday, Oct. 21 — Advanced Family Law – Cutting-Edge Issues, details TBA — Missoula

Wednesday, Oct. 26 — Set Up or Shore Up Your Practice CLE, details TBA — Helena

Other CLE of Interest

Tuesday-Wednesday, Sept. 20-21 — Montana Coalition Against Domestic and Sexual Violence Annual Conference, Use of Technology in Intimate Partner Stalking — Helena, 10 CLE. www.mcadsvconference.com. Contact Kelly Darcourt at kdarcourt@mcadvs.com with questions.

Air Ambulances from page 32

creating a binding arbitration clause to settle disputes between insurers and air ambulance providers. (Draft of this legislation can be found at: http://www.leg.mt.gov/content/Committees/Interim/2015-2016/Economic-Affairs/Committee-Topics/Ambulance/draft-air-ambulance-bill8-8-16.pdf). While this is an interesting approach in protecting Montanans from being balance billed, the federal Airline Deregulation Act prohibits states from creating any regulations that would impact rates of a "carrier." The draft legislation proposed by the work group, again while just in concept, could set up a federal pre-emption argument. And while states do have limited regulatory authority over air ambulance providers around medical and quality standards of care, under current law they are prohibited from regulating the prices, routes, and services of air ambulances.

In April of this year, Sen. Jon Tester proposed amendments to the Federal Aviation Administration Reauthorization Act of 2016. One of those amendments would empower states to decide whether they want to create rules regarding air ambulance rates and services, giving states the ability to evaluate true costs and establishing a standard of payment. Sen. Tester's other amendment would launch a Government Accountability Office investigation to identify the real costs associated with operating an air ambulance. The reauthorization bill and its amendments have not yet been addressed by the full chamber.

Without a federal solution, what can be done in Montana? We need to continue to be transparent on which air ambulance providers are in network and educate medical personnel about the numerous in-network options for these services. Encouraging hospitals to require that their preferred air ambulance providers operate in-network with insurers would go a long way in protecting our Montana consumers. Furthermore, air ambulance providers should be transparent in their billing, just as hospitals and providers are, and just as insurers are required to be with their rate process.

We are thankful for the scores of highly trained men and women who lay their hands on broken bodies in Montana, and quickly transport them to necessary medical services. We stand ready to work with the air ambulance provides and other stakeholders to find solutions to the issues.

Todd Lovshin is the vice president and Montana regional director for PacificSource Health Plans. He joined PacificSource in 2012, bringing with him more than 15 years of experience in government relations and employee benefits. He serves on numerous industry advisory panels including the Governor's Healthcare Advisory Council.

State Bar of Montana montana.inreachce.com

Get Your Credits. On Your Time.

ON-DEMAND CLE COURSE CATALOG

ETHICS
- Cybersecurity in the Law and the Effect of Cyber Crime on Attorneys | February 2016
- At the Table: Practical and Ethical Guidance for Plea Negotiations | April 2015
- Ethics and Social Media | April 2015
- Don't Let the Cloud Rain on You | March 2014
- Ethics and Managing Business Risk in the Law Firm | March 2014
- Ethics and Elder Law | February 2013
- Understanding Behavioral Addictions in the Legal Professional | March 2013
- Stress, Compassion Fatigue and Dealing with Emotional Clients | April 2013
- Do Loose Lips Sink Ships? Ethical Implications of Confidentiality Agreements | April 2013
- Ethics and Elder Law Part I | April 2013
- Ethics and Elder Law Part II | April 2013

Substance Abuse & Mental Illness (Ethics)
- From Distressed to De-stressed | May 2016
- A Lawyer's Toolbox When Substance Abuse Hits Close to Home | May 2014
- Identifying and Treating PTSD | March 2014
- The Aging Lawyer | February 2013
- Ethical Duties and the Problem of Attorney Impairment | January 2013
- Is it Time to Retire? | November 2012
- SAMI Smorgasbord | May 2012

APPELLATE PRACTICES AND PROCEDURE
- Appellate Practice Tips: Brief Writing and Oral Argument | December 2015
- Appellate Practice Tips: Ground Zero | March 2012

BANKRUPTCY
- Rules Update - Bankruptcy Local Rules | April 2012

BUSINESS LAW
- A Limited Primer on Montana Insurance Coverage Issues | June 2016
- Avoiding Malpractice Claims | January 2016

FAMILY LAW
- Montana Child Support Enforcement Guidelines Revisited | February 2016
- Mediating Cases Touched by Domestic Violence | October 2015
- Child Support Cases from an ALJ Perspective Part I | April 2014
- Child Support Cases from an ALJ Perspective Part II | May 2014
- 2013 Legislative Changes to Family Law Statutes | December 2013
- Limited Scope Representation Part I | September 2013
- Limited Scope Representation Part II | September 2013
- Attorney's Guide to the Guidelines | August 2013
- A Primer on Divorce | August 2013
- Parenting Plans | August 2013
- Standing Masters' Observations | June 2013
- Divorce Coaching | April 2013
- Hendershott v. Westphal - Practical Implications | April 2013
- Facilitating Co-Parent Communication with OurFamilyWizard.com | January 2013
- Social Networking and Family Law | January 2013
- How NOT to Mess Up Children During a Divorce Proceeding | April 2012
- Drafting Family Law Briefs to the Montana Supreme Court | April 2012
- Settlement Conference Do's and Don'ts | March 2012

GOVERNMENT
- SB 355 Update -- New Developments in Exempt Water February 2015
- Recurring Issues in the Defense of Cities and Counties

HEALTH CARE
- Demystifying Reference Based Pricing & Determining Whether it Will Work for Your Client | April 2016
- Investigating Health Care Fraud in MT | January 2016
- Health Care Law -- 2015 Montana Legislative Update | June 2015
- Anti-Trust Issues in Health Care | November 2014
- A Look Inside: OCR Compliance Audits | April 2013

LABOR AND EMPLOYMENT
- Contested Case Procedures Before the Department of Labor and Industry | May 2012

LAW OFFICE MANAGEMENT & TECH
- Top Tech tips for Tomorrow's Law Practice | January 2016
- Corporate Counsel Institute: Alternative Billing and Auditing: Viable Alternatives to the Billable Hour?

PROBATE & ESTATE PLANNING
- Estate Planning Basics | January 2016

Roland Graham

Roland "Rollie" Graham died on July 30 at the age of 86 in Helena.

Rollie was born in Minneapolis on May 12, 1930, to Arthur George Graham and Amelia Martina Bille Graham.


Graham

He attended and graduated from the University of Minnesota with a degree in Business Administration, during which time he served in ROTC.

In 1952, he began two years of active duty in the United States Navy as an ensign, and spent 10 months patrolling the waters off of Korea during the Korean conflict. Upon his return from active duty, he married Shari Jones. After he completed his final year of active service in San Diego, he spent the next three years attending the University of Minnesota School of Law, serving on the Law Review, and graduating with a juris doctorate in 1957.

Rollie practiced law in Minnesota and Wisconsin until 1999, working as counsel for the Milwaukee Railroad, the Federal Reserve Bank of Minneapolis, and the First Wisconsin Holding Company. He moved to Helena with his daughter and son-in-law, Sue and Gabe Woodrow, and eventually becoming bored with retirement. Missing the practice of law, he sat for the Montana bar exam. At the age of 72, Rollie was proudly admitted to the Montana State Bar. Shortly after, he began a 10-year "second" law career as of-counsel with the law firm Gough, Shanahan, Johnson & Waterman in Helena, finally retiring at age 82.

Rollie loved the practice of law but, even more so, he loved his family and cherished his friends and colleagues. Special memories are of camping; summers spent boating, fishing, and water skiing; years of piano, trumpet and percussion recitals, band and choir concerts, and dance recitals; Boy Scouts and coaching little league baseball games and watching synchronized swimming and school theater productions; winter skiing in Colorado and Montana; cross country skiing in the Twin Cities' parks; bicycling in the Upper Peninsula; family road trips to Texas, Montana, and Alberta, Canada; golfing; and even a few brief years attempting to master photography. He was a role model, willing audience and constant friend to grandchildren Graham and Lauren who were privileged to have Grandpa ever present as they were growing up.

During these years, Rollie gave back generously to the community with his time and talents. When his family was young, Rollie served in the Optimist Club setting up and manning Christmas tree lots for several years. He found great satisfaction and joy as an active member of Rotary Club, first in Minneapolis for a number of years, and then in the Rotary Club of Helena from 2002 until his passing.

He was buried with military honors at Montana State Veterans Cemetery. In lieu of flowers, memorials may be made in Rollie's name to the Helena Rotary Foundation, P.O. Box 333, Helena, MT 59624. Please visit www.retzfuneralhome.com to offer a condolence or to share a memory of Rollie.

Judicial from page 17

2010 ouster of three Iowa justices — led by outside campaign spending — after its Supreme Court recognized a right to same-sex marriage. To use the hydraulics metaphor sometimes applied to campaign finance, it seems safe to say that, like water or money, political influence will find its way through any judicial-selection landscape.

Conclusion

Montana's judicial elections reflect a territorial suspicion of outside influence, a progressive-era concern about corporate corruption, and extraordinarily deep deliberation among ordinary citizens about competing models for judicial selection in the framing of its 1972 Constitution. The result is a hybrid selection model sharing elements of contested election, retention election, merit, and (with strong gubernatorial representation on the nominating commission) straight appointment models. After the invalidation of its partisan endorsement prohibition in the wake of *Citizens United*, Montana now shares some elements of a partisan-election model, for better or worse. This prompted a vigorous public debate, in the context of the campaign between Mike Wheat and Lawrence VanDyke, about the Montana Constitution and *Citizens United*, the influence of trial lawyers and corporations, and the merits of electing judges at all. The campaign did not settle that debate, of course. Instead, it raised old questions about judicial selection in a new era of campaign finance. In 2016, as in 1866, 1972, and 2014, those questions continue to call for answers.

CLASSIFIEDS Contact *| Joe Menden at jmenden@montanabar.org or call him at (406) 447-2200. See the State Bar of Montana's new online Career Center at* ***jobs.montanabar.org****.*

ATTORNEYS

INDIAN LAW AND CLINIC FACULTY POSITION: The Alexander Blewett III School of Law at the University of Montana, the only law school in the state, anticipates hiring a full-time, tenure-track professor beginning in the 2017-2018 academic year to teach Indian law and other courses related to your practice experience, in addition to co- supervising the Margery Hunter Brown Indian Law Clinic. Our mission emphasizes Indian law training, and the law school offers a Certificate in Indian Law. We are also committed to integrating theory with practice, making substantial practice experience in the areas to be taught particularly valuable. See full listing and apply online at https://goo.gl/p0Edv2

CONSUMER LAW AND PROTECTION CHAIR: The Alexander Blewett III School of Law at the University of Montana, the only law school in the state, anticipates hiring a full-time, tenure-track professor beginning in the 2017-2018 academic year to serve in the newly created Blewett Chair in Consumer Law and Protection. Supported by a substantial endowed program fund, the Chair has an exciting opportunity to build a nationally renowned and innovative consumer law and protection program from the ground up. In addition to teaching consumer law and related courses, the Chair will organize academic programs and develop student opportunities in consumer law and protection through clinical placements, externships, and/or internships. See full listing and apply online at https://goo.gl/18mXsE

ASSOCIATE ATTORNEY: Lorang Law, PC, a general practice firm in Havre, MT, seeks an associate attorney. Salary is based upon experience and partnership potential exists for qualified candidates. Please send cover letter, resume and references to 410 3rd Ave, Havre, MT 59501. For more information on the firm, please visit www.loranglaw.com.

ASSOCIATE ATTORNEY: Silverman Law Office, PLLC (www.mttaxlaw.com) has an associate attorney position available in each of its Bozeman and Helena offices. We believe that customer service and best business practices are a key to a successful legal practice. Applicants must have strong communication, teamwork and people skills and an ability to provide customer service to a wide array of clients. Our practice focuses on business/tax/transactional/estate planning in a rapidly expanding business environment, with an unbelievable support team that provides a positive work and life atmosphere. Applicants must be admitted to practice or in the process of obtaining admission to practice in Montana. We offer a highly competitive compensation and benefits package. Cover letter, references, resume and writing sample should be sent to Julie@mttaxlaw.com.

ASSOCIATE ATTORNEY: Kasting, Kauffman & Mersen, a general practice law firm in Bozeman, MT, is seeking an associate with strong research, writing and analytical skills. Ideal candidate has 2-5 years of experience. Salary depends on experience. Please send resume, cover letter and references to Margaux Meyer, mmeyer@kkmlaw.net.

ATTORNEY: Mackoff Kellogg Law Firm, the oldest law firm in Western North Dakota and Eastern Montana, is looking to add to its team of attorneys. Mackoff Kellogg Law Firm provides legal services in a wide variety of areas including litigation, energy law, estate planning, commercial transactions, taxation, business formation and family law. We are seeking a lateral hire with a strong work ethic, excellent oral and written communication skills, and solid case management skills. Applicants must be licensed in North Dakota or have the ability to be licensed in the next six months, at least three years experience is preferred with some background in litigation. Salary depends on experience and benefits include health care, long term disability insurance, life insurance, and 401K. Please send your resume and cover letter to ljahner@mackoff.com.

ATTORNEY: Established Bozeman law firm seeks an associate for a general practice, emphasizing litigation, real estate and water law. Litigation experience required. Good working environment and benefit package. Salary DOE. Submit cover letter, resume, references and writing sample to: Moore, O'Connell & Refling, P.C., PO Box 1288, Bozeman MT 59771.

DEPUTY COUNTY ATTORNEY: Big Horn County Attorney's Office, Hardin, MT. Full-time. Annual Salary: $75,525 plus benefits. License to practice in Montana; Experience preferred. Subject to Pre-Employment Drug and Alcohol Testing. For job description and application, contact Rhonda at (406)665-9735. Submit application, resume and legal writing sample to: Big Horn County HR Office, P.O. Box 908, Hardin, MT 59034-0908. Applications must be received or postmarked by Friday, September 30, 2016. AAO/EOE.

DEPUTY COUNTY ATTORNEY: The Hill County Attorney's Office has one full-time Deputy County Attorney position open for hire. Salary depends on qualifications and experience, plus all applicable Hill County benefits. The Deputy County Attorney primarily prosecutes criminal matters in Justice Court, District Court and Youth Court, and represents the Department of Public Health and Human Services in abuse and neglect cases. This position performs all duties of the County Attorney in the County Attorney's absence, or at the direction of the County Attorney including representing the county or state in civil matters in various courts of law, and advising county officials and the public on legal matters of concern to the county or the various county departments. A full job description is available at the Havre Job Service or from the Hill County Personnel Office at 265-5481, ext 239, or e-mail personnel@co.hill.mt.us. Please provide a cover letter, resume, transcript, writing sample, and references to the Hill County Personnel Office, 315 Fourth St., Havre, MT 59501; or email to dahlg@co.hill.mt.us. This position is open until filled. For more information, please contact the Personnel Office or Gina Dahl, Hill County Attorney at 265-5481 extension 211.

LITIGATION/TRANSACTIONS: Established law firm in Billings, Montana, seeks attorney with three or more years of experience in litigation and/or transactions. Please send letter of application, references, resume, transcript and writing sample to classifieds@montanabar.org with a subject line of 1606-01.

ASSOCIATE COUNSEL: Zoot Enterprises in Bozeman. Zoot's Legal Group is responsible for managing all legal functions applicable to Zoot's business. The Associate Counsel position will provide legal expertise and guidance regarding a large variety of legal and business issues applicable to Zoot and its related companies, including legal/regulatory compliance, contract drafting and negotiation, licensing, protection and management of intellectual property, employment law issues, tax compliance, entity structure and creation, and management of outside counsel. See full listing at jobs.montanabar.org.

LITIGATION ASSOCIATE: Hall & Evans, L.L.C., a prominent and respected law firm headquartered in Denver, Colorado is seeking an Associate with 3-5 years of litigation experience to join our Billings, Montana office to work with existing major national clients in Montana and Wyoming.

MORE classifieds NEXT PAGE

ASSOCIATE DIRECTOR/GENERAL COUNSEL: The Montana League of Cities and Towns (MLCT) is seeking a qualified candidate for our Associate Director/General Counsel position, to advocate municipal policy positions and to provide general legal review and advice on League functions. MLCT is located in beautiful Helena Montana and has as its sole purpose the cooperative improvement of municipal government in Montana. You can learn more by visiting www.mtleague.org.

LITIGATION ATTORNEY: Chaloupka Holyoke Snyder Chaloupka & Longoria, an AV-rated law firm in Scottsbluff, Nebraska, seeks to hire a litigator with 3-10 years of experience. Practice includes plaintiff's personal injury, criminal defense, commercial litigation, civil rights and appellate work. Western Nebraska is a good location for lawyers who like to try cases; it is also a good location for raising a family, enjoying outdoor recreation and taking in live music and cultural events. We offer a competitive salary and benefits, opportunities for a diverse and satisfying practice and support for your community involvement.

PARALEGALS/LEGAL ASSISTANTS

PARALEGAL: Are you looking to work with a great, hard-working team where you will expand your skills and knowledge within the industry? Silverman Law Office, located in Helena and Bozeman, is seeking two (2) experienced and passionate full-time paralegals to join our Helena and Bozeman office. As a paralegal, you will assist attorneys working with clients on probate, estate planning, real estate, business, and transactional matters. This position requires expertise in use of Microsoft Word and Excel, as well as outstanding proofreading and writing skills. The right candidate(s) must possess knowledge of legal procedures, organizational skills, ability to prioritize workflow assigned by numerous team-members, and the ability to work independently. A full benefit package and competitive wage will be offered to successful candidates. Please send a resume, cover letter, and writing sample to julie@mttaxlaw.com.

ATTORNEY SUPPORT/RESEARCH/WRITING

ENHANCE YOUR PRACTICE with help from an AV-rated attorney with 33 years of broad-based experience. I can research, write and/or edit your trial or appellate briefs, analyze legal issues or otherwise assist with litigation. Please visit my new website at www.denevilegal.com to learn more. mdenevi@bresnan.net, 406-541-0416.

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

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

ON DEMAND LITIGATION SUPPORT: When things get busy, increase your productivity without increasing overhead. Outsource legal research, writing, and other litigation tasks to David Sulzbacher, a Montana and North Dakota licensed attorney with clerkship, civil litigation, and criminal experience in Montana courts. $75/hr for speedy and high quality briefs, pleadings, memoranda, doc review, etc. Call (406) 407-7079 or email david@thefreelanceassociate.com.

OFFICE SPACE/SHARE

GREAT FALLS: Looking for attorney to share fully furnished office and legal assistant in Great Falls, MT. Reasonable terms. Great view. For more information email: ageiger@strainbld.com; (406) 727-4041.

MEDIATION

MEDIATION AND ARBITRATION SERVICES: Please contact Carey E. Matovich, Matovich, Keller & Murphy, P.C., Billings, MT, 406-252-5500, or email at cmatovich@mkmfirm.com.

CONSULTANTS & EXPERTS

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

BOARD CERTIFIED VOCATIONAL EXPERT: 42 years experience providing vocational expert services to Montana attorneys. Professional member of the American Board of Vocational Experts, National Association of Forensic Economics, International Association of Rehabilitation Professionals, and the American Rehabilitation Economics Association. I have provided testimony in FELA, personal injury, marital dissolution, medical malpractice, workers' compensation, and wrongful death cases. Norman W. Johnson, M.S., CRC, ABVE/F, www.normjohnsoncrc.com , nwjcrc@charter.net 406 883-0398

BOARD CERTIFIED VOCATIONAL EXPERT: 42 years' experience providing vocational expert services to Montana, Washington and Idaho attorneys. Professional member of the American Board of Vocational Experts, National Association of Forensic Economics, International Association of Rehabilitation Professionals, and the American Rehabilitation Economics Association. I have provided testimony in FELA, personal injury, marital dissolution, medical malpractice, workers' compensation, and wrongful death cases. Norman W. Johnson, M.S., CRC, ABVE/F, www.normjohnsoncrc.com , nwjcrc@charter.net 406-883-0398, 406-249-5303 cellular.

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

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

EVICTIONS

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

jobs.montanabar.org

State Bar of Montana Career Center

Employers:

- EMAIL your job directly to job seeking professionals
- PLACE your job in front of our highly qualified members
- SEARCH our resume database of qualified candidates
- MANAGE jobs and applicant activity right on our site
- LIMIT applicants only to those who are qualified
- FILL your jobs more quickly with great talent

Job Seekers:

- POST multiple resumes and cover letters or choose an anonymous career profile that leads employers to you
- SEARCH and apply to hundreds of fresh jobs on the spot with robust filters
- SET UP efficient job alerts to deliver the latest jobs right to your inbox
- ASK the experts advice, get resume writing tips, utilize career assessment test services, and more

STATE BAR OF MONTANA CAREER CENTER

ymcareers

jobs.montanabar.org

MONTANA LAWYER
State Bar of Montana

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