


# MONTANA LAWYER



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## 'For this and future generations'

Montana celebrates  
50th anniversary of  
state constitution

### ALSO INSIDE:

MJF announces Access  
to Justice grants

Mediation settlement  
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New column: Jury Behavior

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## FEATURE ARTICLES



### THE LAWYERS OF THE 1972 CONSTITUTIONAL CONVENTION

As Montana celebrates the 50th anniversary of the convention, the Montana Lawyer looks at the 24 lawyers who helped draft it.

### TO ZOOM OR NOT TO ZOOM

Weigh the pros and cons when deciding between in-person or virtual mediation conferences.



### MT JUSTICE FOUNDATION & CASA A POWERFUL PARTNERSHIP

MJF announces over \$214K in Access to Justice grants, including awards to CASA programs all across Montana.



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# Celebrate our state constitution, and all who work to uphold it

While in college, I worked part time for an attorney who mostly practiced in personal injury law. When I mentioned that I was thinking about going to law school, the first question he asked was what type of law I was interested in. My quick and immediate response? Constitutional law. This attorney said I would not be interested in constitutional issues because there was no money in it. Whether Keith Miller was right or wrong, or whether money was even part of my decision-making process, is a discussion for another day, but the sufficiency of pay didn't stop 24 lawyers in 1972 from joining other delegates and spending 56 days in Helena drafting a new constitution for the State of Montana. We, the attorneys of the State Bar of Montana and the citizens of Montana, are indebted to the contribution of these 24 lawyers. This year is the 50th anniversary of the Constitutional Convention, and it will and should be celebrated. The question going forward is not whether we should protect and strengthen Montanan's constitutional rights as it enters its next 50 years, but how. This is a weighty question, but one clear answer to enhance and protect Montana's constitution is to invest in those individuals dedicating their practices and their lives to defending it.

Much of Montana's Declaration of Rights is protected against government encroachment by attorneys that work for and contract with the Office of the State Public Defender. Nationwide, and in the State of Montana, public defense is at a crisis point. Montana, Missouri, New Hampshire, Oregon, Maine, Minnesota, New Mexico, Nevada ... the list goes on ... are all struggling with appropriately funding our public defender systems. Most states and jurisdictions don't prioritize or invest in public defense to provide an even playing field for the prosecution and defense. Parity between defense and the prosecution is a core principle of public defense, and the American Bar Association recognizes it in its Ten Principles of a Public Defense Delivery System. Pay and resource parity between the defense and prosecution is critical to the

## COMMENTARY

proper function of the justice system. While there are many facets to the justice system, which itself is a complex tangle of people, politics, and justice, one area of common ground on which everyone should agree is this:

Those using the color of state law to incarcerate or otherwise affect the life, liberty, and property of Montana's citizenry and those dedicating their lives to defending our citizens and our Constitution should be equally compensated.

The 1972 delegates provided for the right to counsel in section 24, the Rights of the Accused. "In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel." We need only look at the resources we give the defense to determine how much we – the citizens of Montana – value our constitutional rights, including the right to counsel. How much is the right to privacy or the right to be free from unreasonable search and seizures worth? Sections 10 and 11. How much is the right to bear arms worth? Section 12. How much is due process worth? Section 17. How much is the right to counsel worth? Section 24. The disparity in resources is staring us in the face.

A 2020 legislative audit of the Office of the State Public Defender found that public defenders were paid, on average, less than all other public sector attorneys. When comparing public defenders to prosecutors it isn't hard to find examples of attorneys with **equal** experience commonly being paid \$10,000 to \$15,000 less for comparable positions, and in some instances the public defender pay is as much as \$30,000 less than their prosecution counterparts. Why? Do we value the defense of our Constitution less? There are solutions to these issues, but they require the willingness to invest in our Constitution, just as our predecessors did 50 years ago at the Constitutional Convention. Montana has a powerfully protective constitution against government encroachment



BRIAN C. SMITH

***Brian C. Smith is a longtime criminal defense attorney from Missoula who currently serves as Public Defender Division administrator with the Montana Office of State Public Defender.***

and interference, even more so than the United States Constitution, but our protections are only as strong as the support we provide to those that defend it.

Was Keith Miller right? So far, yes. But there is hope he will eventually be wrong. For the first time in our nation's history, we have a former public defender on the highest court. Congratulations on your confirmation, Judge Ketanji Brown Jackson. You give us hope. The State of Minnesota (where Keith is from) recently reached an agreement with its defenders to pay them more and control their caseloads. Oregon appears to have made a commitment to re-evaluate the way it provides defense services. The chief justice of the Oregon Supreme Court has sounded the alarm and the legislature recently allocated \$12.8 million to counties with the largest shortage of attorneys. The pandemic and attorney shortages have not been kind to public defense nationwide, including Montana. But also the problem is deeply rooted in systems and history. Time will tell how Montana will respond. How much is defense of constitutional rights worth? We should value protection of these rights as much as efforts to remove these rights. Celebrate Montana's Constitution this year. But remember, constitutional rights are only as strong as their current defenders. We had strong attorney defenders of rights at the 1972 Convention. Here is to the hope that we will have stronger, well resourced, defenders in the present.

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## CAREER MOVES

**Kimball joins as associate attorney at Berg Lilly PC**

Kasey Kimball joined Berg Lilly, PC as an associate attorney in January 2022.

A Bozeman native, Kimball graduated from Montana State University with high honors in 2015 before moving to New York City where she enrolled in the Honors Program at New York Law School. While in law school, she authored a case comment published by the Law Review and served as the journal's managing editor. Kimball graduated



**Kimball**

cum laude from New York Law School in 2018, receiving the Dean's Award for Student Leadership and the Faculty Award for Outstanding Service to the Law Review.

Following graduation, Kimball returned to Montana where she practiced with Browning, Kaleczyc, Berry & Hoven, P.C. prior to joining Berg Lilly.

Kimball is licensed to practice in Montana state and federal courts and the Ninth Circuit Court of Appeals. As part of the firm's litigation and defense team, she will be serving clients in the areas of general litigation, insurance defense, and business and commercial transactions. Kasey has extensive experience in contract and tort litigation, coverage determinations, employment actions, and commercial disputes. She looks forward to continuing to build her practice in Bozeman and around the state.

Away from work, Kasey enjoys spending time with her family, staying

active outdoors with her dog, reading a variety of literature, and cheering on Bobcat athletics. In addition, Kasey fulfills her passion for humane and ethical treatment of animals by supporting the Heart of the Valley Animal Shelter and the Humane Society of the United States. Since moving back to Montana, Kasey has enjoyed giving back to the community by serving as a CAP Mentor in the Bozeman Public Schools through Thrive, and looks forward to continued volunteer involvement.

**Talia returns to Church, Harris, Johnson & Williams in Helena**

After an eight-year break for service with the Montana National Guard, Mike Talia hung up his fatigues and returned to Church, Harris, Johnson & Williams, P.C. as a shareholder in the Helena office.

At the Montana National Guard, Talia's practice focused on compliance, federal contracting, government relations, and defensive cybersecurity operations. He was a founding content developer and instructor of the National Guard Bureau's Cyber Law Course, teaching military



**Talia**

lawyers nationwide about the legal aspects of public-private partnerships in incident response.

Talia resumes a litigation practice focused on commercial, real property, trust, and estate matters, and he will support the firm's growing personal injury practice. He will also take Federal Acquisition Regulation-based contract litigation, government relations

matters, and cybersecurity breach liability, planning, and incident response matters.

He can be reached at 406-761-3000.

**VonLangen joins Bilstein, Monson & Small**

Bilstein, Monson & Small in Billings has announced that John VonLangen has joined the firm as an associate attorney.

VonLangen received a Bachelor of Science degree in electrical engineering from the State University of New



**VonLangen**

York at Buffalo. After graduation, he earned his JD, cum laude, from the University of Dayton School of Law.

VonLangen has practiced law in Billings since December of 2010 as Senior Counsel

for GE Capital US Holdings, Inc. handling a wide variety of legal matters including commercial contracts, secured transactions, real estate, business and corporate law matters, employment issues, licensing, data privacy, operations, internal investigations and regulatory and compliance matters. Prior to joining GE Capital, in private practice he represented large and small lenders and borrowers in finance transactions including real estate based loans and asset based loans together with loan workouts and restructures. He also represented individuals, businesses, corporations, real estate developers, landlords, tenants, investors and agribusiness owners handling all of their business, commercial and real estate needs.

VonLangen is licensed to practice

**SUBMITTING MEMBER NEWS ANNOUNCEMENTS TO THE MONTANA LAWYER**

**The Montana Lawyer welcomes news from members including announcements of new positions, advancements, honors, appointments and**

**publications. If you have news you would like to submit to the Member News section, you can email it to [editor@montanabar.org](mailto:editor@montanabar.org).**

**Please send questions to the same address.**

**If you are submitting photos, they must be at a resolution of at least 200 ppi.**

law in Montana, Alaska and Florida.

On a personal note, John is a father of 3 amazing kids. He strives to live a healthy and active lifestyle and enjoys a wide variety of fitness related activities in his free time including running, weightlifting, hiking, biking, triathlons, 10K's, half marathons, marathons, adventure races, snowboarding, kayaking and paddle boarding, to name a few.

## Great Falls firm announces Mitcham as a new partner

Gregg Smith, Steph Oblander, and Matt Meade are extremely pleased to announce that Kaitlyn Mitcham (formerly, Kaitlyn McArthur) has become

a shareholder in our firm, which will hereafter be known as Smith Oblander Meade & Mitcham, PC.



**Mitcham**

personal injury litigation.

The partners say it is especially gratifying to them because Mitcham began her career with the firm as an

Mitcham graduated from the University of Montana School of Law in 2017. She has practiced with the firm since that time, engaging in the general practice of law with an emphasis in per-

undergraduate at the University of Providence. "We knew even then she would be a top-notch attorney and if you have ever practiced with or against Kaitlyn, you know we were right!"

In addition to helping people as a lawyer, Kaitlyn also volunteers for Big Brothers Big Sisters, and was the Secretary of the Cascade County Bar Association for several years.

## HONORS

### Carestia inducted into national mediation organization

Pax Dispute Resolution Services, PLLC is pleased to announce that Brandy Carestia has been inducted into the National Academy of Distinguished Neutrals (NADN).

With over two decades of litigation and alternative dispute resolution experience, Carestia specializes in the mediation and arbitration of a broad range of civil and commercial disputes. She litigated professional liability, product liability, premises liability, subrogation, and appellate cases in the San Francisco office of Hinshaw & Culbertson for several years before returning to her home state of Montana, where she further expanded her areas of expertise through a diverse law practice. The reason, ingenuity, and tenacity she brings to the mediation process has led to the successful resolution of countless claims since 2003. Brandy also serves as an arbitrator of various civil claims, including class action claims across the United States against several major auto manufacturers. She founded Pax Dispute Resolution Services, PLLC to further expand innovative dispute resolution offerings, including the utilization of specifically tailored systems to refine online negotiation, mediation, neutral evaluation, and arbitration.

The National Academy of Distinguished Neutrals is a professional association whose membership consists of ADR professionals distinguished by their hands-on experience in the field of civil and commercial conflict resolution. Membership is by invitation only and all Academy members have been thoroughly reviewed and found to meet stringent practice criteria. Members are amongst the

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most in-demand neutrals in their respective states, as selected by their peers and approved by local litigators.

"We're delighted to recognize Brandy Carestia to the Academy's Montana Chapter in recognition of Excellence in her mediation practice," commented Darren Lee, Executive Director of NADN.

## PUBLICATION

### Zellmer publishes article on freshwater protections

Sandra Zellmer, professor of law at the Blewett School of Law, recently published an article on the American College of Environmental Lawyers (ACOEL) website titled "Will the 30 x 30 Initiative Protect 30% of the Freshwaters by 2030?"

Also published by JDSupra and the Center for Progressive Reform, the article examines the global movement to protect 30 percent of the Earth's lands and waters by 2030.



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# Gallagher retires after 30 years with Federal Defenders of MT

Anthony R. Gallagher retired on April 1 after 30 years as executive director of the Federal Defenders of Montana, having served in that role since he was selected as the first executive director for the Federal Defenders upon its creation in 1992.

The Federal Defenders is a community defender organization created pursuant to the Criminal Justice Act to provide criminal defense services to



**Gallagher**

indigent individuals charged with the full gamut of criminal accusations in federal court throughout the district of Montana.

"Under Tony's excellent management, the Federal Defenders of Montana has

garnered the reputation of providing excellent criminal defense services to those charged in federal court," said Hank Branom, senior litigator for the Federal Defenders. The organization has grown from five employees in 1992 to 32 employees now, employing a range of individuals from attorneys to legal assistants, paralegals, investigators and computer systems analysts.

Before assuming the executive director position, Gallagher worked in both private and public positions. After graduating with distinction from Duquesne University in Pittsburgh in 1971, and following decorated service in the U.S. Army during the Vietnam conflict, he received his Juris Doctor from the University of Baltimore School of Law. He then worked for nearly seven years as a prosecutor in Baltimore, leaving to become an assistant federal public defender for the District of Maryland. After a brief stint in private practice he rejoined the Federal Public Defenders in Maryland as a supervisory assistant, and later, acting federal public defender.

Branom said that Gallagher

maintained an active litigation and appellate practice while serving as executive director, "exemplifying his incredible work ethic and leading by example. He has taken part in hundreds of jury and non-jury trials, argued before the Ninth Circuit on numerous occasions, and mentored countless attorneys both at the Federal Defenders of Montana and through the Criminal Justice Act panel mentorship program. He maintained this practice while providing leadership to the Great Falls headquarters office of FDOM, and all three branches located across the state in Helena, Missoula and Billings, regularly traveling to provide support and management to attorneys and staff throughout the state of Montana."

A fellow of the American College of Trial Lawyers, one of the premier legal associations of America for which membership is extended only by invitation to extremely experienced trial lawyers with the highest ethical, professional, and collegial practices, Gallagher has also won countless other awards and honors. He was named Criminal Defense Lawyer of the Year in 2005 by the Montana Association of Criminal Defense Lawyers. In 2016, he received the prestigious Ninth Circuit John Frank Award, which "recognizes an outstanding lawyer practicing in the federal courts of the western United States."

Gallagher has also contributed to the greater legal community through sharing his knowledge with others. He has been an adjunct professor at three law schools, a guest lecturer at five others, and a featured speaker on criminal defense topics and professional ethics for Continuing Legal Education programs throughout the United States. He has served on a number of local and national committees, expert panels, advisory and working groups, helping to improve the provision of indigent defense services across the nation, within

More **Gallagher**, page 19





# GANGLE MEDIATION

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Cory Gangle has approximately 20 years of experience in litigation, business and dispute negotiation, and transaction review.

Cory's litigation experience includes both plaintiffs' work and defense work (including insurance defense and insurance coverage). His experience on all sides brings substantial value to the dispute resolution process.

Cory is highly recommended by some of Montana's finest mediators. Allow Gangle Mediation Services to serve as your next settlement master or mediator. You will not be disappointed.

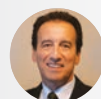
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- Probate and will disputes
- Professional negligence (architects, engineers, attorneys, etc.)
- Real estate disputes
- Soil and structural engineering
- Union contracts
- Water disputes

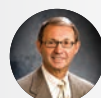
## OUR REFERENCES

“I strongly recommend that Cory Gangle be considered as your mediator. Over the last few years, I served as a mediator for Cory in a series of complex litigated matters. I found Cory to always be extremely prepared. By working with Cory, I found that he has many of the attributes and skills necessary to be an effective mediator. These include his knowledge, experience, intelligence, patience, neutrality, optimism, respectfulness and professionalism. I know Cory will do great work”.



– **Michael A. Viscomi, Esq.**

“Over the past several years, I have had the opportunity to mediate many cases in which Cory Gangle was involved. Cory has evolved into an outstanding litigant in both his approach to resolution and demeanor. I believe Cory would be a very good mediator, studious, and balancing arguments to effect an acceptable resolution. I recommend Cory as a choice for your mediation”.



– **Dennis E. Lind, Esq.**

## TO SCHEDULE

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2. Schedule Online at [ganglelaw.net/mediation](http://ganglelaw.net/mediation)
3. Contact us at (406) 273-4304



# To Zoom or not to Zoom?

**By Brandy Carestia**

The pandemic brought the necessity of online mediation to the forefront of nearly every attorney's practice. Video-conferencing platforms like Zoom have enabled cases to continue through lockdowns and their use has now become the norm. Despite technology lubricating the wheels of justice to keep them turning through the sludge of COVID-19, many of us prefer in-person mediation.

After all, the benefits of in-person

mediation are well-known and have a proven track record. Building the rapport and trust that comes from a solid handshake and conveying understanding, empathy, and sincerity by looking someone in the eye can be more difficult online and is certainly helpful in allowing everyone involved to work toward the resolution of a dispute. Recognizing all the nonverbal cues that make up such a large piece of what is actually communicated is more limited when viewing just the speaker's face through a web camera and listening for changes

in tone through a computer speaker, headphones, or ear buds. For attorneys, assessing the other side's "Exhibit A" (or giving opposing counsel or a claims adjuster the opportunity to do so) is also more effective in person.

Frankly, when parties are required to come together in the same physical place at the same time to address the problem that everyone has, there is a formality to the occasion that reinforces the idea that today is the day to get this done. Everyone's focus is on the same problem. Now is the time.





## Whether you hold a conference in person or online can affect cost, convenience, time – and a whole lot more

The last many months have proven, however, that a good mediator can succeed in all that is required to assist the parties in getting cases settled despite whatever obstacles video conferencing might present. What may come as a surprise to some is that online mediation exerts its own unique impetus in encouraging cases to settle.

First of all, there are the obvious convenience and cost-saving benefits of eliminating the need to travel. Travel expenses, gasoline, hourly fees, and the opportunity cost of being away from

other business endeavors even longer are all spared when travel is eliminated. Saving travel costs may also leave more resources available for resolution. At times, larger in-person mediation cases have required clients, attorneys, and representatives to set aside a full week to travel to and conduct an in-person mediation. Even local in-person mediations could take a sizable portion of a day to drive, fight traffic, find the office location, and park the car. Especially in this climate of flight delays or cancellations and inclement driving conditions,

attendance by all parties is more assured without travel being involved. Online mediation conferences also offer greater accessibility to mediation by allowing participants to join the mediation from any quiet, secure environment with a good internet connection.

In-person conferences, however, allow the mediator to ensure that the process remains confidential, ensure that all who have an interest in the resolution are present, and ensure that no

**MORE ZOOM, NEXT PAGE**

## ZOOM FROM PREVIOUS PAGE

others are unknowingly present at one of the locations. Because the mediator does not have complete control over the physical environment of each party during online conferences, the importance of confidentiality should be addressed prior to the mediation and commitments that the rules will be followed should be obtained from each participant. While the mediator may have less control over each participant's environment during an online conference, the mediator gains more control over other aspects of the process since the mediator has the ability to mute participants or immediately send them to another "room", and has control over what is shared on the screen.

Online conferences continue to provide the opportunity for attorneys and their clients to consult and brainstorm between caucus sessions in their own breakout rooms, just as is done during in-person conferences. However, in this setting, all participants have the opportunity to engage in other activities when the mediator is with another party. For example, clients are able to tend to other responsibilities at home and attorneys have convenient access to all their files and office staff. Yet, this ability to multitask may result in participants devoting less focus to resolving the dispute than they would during an in-person conference. In this regard, the mediator can implement ground rules for keeping parties focused and should also be prepared to intervene when needed if the parties are not fully engaged.

Not only is productivity increased but the convenience that comes with mediating online allows for greater flexibility in scheduling, as well. For instance, an online mediation conference could be scheduled on an afternoon when one of the parties has another commitment that morning; whereas, scheduling mediation that day might not be feasible at all if that party needed time in the morning to travel to the mediation.

While you may have considered these side advantages of online

conferences, you may not have considered, however, the ways in which holding a mediation conference online can actually provide an environment more conducive to settlement than in-person conferences in some cases. In certain types of cases like family, employment, and wrongful death, or any highly emotional case, the parties may well be far more likely to compromise when they are not required to be at the same location.

While the very existence of conflict can be stressful, when people in conflict are in the same room, stress levels tend to be even greater. Sometimes even inadvertent contact with another party can cause emotional flare-ups that might cloud one's ability to make logical decisions. Keeping stress levels as low as possible allows all parties to maintain focus on the effort to find a reasonable resolution.

Keep in mind that even when a mediator refrains from bringing everyone together during an in-person mediation in a contentious case, each party still knows the other is in the building and stress levels and emotions may rise with the worry of running into one another on a break or while entering or leaving the building, or with the trepidation of crossing paths enroute to the restroom or when stepping outside for a breath of fresh air. Holding a mediation conference online can eliminate the possibility of even catching a glimpse of the other party entirely. The physical separation from potentially emotionally triggering individuals and the comfort a home environment provides can improve the emotional climate in mediation and keep everyone's focus on getting the case resolved. Consequently, less stressful environments enable participants to think more clearly, be more reasonable, more successfully regulate emotions, and make better decisions.

Removing the travel component also results in less stress in many cases. In a state like Montana, where parties or their attorneys frequently reside in different locales, white knuckle driving for miles in the middle of a snow storm or the shrill cry of the baby in the

seat behind you on the plane are not conducive to the collaborative mindset the mediator hopes to foster when the conference begins. Conflicts are already distressing situations. The less anxiety a participant experiences of any kind, the more conducive that participant is to compromise. After dealing with whatever travel frustrations they might encounter, people can be understandably upset or frazzled when they arrive, requiring more time and effort to bring the parties back to the mindset that will lead to resolution. Mediators and the parties instead can benefit from individuals starting off more relaxed, at ease, comfortable, and focused at the outset. More importantly, nothing creates a more relaxed, secure, and open emotional state than being in one's own home or office. An increased comfort level leads to greater honesty in the exchange of information and, ultimately, greater willingness to reach a compromise that will ultimately work for everyone.

And yet, sometimes the parties are best served by being physically present in one place at the same time, looking each other and the mediator in the eye, and absorbing all the nonverbal cues. Sometimes the benefits of an online conference provide a softer path to a more advantageous settlement. The bottom line is that the benefits of an in-person mediation conference outweigh the benefits of an online mediation conference in some cases and the benefits of an online mediation conference outweigh the benefits of an in-person mediation conference in others. A good mediator should be able to skillfully employ either method to help the parties resolve the dispute in the most efficient and beneficial way for all involved.

**Brandy Carestia**  
*specializes in the mediation and arbitration of a broad range of civil and commercial disputes. You can reach her at [bcarestia@paxdrs.com](mailto:bcarestia@paxdrs.com)*







CASA organizations around the state are among MJF grant recipients for 2022. (Photo courtesy of CASA of Yellowstone County)

# Montana Justice Foundation and CASA: A powerful partnership for Montana kids

By Niki Zupanic  
Montana Justice Foundation

They are essential links in the chain of justice. They speak up for the youngest and most vulnerable. They are CASA volunteers, advocating for abused and neglected children in Montana.

CASA groups are the only organizations empowering local citizens to speak on behalf of children in foster care. Their work is vital in “normal years.” During these challenging times, with Montana facing alarming increases in child abuse and neglect, they are even more essential. That’s why five of our grantees were CASA groups in 2021, and why this year, we hope to support them even more.

According to CASA of Montana, even though 914 volunteers were working with 2,253 children in 2020, nearly 1,000 children await an advocate of their own. Besides recruitment, groups face other challenges that come with Montana’s great size and rural makeup. One of our grantees, Eastern Montana CASA, covers 18 counties and 105 small towns! Their hard-working volunteers often drive long distances on two-lane snow-covered roads to visit children. With gas costs rising, a single trip for a volunteer can run as high as \$200.

Our support of CASA organizations dates back more than 20 years. In 2021

**MORE MJF, PAGE 15**

## RELATED ARTICLES

Development director for CASA of Yellowstone County discusses CASA’s work, its needs, and its partnership with Montana Justice Foundation. **Page 15**

See the list of organizations and programs from around Montana that are 2022 MJF grant recipients.

**Page 16**

# MJF GRANT CYCLE OPEN

## 2022 ACCESS TO JUSTICE GRANTS

The Montana Justice Foundation is pleased to announce its grant application portal is now open!

Grants are available to non-profit organizations to:

- Provide legal services for underserved populations
- Increase public understanding of the law and the legal system
- Promote the effective administration of justice
- Increase access to alternative dispute resolution

**APPLICATIONS BEING ACCEPTED NOW**

**VISIT [MTJUSTICE.ORG](https://mtjustice.org) TO LEARN MORE AND APPLY**





# For CASA programs, needs have never been greater even as resources are tight, development director says

**When it comes to serving Yellowstone County's children in foster care, what is the current situation for the CASA program?**

The needs are great. Right now, we have 780 children in foster care in the county, making us the largest population by county of children in need in Montana. But we have less than 300 volunteer advocates. That means our CASA staff need to go through and prioritize, choosing cases where children were most seriously abused or severely neglected. We would like to serve each child who would benefit from having a volunteer advocate, but this is just not possible at this time.

**What other issues are surfacing?**

A disproportionate number of the children we serve are Native American. Since we are a child-focused organization, we need to embrace the cultures our children come from and make our training and programs inclusive. We don't just want to be "checking a box" on surveys about diversity – these are values we need to carry out in practical terms. We're making real strides in this area.

**How has Montana Justice Foundation helped with those challenges?**

Definitely by supporting training of new volunteers. Helping us to create quality materials and pay for the costs of holding our recruitment events, trainings and with recognition of quality volunteers. Recruitment and retention efforts really are key to our success and you support us in that way.



**Emily Gaudreau, development director for CASA of Yellowstone County.**

**Has the pandemic affected how your organization works?**

Yes, very much so. We likely lost about a quarter of our advocates during the whole time, and some of those decreases are still going on. Some volunteers were unable to keep helping us because of Covid restrictions, or balancing their own family needs. We will need to rebuild. In a social system that is overloaded, volunteers and professionals alike are stretched thin.

The pandemic revealed stresses that were already present, though, that contribute to child welfare cases going up. Current challenges that we face are an increase in methamphetamine use – it's linked to the trafficking along the

I-90 corridor – which can lead to family breakdowns. The cycle of substance abuse is sometimes inter-generational. Poverty and untreated mental illness, too. These are multi-dimensional challenges.

**Who is an ideal CASA volunteer?**

A volunteer makes a commitment of 18-24 months to help a child, 5 to 15 hours per month is needed. We have retired teachers and nurses – these are people who have skills to bring, but we also have young professionals and people with a variety of backgrounds. You can make it work. So many potential volunteers don't even know that they could excel in this role.

For some advocates, it can be tough, though. There really is such a thing as secondary trauma, which can affect a person who is advocating for a child. But it's rewarding. Sometimes a CASA volunteer is the sole constant in a child's life filled with turmoil and uncertainty. These children go from home to home, school to school in an overwhelmed system. Reliability from some adult is important. Volunteers see children through key milestones.

**Given the tough situation, what keeps you going?**

In my three years in this role, I've always found it personally inspiring. I'm fortunate to be here. Everyone wants their community to be the best place to live and work and have friends and family. I'm no different. I truly believe that the best way to invest in the future of our communities is to work with our children.

---

**MJF**

FROM PAGE 13

and 2022, we made grants to CASA programs stretching from Libby to Ekalaka, including organizations in eastern Montana, and Yellowstone, Missoula, Lake, Sanders, Lincoln, and Flathead

counties. Our grantees consistently deliver exceptional assistance, employing data-informed and evidence-based strategies that result in better outcomes for the children they serve. In December 2021, we invited CASA of Yellowstone County to talk to our Board of Directors and highlight their work (see sidebar). It was clear from that discussion that our

grantees have been even more flexible and innovative during these uncertain times.

Your support through Montana Justice Foundation makes a difference to our grantees across the state. Unfortunately, our ability to fully

**MORE MJF, NEXT PAGE**

# MJF announces \$241K in Access to Justice Grants

The Montana Justice Foundation is proud to announce the 2021-2022 recipients of our Access to Justice Grants. This past year, MJF made new awards totaling \$241,500 to 15 nonprofit organizations across the state. Our grant programs serve ordinary Montanans: children in foster care, families working to make ends meet, veterans denied hard-earned benefits, seniors, and survivors escaping abusive and violent environments. We support projects that help people stay in stable housing, receive medical care, and get back onto a path of safety and financial security.

Many of our grantee organizations provide direct legal representation, such as Montana Legal Services Association, Cascade County Law Clinic, and programs that serve survivors of sexual assault and domestic violence, such as SAFE Harbor of Ronan and the YWCAs in Billings and Missoula. However, the range of services provided by our grantees includes so much more. Montana Justice Foundation grants went to the mediation programs at the Billings Mediation Center and the Community Dispute Resolution Center in Missoula, the housing discrimination program

at Montana Fair Housing in Butte, and the Montana Innocence Project's wrongful conviction program. MJF also awarded a grant to the International Rescue Committee in Missoula, allowing them to continue providing low- and no-fee immigration services to refugees, asylees, and immigrants throughout the state. And as Montana continues to grapple with the pandemic recovery – and many communities face alarming increases in child abuse and neglect cases, in particular – Montana Justice Foundation continues to provide funding to Court Appointed Special Advocate (CASA) programs to ensure that children have a voice as they navigate the legal system. [See *Montana Justice Foundation and CASA: Powerful Partnership for Children* starting on page 12]

Funding for our Access to Justice Grants is made possible through the generous support of our donors and the Interest on Lawyers Trust Accounts (IOLTA) program. MJF is grateful to attorneys for maintaining their IOLTA accounts, which helps us provide funding to impactful legal aid programs across our state.

## MJF GRANT RECIPIENTS

The following organizations have received Montana Justice Foundation Access to Justice Grants.

Organization	Award
Montana Legal Services Association	\$172,500
Montana Legal Services Association Eviction Data Project	\$6,000
Cascade County Law Clinic	\$4,875
SAFE Harbor	\$5,000
YWCA of Billings	\$5,625
YWCA of Missoula	\$2,000
Community Dispute Resolution Center of Missoula County	\$4,000
Billings Mediation Center	\$3,500
Montana Fair Housing	\$5,500
Montana Innocence Project	\$3,000
International Rescue Committee of Missoula	\$3,000
CASA of Yellowstone County	\$5,000
CASA of Lake & Sanders Counties	\$4,500
CASA for Kids	\$4,500
CASA of Missoula	\$3,000
Eastern Montana CASA GAL	\$9,500
<b>Total</b>	<b>\$241,500</b>

## MJF FROM PREVIOUS PAGE

fund the deserving organizations is in jeopardy. Historically low interest rates have devastated our funding from IOLTA accounts. Even as the need for assistance has never been greater, we have fewer resources for our grantees. In 2021, we had no choice but to reduce all our existing grantees' awards,

and even turn away new grantees. In each of our last 10 years, requests from worthy groups have exceeded our ability to help.

With additional funding from our foundation, CASA programs could recruit, train and retain many more volunteers. Your gifts would pay for educational sessions, producing materials and ongoing travel needs. With your help, we could fund more groups

across the state, and possibly offer our current grantees technical assistance or strategic advice. Your support will help expand the powerful partnership between the legal community and organizations that make our justice system work better – for more than 3,000 of Montana's most deserving children.

***Niki Zupanich has been the executive director of the Montana Justice Foundation since December 2015.***



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# Court approves Rules for Access to Trial Court Public Record Portal

The Montana Supreme Court on April 7 approved Rules for Access to the Trial Court Public Record Portal proposed by the court's Commission on Technology effective immediately.

The court considered the proposed rules at a public meeting on April 5, inviting comments and questions from interested parties and the public.

Following is the text of the sections stating the purpose of the rules and who has access under them.

## **Section 1.00 - Purpose of these Rules:**

These rules provide policy guidance for the use of the Full Court Enterprise portal that provides public access to records filed with district court and courts of limited jurisdiction. These rules are not intended to address access to official

court records available through local Clerks of Courts' offices. Access to official court records is governed by statute and court orders. Best practice guides for searching and using the public portal, including links to the appropriate local court, are available at [courts.mt.gov](http://courts.mt.gov). The public portal is intended to:

Maximize accessibility to court records,

- a. Support the role of the judiciary,
- b. Promote governmental accountability,
- c. Contribute to public safety,
- d. Protect individual privacy rights and interests,
- e. Make most effective use of court and clerk of court staff,
- f. Provide excellent customer

service, and

g. Not unduly burden the ongoing business of the judiciary.

## **Section 2.00 - Who Has Access under these Rules**

Every member of the public will have the same access, at no cost, to the trial court public portal as deployed by the Office of Court Administrator under the direction of the Commission on Technology. The COT recognizes the rules will need to change as more courts use e-filing and different technologies become available to increase the type of information available in a centralized public portal.

The court's order and the adopted rules are posted online at [www.montanabar.org](http://www.montanabar.org).

## Haladay, Mendenhall, Ogle tapped for Commission on Practice

The Montana Supreme Court has appointed three attorney members to the court's Commission on Practice representing Areas A, B, and F.

Kalispell attorney Randall S. Ogle was reappointed to the commission to represent Area A, which consists of Flathead

County.

Missoula attorney Carl Mendenhall was reappointed to represent Area B, which consists of Missoula and Mineral Counties.

Helena attorney Andres Haladay was appointed to the commission to

represent Area F, which consists of Lewis and Clark and Broadwater counties.

Haladay, Mendenhall and Ogle were selected after elections were conducted in their respective districts. The top three candidates in each election were forwarded to the court for selection.



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# 50th Anniversary Constitution Celebration event to be held at State Capitol June 15-16

*"We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution." – Preamble, Montana Constitution.*

**By Joel Krautter**

Every time I read the Preamble to our Montana Constitution I am filled with pride and inspiration. Not only do I get to call this great state home, but, as a Montana attorney, I am thankful to take and adhere to an oath to "support, protect and defend" our beautifully written and forward-looking Constitution.

Fifty years ago, 100 citizen-delegates from every corner of the state came together to draft our Constitution. "We the people" adopted it, and we are the source of all political power. Many provisions have come to be taken for granted by today's Montanans – the right to privacy, the right to know about and participate in government operations, the right to a clean and healthful environment, the right to equality in educational opportunity, and the fundamental right to vote, to name just a few. Yet an awareness of Montana history tells us that these provisions mark a dramatic change from the Copper King era, and they make Montana's Constitution a model for other states.

Thus, when I received a phone call asking if I would consider serving on the Constitutional Convention Celebration Committee (CCCC), to help plan and organize the 50th Anniversary celebration of the 1972 Montana Constitutional Convention and the Constitution itself – I considered it the honor of a lifetime to serve among this distinguished group of Montanans in this endeavor and

immediately accepted the opportunity.

The committee has been working hard to put together a series of events across Montana on the Constitution's 50<sup>th</sup> Anniversary. The planned events highlight the Constitution's uniqueness and importance. We hope to promote a better understanding of its provisions by all Montana citizens.

On May 23, in conjunction with the Mike Mansfield Center and Leadership Montana, CCCC will conduct concurrent "We the People" community discussions about Montana's Constitution in Billings, Bozeman, Butte, Great Falls, Helena, Kalispell, Lewistown, Missoula and Sidney. On June 15-16, the 50th Anniversary Constitution Celebration will culminate in Helena at the State Capitol and the Montana Historical Society, with a series of tributes, receptions, panel discussions and keynote addresses. In the spirit of the 1972 Constitution, all events are free and open to the public. For those in the legal profession, CLE credit approval for the panel discussions is pending.

I strongly encourage you to attend at least one event near you or in Helena. I also ask you to tell your friends, family, neighbors, and fellow citizens about the schedule of events. This is a time for the citizens of our State to be vigilant about our democracy and promote and foster trust in our institutions, so as to strengthen support for its foundation, the rule of law. I hope that you will join us in celebrating our groundbreaking Montana Constitution on its 50<sup>th</sup> Anniversary by attending a "We the People" event and the celebration in Helena on June 15 and 16!

***Joel G. Krautter is an attorney with the Netzer Law Office, P.C., a former State Representative and a member of the Constitutional Convention Celebration Committee. He is a State Bar of Montana Trustee representing Area E.***



## CELEBRATION COMMITTEE MEMBERS

The Constitutional Convention Celebration Committee is made up of Governors Ted Schwinden, Marc Racicot, Brian Schweitzer and Steve Bullock, honorary chairs; Co-Chair Mae Nan Ellingson of Missoula, retired attorney and ConCon Delegate; Co-Chair Jerry Loendorf of Helena, retired attorney and ConCon Delegate; Evan Barrett of Butte, ConCon historian; Norma Bixby of Lame Deer, former MT State Legislator and Indian Education Specialist; Bob Brown of Whitefish, former MT Senate President and Secretary of State; Tim Fox of Helena, former MT Attorney General; Mike Halligan of Missoula, attorney and former State Senator; Joel Krautter of Sidney, attorney and former State Legislator; Nancy Leifer of Missoula, President of the League of Women Voters of Montana; Rob Saldin of Missoula, UM Professor and the Maureen and Mike Mansfield Center; and Chantel Scheiffer of Helena, Executive Director of Leadership Montana.

# Criminal Law Section 'CLE & Breathe' is June 10 in Choteau

The Criminal Law Section of the Montana State Bar is hosting the first CLE & BREATHE in Choteau on Friday, June 10, from 8 a.m to 1:15 p.m. The CLE portion consists of 5 approved CLE credits. The "BREATHE" portion consists of the option to purchase a discounted ticket to the Front Range Yoga Festival.

Following is the agenda for the CLE programming:

- Involuntary Commitments and Mental Health in the Justice System: Q&A with District Judge Elizabeth

Best

- Brady & Giglio Issues: Keeping Officers Honest, presented by Adam Durek
- Jury Instructions: To Appeal or Not to Appeal, presented by Colin Stephens and Jordan Kilby.

In an effort to promote lawyer wellness, the section invites you to come for the CLE and stay for the weekend. The yoga festival begins Friday afternoon and finishes Sunday afternoon.

You can register online at [www.montanabar.org](http://www.montanabar.org) under "Events."

## 29 applicants pass February bar exam

Congratulations to the 29 people who received passing scores on the February 2022 bar exam in Montana. They were among the 51 candidates for admission to the Montana bar who took the exam Feb. 22-23. They are:

- Nicole Kathleen Auer
- Jeffrey Keith Bass
- Abra Leigh Noelle Belke
- Kevin Michael Bratcher
- Jordan Raymond Bridgman
- Julie Ann Casey
- Madeline Marie Clark
- Kaitlin Lyn Crowell
- Nathan Rolfe Eaton
- Daniel Andrew Elsen
- Lindsay Mikal Garpestad
- Van Ellis Gillette
- Emil Andrew Gjester
- Daniel Rashad Horton
- Sarah Genevieve Klein
- Dustin Lee Kuipers
- Erin Elizabeth Mahaney
- Ralph Lewis Matthews
- Karla Lizeth Mendez Arellano
- Ryan Alexander Payne
- Helena Theresa Pegram
- Lee Ann Marie Pekovitch
- Mason Breckenridge Reay
- Kelsey Sabol
- Holly Ann Seymour
- Amanda Gail Smith
- Kathleen Lynn Smithgall
- Austin Irene Helene Wallis
- Lindsay Kay Whalen

### 50TH ANNIVERSARY CONSTITUTION CELEBRATION JUNE 15-16 — STATE CAPITOL, HELENA — CLE CREDIT PENDING

#### Wednesday June 15th

- **Opening Greetings** from former Governor Ted Schwinden, remarks from former Governor Brian Schweitzer, and welcome from Governor Greg Gianforte.
- **Panel Discussions 1-2:**
  - o "The Beginning" – How it came to be: why, when, what, and who"
  - o "Let the Sunshine In" Right to Know, Right to Participate, Open Government at all levels.
- **Evening cocktail reception** at the Montana Historical Society.

#### Thursday June 16th

- **Welcome from Chief Justice McGrath**
- **Lunch in the Rotunda** with guest speakers: Montana's Constitution and Native Americans
- **Panel Discussions 3-7:**
  - o "The Basic Rule of Law: the Backbone of a Constitution" The separation of powers and checks and balances in the three branches of government.
  - o "Natural Resources and Water" Montana's Constitution



is unique among State Constitutions in providing the Right to a Clean and Healthful Environment. What does this mean, and what have been the implications?

- o "Montana's Unique and Comprehensive Declaration of Rights"
- o "Revenue and Taxation" – Basic provisions of the Constitution.
- o "Education and Public Lands"
- **Closing remarks** with Mae Nan Ellingson, former Governors Marc Racicot and Steve Bullock.

## GALLAGHER

FROM PAGE 8

both the Federal Defender and private communities.

In addition, Gallagher has contributed to his local community in Great Falls and the surrounding area, serving as a small college football official, and an American Legion baseball umpire for more than 30 years. To this day, Tony continues to be a high school football official.

Although he is retiring from the executive director position, after enjoying retirement for a bit, he will continue to practice federal criminal defense.



# THE LAWYERS OF THE 1972 CONSTITUTIONAL CONVENTION

24 Montana attorneys served among the 100 delegates at the convention. The landmark document they helped create remains strong 50 years later.

By Joe Menden

Photos courtesy of Montana Memory Project and Digital Commons at Montana Tech



“I think our Constitution is the finest gift to the young people of Montana that it is within our power to give.”

James C. Garlington, Missoula in a speech to delegates before the signing of the Constitution



**James Garlington signs the newly drafted Montana Constitution on March 22, 1972. At his left is delegate Jean Bowman, who is one of three delegates who became lawyers after the convention.**

This spring marked the 50th anniversary of Montana's momentous 1972 Constitutional Convention.

That year, 100 Montanans gathered in Helena for the monumental task of drafting a new constitution over 56 days. The result of their work was a document signed by all 100 delegates – 58 Democrats, 36 Republicans and six Independents. Of those 100 delegates, 24 were lawyers – 14 Democrats, nine Republicans and an Independent.

The document created by the 100 delegates who gathered in Helena 50 years ago was not without detractors or controversy. Voters ratified it by the slimmest of margins of only 2,532 votes, and it survived a court challenge by a 3-2 decision in the Montana Supreme Court. But it has stood the test of time, thanks in large part to the 24 lawyer-delegates, who brought expertise from a variety of subject matters – taxation, government, water law, property law, and, of course, a deep understanding of how the law works and how to make the constitution stand up to the scrutiny they knew it would receive. In 2010, the Constitution's lasting strength was demonstrated when voters rejected a proposal for a new constitutional convention by a 59-41 margin.

Despite the fact that delegates were required to run as a member of

a political party and Democrats held a large majority, the convention was by all accounts a nonpartisan affair. That nonpartisan atmosphere was cultivated by Convention President Leo Graybill, a lawyer from Great Falls, who set the tone by seating delegates in alphabetical order rather than by party affiliation.

Among Graybill's other important decisions were his choices for committee assignments. Over 80% of the delegates were assigned to their first choice of committees, and all but four were assigned to one of their top four choices. But, as Graybill noted in his foreword to the transcript of the convention, he also took care to ensure each committee was balanced based on party representation while also containing people who were strong advocates of opposing ideologies on the subject.

Noted Thomas Joyce, a lawyer-delegate from Butte who served as the chairman of the Executive Committee: “no vote in the Convention itself other than the election of officers was decided on party lines.”

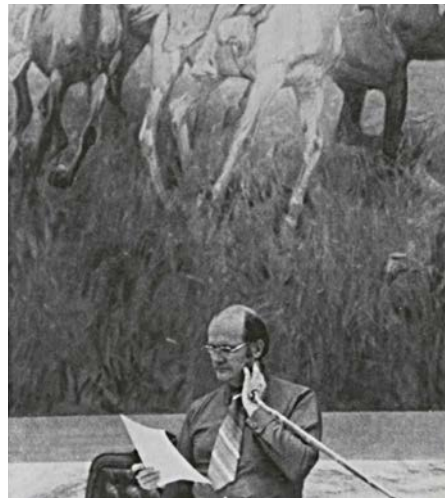
Illustrating that nonpartisan spirit was James Garlington of Missoula, a Republican who at 64 was the elder statesman among the lawyer-delegates. Garlington would go on to be one of the most outspoken advocates for its ratification after the convention.





**“** It always seems amazing to me that the voters could choose 100 of us to undertake that monumental task and that Leo Graybill and his staff could organize and distribute us among the 10 committees. The result was a document that was accepted by the voters and will serve their best interest in future years. **”**

OSCAR ANDERSON, CHAIR OF THE CONVENTION'S LOCAL GOVERNMENT COMMITTEE



**President Leo Graybill Jr. stands at the dais during the Constitutional Convention.**

“I think our Constitution is the finest gift to the young people of Montana that it is within our power to give,” Garlington said, in a speech before the document was signed. “We are giving them the gift of participation in their present, and the management of their future, on a ship of state that is far more manageable and sensitive than the old one which we have had. I shall therefore be intensely proud to sign our document tomorrow. My act of signing will also be my act of commitment to do all I can to procure its ratification, and beyond that, to help whenever I can in its transition to full power and effectiveness.”

Lawyers played major roles in many of the substantive committees. Wade DaHood, a Republican from Anaconda, chaired the Bill of Rights Committee, which also contained lawyers Bob Campbell, a Democrat, and Marshall Murray, a Republican. Dave Holland of Butte chaired the Judiciary Committee, whose members included lawyers Cedor Aronow, John Schiltz and Ben Berg. The Style and Drafting Committee, chaired by Schiltz, also included lawyers Dave Holland, Bob Kelleher, Berg and Garlington as members. The Rules Committee, chaired by attorney Marshall Murray, also included attorneys Thomas Ask, Jerome Loendorf and Joyce.

Mae Nan Ellingson, who at age 24 represented Missoula as a Republican at the convention, was the youngest of the 1972 delegates. She was not a lawyer at the time, but inspired by the process, and at the urging of several of the lawyer

delegates, she began law school the year after the convention. She earned her J.D. from the University of Montana School of Law in 1976 and went on to a long legal career. Ellingson co-authored a 2011 Montana Law Review article detailing the contributions the lawyer-delegates made to the convention. In a foreword to that article, she wrote that she often felt overpowered by them because their opinions seemed to carry more weight by virtue of their law degrees. But she added:

“The truth is that as a result of their experience, legal education and the skills and knowledge they honed in their respective practices, the lawyers were more knowledgeable than many of us non-lawyer delegates. And the decisions made by the convention as a whole were better and more informed as a result of the lawyers’ scrutiny . . . .”

Much has been written, both in Montana and nationally, about the constitution and its delegates over the years. Upon its ratification, it was considered a groundbreaking achievement – the New York Times once referred to it as a “prairie revolution” and according to a 1999 survey found the group of 100 delegates second on the list of most influential Montanans of the 20th century, trailing only Mike and Maureen Mansfield.

The following pages contain photos and brief biographical sketches along with photos and quotes of the 24 lawyers who played such a pivotal role in drafting and advocating for the 1972 Montana Constitution.

## THE 24 LAWYER DELEGATES

### Franklin Arness, Democrat-



**Libby.** Arness was born March 27, 1933, in Grafton, N.D. Prior to the convention he was elected county attorney in

Lincoln County and served as city attorney in Libby before working for Fernesey and Crocker Law Firm. He and his wife, Raila, had two children. He served on the convention’s Local Government Committee. Arness, now 89, is one of 10 living delegates, including three attorney-delegates.

### Cedor B. Aronow, Democrat-

**Shelby.** Aronow was born Sept. 10, 1910, in Odessa, Russia (now Ukraine). He served on the convention’s Judiciary Committee. His family came to Montana in 1911. Prior



to the convention, he served in the Montana House of Representatives from 1949-1953, and he served as a delegate to the 1956 Democratic National Convention. He and his wife, Jane, had three children. He died in 1991.



**Thomas Ask, Republican-Roundup.** He was born on July 19, 1925, in Forsyth. He graduated from the University of Montana with a law degree and a degree in business administration in 1953.



After a year in private practice he was elected county attorney of Musselshell County in 1954, serving in that role for 12 years.

During the convention he served on the Local Government Committee and the Rules and Resolution Committee. He and his wife, Margaret, had four children. He died in 2015 just short of his 90th birthday.

**Ben Berg, Republican-Bozeman.**

Born Dec. 17, 1916, Columbus. He served for 15 years as city attorney in



Bozeman before he was elected to the convention. He served on the convention's Judiciary Committee and the Style, Drafting and Transition

Committee. He and his wife, Joan, had four children. He died in 2011 at age 94.

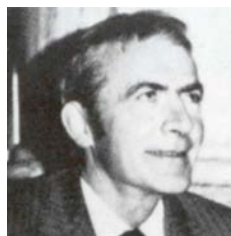
**Geoffrey L. Brazier, Democrat-Helena.** Born Nov. 8, 1929, Helena.

A 1957 graduate of the University of



Montana School of Law, he was He served on the convention's Natural Resources and Agriculture Committee. He served as the first

Chairman of the Montana Consumer Counsel from 1973-1979. He and his wife, Marie, had three children. He died in 1995.



**Bruce Brown, Independent-Miles City.** Born Feb. 25, 1922, in Miles City. He served on the convention's Executive Staff

as the Eastern District Vice President and the General Government and Constitutional Amendments Committee and ex officio on the Public Information Committee. He and his wife, Margaret, had five children. He died in 2000 at age 78.

**Robert Campbell, Democrat-Missoula.** Born Dec. 21, 1940, in Sidney.

During the Convention, Cambell served



on the Bill of Rights Committee and submitted proposals on the Preamble, the right of privacy, a clean and healthful environment, and making the

age of majority uniform at 18. These proposals were included in the final document. He and his wife, Mary Ann, had two children. He died on April 5 at age 81. See obituary on page 36,

**Jerome J. Cate, Democrat-Billings.**

Born Sept. 19, 1939, in Baker. He received his J.D. from the University of Montana School of Law in 1966. He



was a Legal Intern in the office of Attorney General, State of Montana in the summer of 1965, and became an associate of the law firm of Sandall, Moses

and Cavan in Billings, Montana from 1966 to 1972. Cate was active in politics much of his life, including serving as president of the Carroll College Young Democrats in 1960. He would be chairman of Yellowstone County Central Committee and serve on the Executive Committee of the Montana Democratic Party. Cate served on the Convention's Legislative Committee. He and his wife, Mary, had two children. He died in 1995.



**Wade DaHood, Republican-Anaconda.** Born Dec. 31, 1927, Brooklyn, N.Y., and his family moved to

Montana in 1928. He and his wife, Grace, had five children. He served as chair of the Bill of Rights Committee during the convention. He is founder and past president of the Montana Trial Lawyers Association. His firm, Knight & DaHood, is still operating in Anaconda. He died on April 18 at age 94. See obituary on page 36.

**Carl M. Davis, Democrat-Dillon.**

Born Nov. 21, 1922, Dillon. Davis earned an LL.B degree from the University of Montana in 1949. That

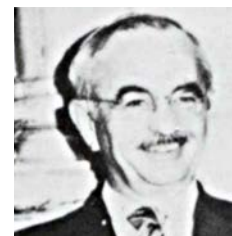


year he opened a general practice in Dillon that lasted as Schulz, Davis and Warren for his entire 40-plus career in law. He was inducted into the Hall of Fame

of Western Montana College, which he attended from 1940-1942 and where he served on the Executive Board for 14 years. He and his wife, Martha, had four children. He died in 2012 at age 89.

**James Felt, Republican-Billings.**

He was born in Glendive on Dec. 9, 1920. Graduated from the University of Montana Law School in June 1943.



After earning a Master of Laws in Taxation from New York University in 1946, he opened his own law office in Billings specializing in taxation. A devoted

Republican, Felt served five terms in the Montana House of Representatives from 1954-60, and from 1965-69, Speaker of the House. He served on the convention's Executive Committee. He and his wife, Merice, had seven children. He died in 1993 at age 72.



**James C. Garlington, Republican-Missoula.** March 24, 1908, Missoula. Graduated from

**MORE DELEGATES, NEXT PAGE**

## DELEGATES FROM PREVIOUS PAGE

UM with BA and LL.B. degrees. Was principal of several firms in Missoula before founding Garlington, Lohn and Robinson in 1955, now one of the state's largest firms. President of the Montana State Bar Association 1949-50. He was Vice Chairman of the Convention's Executive Committee and served on the Style, Drafting and Transition Committee. He and his wife, Nancy, had three children.

**Leo C. Graybill Jr., Democrat-Great Falls.** Born in Belt, March 28, 1924. Graduated from both Yale Law School and the University of Montana School of Law. During the convention, Graybill served as the Convention's President and as ex-officio on all Committees and was widely praised for overseeing the tremendous task. Graybill was the second genera-



tion in a long line of Montana attorneys. His father, Leo C. Graybill Sr., moved to Montana after World War I and formed a law partnership with his brother F.L. Graybill. He and his wife, Sherlee, had three sons, and two more generations of Graybills followed him into the practice of law.

**Otto Habedank, Republican-Sidney.** Born Oct. 8, 1917, Bowdoin. Studied law by correspondence while working as a court reporter. After passing equiva-



lency tests from the University of Montana, passed the bar and formed what would become the oldest law partnership east of Billings, eventually known as Habedank Cumming, Best, Maltese & Savage. Served on the General Government Committee. He and his wife, Arleen, had four children. He died in 2010 at age 92.

**David L. Holland, Democrat-Butte.** He was born June 27, 1924, in Butte. Holland had a long career in public service before the convention, serving as an assistant attorney general, Butte City Attorney, Chief Deputy County Attorney, and U.S. Commissioner. He served on the convention's



Judiciary Committee as chairman and on the "Style, Drafting and Transition" Committee. He and his wife, Mary Loy Murphy, had four children.

**Thomas Joyce, Democrat-Butte.** He was born April 18, 1923, Anaconda. After he earned a mathematics degree from the University of Montana he went on to receive an LL.B. in 1949, both with honors. After bar admission, he served



as an assistant attorney general, a deputy county attorney and city attorney of Butte from 1957-59. He was a partner in the law firm of Burgess, Joyce & Whelan in Butte. He served as the chair of the convention's Executive Committee and served on the Rules Committee. He and his wife, Dorothy, had 12 children. His Montana legal legacy is continued by three of his children who are now lawyers in Butte: Eileen, Bill and Tom.

**Robert Kelleher, Democrat-Billings.** Born March 30, 1923, Oak Park, Ill. He served on the Convention's Legislative Committee and the Style, Drafting and Transition Committee. Was a frequent candidate for public office after the convention as a



member of the Democratic Party, Green Party, and Republican Party, including winning the Republican primary for

U.S. Senate in 2008, losing to Sen. Max Baucus. Died in 2011 at age 88, a practicing lawyer until his death according to news reports at the time. He and his wife, Geraldine, had six children.

**Jerome T. Loendorf, Republican-Helena.** He was born June 5, 1939, in Wolf Point. Earned his J.D. from the University of Montana School of Law in 1964. He was Lewis and Clark County



Attorney at the time of the convention. During the convention he served as vice chair of the Legislative Committee and served on the Style, Drafting and Transition Committee. He was a partner with Harrison, Loendorf, Poston and Duncan from 1966 through 2003. Now 82, he currently resides in Helena and is a member of the 50th anniversary Constitutional Convention Celebration Committee.

**Russell C. "Swede" McDonough, Democrat-Glendive.** Born Dec. 7, 1924, in Glendive. Earned his J.D.



from George Washington University in 1949. He served on the convention's Revenue and Finance Committee. After the convention

he was elected as a judge in Montana's Seventh Judicial District in 1982. In 1987 he was appointed to the Montana Supreme Court. He retired from the court in 1993. He died April 3, 2018. He and his wife, Dora, had six children.



**Michael "Mick" McKeon, Democrat-Anaconda.** Born July 17, 1946, in Anaconda. McKeon graduated from Notre Dame in 1968 before earning his J.D. from the



University of Montana School of Law in 1971. He was elected as a delegate to the Constitutional Convention that year. At 25 years old, he was the second youngest delegate to the convention. He served on the convention's Revenue and Finance Committee and the Administration Committee. In 1992 he and Rick Anderson, his law partner at the time, won a federal court verdict of \$11.5 million, which at the time and for years later was the largest verdict in Montana. Mick and his wife, Carol, had two sons, Michael and Matthew, who are both Montana attorneys. McKeon died on April 15, 2020, at age 73.

**Charles B. "C.B." McNeil, Republican-Polson.** Feb. 17, 1937. McNeil was a 1966 graduate of the



University of Montana School of Law. After the convention he was elected to five terms and served 29 years as a judge for Montana's 20th Judicial

District. He served on the convention's National Resources and Agricultural Committee. He and his wife Jo Ann, had two children. His son Charles is a lawyer in Missoula. He died in 2017 at age 80.

**Marshall Murray, Republican-Kalispell.** Born Aug. 29, 1932 in Eureka. He graduated with a law degree from the University of Montana in 1956 and began practicing law in Kalispell in 1959. He served in the Montana House of



Representatives from 1960-64. Chair of the Rules Committee and served on the Bill of Rights Committee and was the convention's floor manager. After the convention he became a special assistant attorney general for the State of Montana, and in 1975 he became the first president of the unified State Bar of Montana. He eventually moved back to Kalispell, becoming the

senior principal attorney in the firm Murray, Kaufman, Vidal & Gordon. He and his wife, Joan, had three children. Daughter Marsha was an attorney for 35 years in Portland, Oregon. Now 89, he is one of three attorney-delegates who survive.

**John Schiltz, Democrat-Billings.** Born May 29, 1919, in Kremlin. After earning an LL.B. from the University of Montana, he practiced in Billings



for 26 years with classmate and future Montana Supreme Court Justice John "Skeff" Sheehy. His long career in Montana law was interrupted by

two stints in Texas, including handling the \$50 million Howard Hughes estate at the behest of the Texas attorney general. Schiltz served in the Montana House of Representatives in the 1951 and 1953 sessions. Though he ran as a Democrat for the convention, he served as a Republican in the legislature. Chair of the Style and Drafting Committee and served on the Judiciary Committee. He and his wife, Edna Marie, had four children. He died in 2012 at age 93.

**William Swanberg, Democrat-Great Falls.** Born Aug. 29, 1916, in Great Falls. Swanberg graduated from the University of Montana in 1940 with an LL.B. degree. After a year as



a law clerk for the Montana Legislature, he was drafted into the Army in 1941, serving in the Pacific Theater before being discharged to the

Army Reserve in 1945. After the war, he practiced law in Great Falls from 1945-1961. During that time he served two terms each as a city alderman and mayor of Great Falls. During the convention he served on the Public Health Welfare and Labor Committee. He and his wife, Marie, had seven children.



**Marshall Murray, chair of the Rules Committee, is seen with Diana Dowling. Dowling, a young lawyer at the time, was among many non-delegate lawyers who performed key roles, serving as a research coordinator and counsel.**

“ The rules of our Convention were the most advanced set of rules then adopted by any state constitutional convention, and encompassed the most open and flexible procedures and rules utilized to that date. I have been informed that they have been used as, and now serve as, a model for other state constitutional conventions. ”

MARSHALL MURRAY,  
CHAIR OF THE RULES COMMITTEE





**The Constitutional Convention's Bill of Rights Committee counted three lawyers among its 10 members, including chairman Wade Dahood. Pictured are, from left, Chet Blaylock, attorney Robert Campbell, Dorothy Eck, Bob Hanson, Dahood, George James, Rachel Mansfield, Lyle Monroe, attorney Marshall Murray, and Veronica Sullivan. Don Foster was also on the committee.**

## Bill of Rights Committee dedicated to citizen rights

One of the most important committees in the Constitutional Convention — and most scrutinized in the years since — was the Bill of Rights Committee, chaired by attorney-legislator Wade Dahood of Anaconda. The scrutiny is largely because the Montana Constitution is unique in the number of specific rights it provides to citizens: Article II, “Declaration of Rights” contains 35 sections (see below.) The Declaration of Rights has many

champions and vocal critics alike.

In a historical volume published by the Montana Centennial Commission in 1989, Dahood, a Republican, wrote that he fondly recalled the committee members’ concern for citizen rights and their intense desire for a declaration of rights that would be meaningful to citizens.

“The members of the Bill of Rights Committee were all dedicated to drafting and submitting a

declaration of rights of which all Montanans could be proud. This was accomplished,” Dahood wrote.

“After all these years since our adjournment the conflict between citizen and state rages on but there is greater opportunity for the citizen to be heard and to protect his rights because of the exemplary dedication exemplified by all of us who honored our trust as an elected delegate on behalf of the people of the State of Montana.”

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### ARTICLE II, DECLARATION OF RIGHTS

- |   |  |  |
|---|--|--|
| 1. Popular Sovereignty                      | 14. Adult Rights                           | 27. Imprisonment for Debt  |
| 2. Self-Government                          | 15. Rights of Persons Not Adults           | 28. Criminal Justice Policy—Rights of the Convicted                    |
| 3. Inalienable Rights                       | 16. The Administration of Justice          | 29. Eminent Domain   |
| 4. Individual Dignity                       | 17. Due Process of Law                     | 30. Treason and Descent of Estates                                     |
| 5. Freedom of Religion                      | 18. State Subject to Suit                  | 31. Ex Post Facto, Obligation of Contracts, and Irrevocable Privileges |
| 6. Freedom of Assembly                      | 19. Habeas Corpus                          | 32. Civilian Control of the Military                                   |
| 7. Freedom of Speech, Expression, and Press | 20. Initiation of Proceedings              | 33. Importation of Armed Persons                                       |
| 8. Right of Participation                   | 21. Bail                                   | 34. Unenumerated Rights  |
| 9. Right to Know                            | 22. Excessive Sanctions                    | 35. Servicemen, Servicewomen, and Veterans                             |
| 10. Right of Privacy                        | 23. Detention                              |  |
| 11. Searches and Seizures                   | 24. Rights of the Accused                  |  |
| 12. Right to Bear Arms                      | 25. Self-Incrimination and Double Jeopardy |  |
| 13. Right of Suffrage                       | 26. Trial by Jury                          |  |



# Wait, the IRS has how long to audit? Beware of common misconceptions

By Robert W. Wood

It would be very satisfying to say, “Sorry, IRS, you are too late to audit me!” It can save you stress and expense, and avoid having to prove that you were entitled to a deduction or find receipts. The IRS statute of limitations is important for heading off audit trouble, whether you are an individual, corporation, partnership, nonprofit organizations and individuals are consistent. Here’s what you need to know.

## Myth #1. The IRS Has 3 Years, and Then You’re Home Free

Not really. It is true that the main federal tax statute of limitations runs

three years after you file your tax return. But there are many exceptions that give the IRS six years or longer. Timing can be critical. If your tax return is due April 15, but you file early, the normal statute runs three years after the *due* date. Filing early does not start the three years to run. If you get an extension and file on October 15, your three years runs from then. If you file late and *do not* have an extension, the statute runs three years following your actual (late) filing date.

The statute is six years if your return includes a “substantial understatement of income.” Generally, this means you have left off more than 25 percent of your gross income. Suppose that you earned \$200,000 but only reported

\$140,000? You omitted more than 25 percent, so that means you can be audited for six years.

The circumstances can matter too. Maybe this was unintentional or reporting in reliance on a good argument that the extra \$60,000 wasn’t your income. That means the six-year statute applies. But be aware that the IRS *could* argue that your \$60,000 omission was fraudulent.

If so, the IRS gets an unlimited number of years to audit, as we will see. What about not an omission of income, but overstated deductions? The six-year statute of limitations does not apply if the underpayment of tax was due to the overstatement of deductions or credits.



“ Innocent mistakes can sometimes be interpreted as suspect. It pays to know how far back you can be asked to prove your income, expenses, bank deposits and more. ”

## MYTHS

FROM PREVIOUS PAGE

### Myth #2: Only Omitting 25% of Your income Triggers 6 Years

Actually, the 25% is a practical one. For years, there was litigation over what it *means* to *omit* income from your return. Taxpayers and some courts said «omit» means leave off, as in don't report. But the IRS said it was much broader.

Example: You sell a piece of property for \$3M, claiming that your basis (what you invested in the property) was \$1.5M. In fact, your basis was only \$500,000. The effect of your basis overstatement was that you paid tax on \$1.5M of gain, when you should have paid tax on \$2.5M.

In *U.S. v. Home Concrete & Supply, LLC*,<sup>1</sup> the Supreme Court slapped down the IRS, holding that overstating your basis is *not* the same as *omitting* income. The Supreme Court said 3 years was plenty for the IRS to audit. But Congress *overruled* the Supreme Court and gave the IRS six years in such a case, so that is the current law. Six years can be a long time.

### Myth # 3: No Return or Fraudulent Return

The IRS has no time limit if you never file a return, or if it can prove civil or criminal fraud. If you file a return, can the IRS ever claim that your return didn't count, so that the statute of limitations never starts to run? Yes. If you don't sign your return, the IRS does not consider it a valid tax return. That means the three years can never start to run.

Another big no-no is if altering the 'penalties of perjury' language at the bottom of the return where you sign. If you alter that language, it also can mean that the tax return does not count. Such a move may sound like tax protester statement. However, some well-meaning

taxpayers forget to sign, or may unwittingly change the penalties of perjury wording. Some other taxpayers just miss a form to end up in audit purgatory.

### Myth #4: Foreign Income, Foreign Gifts and Assets Are the Same.

Nope, this kind foreign income and assets are different to the IRS, and they trigger tougher rules. The IRS is still going after offshore income and assets in a big way, and that dovetails with another IRS audit rule. The three years is also doubled if you omitted more than \$5,000 of foreign income (say, interest on an overseas account).

This rule applies even if you disclosed the existence of the account on your tax return, and even if you filed an FBAR reporting the existence of the account. This six years matches the audit period for FBARs. FBARs are offshore bank account reports that can carry civil and even criminal penalties far worse than those for tax evasion.

Certain other forms related to foreign assets and foreign gifts or inheritances are also important. If you miss one of these forms, the statute is extended. In fact, the statute never runs. If you receive a gift or inheritance of over \$100,000 from a non-U.S. person, you must file Form 3520. If you fail to file it, your statute of limitations never starts to run.

IRS Form 8938 was added to the tax law by FATCA, the Foreign Account Tax Compliance Act. Form 8938 requires U.S. filers to disclose the details of foreign financial accounts and assets over certain thresholds. This form is separate from FBARs, and is normally filed with your tax return.

The thresholds for disclosure can be as low as \$50,000, so it pays to check out the filing requirements for your situation. Higher thresholds apply to married taxpayers filing jointly, and U.S. persons residing abroad. But the forms are nothing to ignore. If you are required to file Form 8938 and skip it, the IRS clock *never even starts* to run.

### Myth #5: U.S. and Foreign Companies are Treated the Same.

Not hardly. If you own part of a foreign corporation, it can trigger extra reporting, including filing an IRS Form 5471. It is an understatement to say this form is important. Failing to file it means penalties, generally \$10,000 per form. A separate penalty can apply to each Form 5471 filed late, incomplete or inaccurate. This penalty can apply even if no tax is due on the whole tax return. That is harsh, but the rule about the statute of limitations is even harsher.

If you fail to file a required Form 5471, *your entire tax return remains open for audit indefinitely*. This override of the normal three year or six-year IRS statute of limitations is sweeping. The IRS not only has an indefinite period to examine and assess taxes on items relating to the missing Form 5471. In addition, the IRS can make any adjustments to the *entire* tax return, with no expiration until the required Form 5471 is filed.

You can think of a Form 5471 a bit like the signature on your tax return. Without the form, it is almost as if you didn't file a return. Forms 5471 are not only required of U.S. shareholders in controlled foreign corporations. They are also required when a U.S. shareholder acquires stock resulting in 10 percent ownership in any foreign company. The harsh statute of limitation rule for Form 5471 was enacted in 2010, part of the same law that brought us FATCA, the Foreign Account Tax Compliance Act.

### Myth #6: Limits for Amended Tax Returns

If you want to amend your tax return, you must do it within three years of the original filing date. You might think that amending a tax return would restart the IRS's three-year audit statute, but it doesn't. However, where your amended tax return shows an *increase* in tax, and when you submit the amended return within 60 days

<sup>1</sup> 132 S. Ct. 1836 (2012).



before the three-year statute runs, the IRS only has 60 days after it receives the amended return to make an assessment. This narrow window can present planning opportunities. In contrast, an amended return that does *not* report a net increase in tax does not trigger an extension of the statute.

### **Myth #7: Time Limits on Tax Refunds**

Getting money back from the IRS is hard. If you pay estimated taxes, or have tax withholding on your paycheck but fail to file a return, you generally have only two years (not three) to try to get it back. Suppose you make tax payments (by withholding or estimated tax payments), but you have not filed tax returns for five years. When you file those long-past-due returns, you may find that overpayments in one year may not offset underpayments in another. This is painful, resulting in lost tax money, and it catches many taxpayers unaware.

### **Myth #8: It's a Mistake To Give the IRS More Time**

On the contrary, usually if the IRS wants more time to audit you, you should generally agree. The IRS must normally examine a tax return within three years, unless one of the exceptions discussed here applies. The IRS tracks the three-year statute, but the IRS may need more time to audit.

The IRS may contact you asking you to sign a form extending the statute. It can be tempting to say no, but saying no is often a mistake.

It usually prompts the IRS to send a notice assessing extra taxes, without taking the time to thoroughly review your explanation of why you do not owe more. The IRS may make very unfavorable assumptions. Thus, most tax advisers tell clients to agree to the requested extension. You may, however, be able to limit the scope of the extension to certain tax issues, or to limit the time (say, an extra year).

### **Myth #9: Counting the Years is Easy**

Counting three years is easy, but it can be tough to apply the statute and to count those three years in some cases.

For example, say an IRS notice is sent to a partnership, but not to its individual partners. The partnership tax rules may give the IRS extra time. In other cases, the statute may be “tolled” (held in abeyance) by an IRS John Doe summons, even though you have no notice of it.

A John Doe summons is issued not to taxpayers but to banks and other third parties who have relationships with taxpayers. You may have no actual notice that the summons was issued. Yet it can extend *your* statute of limitations. This can occur if a promoter has sold you on a tax strategy. The IRS may issue the promoter a summons asking for all the names of his client/customers. While he fights turning those names over, the statute of limitations clock for all of those clients is stopped.

Another situation in which the IRS statute is tolled is where the taxpayer is outside the United States. If you flee the country for years and return, you may find that your tax problems can spring back to life.

### **Myth #10: You Don't Need To Worry about the States**

Actually, state tax filings matter a lot. The IRS may audit first and the state later, or the reverse. They are usually connected. Some states have the same three- and six-year statutes as the IRS. Some have their own, like California, where the basic tax statute of limitations is four years, not three. In California if the IRS adjusts your federal return, you are *required* to file an amended return to match up what the feds did. If you don't, the California statute will *never* run out.

In most states, if you never file a return, the state statute never starts to run. That means thinking about your exposure. In California, for example, if you move out, filing non-resident returns just to report California source income to start California's statute can be wise. There can be many tricky interactions between state and federal statutes of limitations.

### **Myth #11: Proof of Filing Isn't Important**

Actually, being able to prove exactly when you filed and exactly what forms were included can be critical. For that

reason, keep scrupulous records, including proof of when you mailed your returns. The difference between winning and losing may depend on your records. The vast majority of IRS disputes are settled, and getting a good or mediocre settlement can hinge on your records too. The statute usually begins to run when a return is filed, so keep certified mail or courier confirmation.

If you file electronically, keep all the electronic data, plus a hard copy of your return. As for record retention, many people feel safe about destroying receipts and back-up data after six or seven years. However, never destroy old tax returns. Keep copies forever. Also, do not destroy old receipts if they relate to basis in an asset.

For example, receipts for home remodeling 15 years ago are still relevant, as long as you own the house. You may need to prove your basis when you later sell it, and you will want to claim a basis increase for the remodeling 15 years back. For all these reasons, be careful and keep good records.

### **Conclusions**

An audit can involve targeted questions and requests on particular items only. Alternatively, audits can cover the waterfront, asking for proof of virtually every line item. Even if you do your best with your taxes, taxes are horribly complex.

Innocent mistakes can sometimes be interpreted as suspect, and digging into the past is rarely pleasant. Records that were at your fingertips when you filed might be buried or gone even a few years later, so the stakes can be large.

Tax lawyers and accountants are used to monitoring the duration of their clients' audit exposure, and so should you. It pays to know how far back you can be asked to prove your income, expenses, bank deposits and more. Watch the calendar until you are in the clear.

***Robert W. Wood practices law with Wood LLP ([www.WoodLLP.com](http://www.WoodLLP.com)) and is the author of *Taxation of Damage Awards and Settlement Payments* and other books available at [www.TaxInstitute.com](http://www.TaxInstitute.com). This discussion is not intended as legal advice.***

# The gift of a Montana law dog: An obituary for a very good boy

Though this is a story about a dog, I'll need to begin with a brief confession. Maybe like some of you, I had reservations about becoming a lawyer. I wonder why I chose to be surrounded by so much fighting and sadness, even though I know that I care about and genuinely like the people I'm helping. I don't identify as a fighter or zealot. Even when I try to define a lawyer as a problem solver, we come across those clients who just don't want to solve problems but instead want to fight or to punish. There is a much lower percentage of "justice" than what I was promised. It's a constant struggle to stay true to who I am while making strides to reach resolution, and I don't always feel like I can do it. But, for my entire 13-year legal journey, I had a helper with all of this<sup>1</sup>, with finding what it means to me to be a lawyer, and this is his story:

Having lived the whole first year of his life in the wild back woods of Ravalli County subsiding off grubs, trash, and the occasional kindness of strangers, Trapper ("Gary" as he was first-known) was surprised when we gave him a whole bowl of food, just for himself. He looked at us, looked at the food, and booped his nose on the edge of the bowl to spill kibble across the floor so he could at least forage for it. As he ate he watched his back, waiting to take a bite until it looked like we weren't watching, giving us a look of victory that said, "these dummies are just leaving this here! I'm eating it RIGHT IN FRONT OF THEM!" We chose him at the humane society when, as we walked down the aisle of barking dogs, Gary couldn't be bothered to get up. He was sitting with his back to the chain-link kennel wall and instead of turning around and jumping up the fence like his brethren,

he stayed with back to us and craned his head up, over and backwards to gaze at us upside down. He made the minimum effort necessary to see what the ruckus was about. "We'll take him," we said, and the rest was history.

For the next year of his life he learned to be a dog but believed he was human. When we crawled in bed and put our heads on the pillow, he did the same. When we went into a restaurant and pulled up a chair, he did the same (literally, Lima bar 2009, he thought there'd be fries.) When we gave him toys he would dawn a look of confusion and wander off.

He knew that when he was left at home he had clearly been left for dead. His only choice was to eat all the food in the pantry and litter the house with garbage. He dug a three-foot-deep trench under the fence to escape the backyard only to lie in the sun in the front yard. And his crowning achievement was to break through drywall, a window screen, and a locked window to break out of the attic and on to the roof. At this point I learned that the fire department only rescues pets from up high on TV. So, since he preferred being tied to a pole on the street to suffering through being home alone he spent many hours greeting friends at the brewery, restaurants downtown, and on the law school campus where his interminable sit-stay kept him happily napping and greeting for hours and he became a Missoula-famous dog fixture.

Trapper excelled at such games as "fairy princess dress-up," and "you-throw-a-ball-then-you-go-get-it." He destroyed no less than three and as many as nine couches, but he was right: they weren't fluffy enough, and leather couches are dumb. He loved his little girls, friends, hiking, camping, Christmas, and sledding. He could take or leave cats. Probably leave.

Trapper did not know how to walk,



MERI ALTHAUSER

***Meri Althaus is an attorney of over 10 years practicing family law and mediation in Missoula. Her practice focuses on collaboration and solution-finding for her clients and their families. She also offers consulting services in workplace wellness, with a certification as a Workplace Wellness Specialist through the National Wellness Institute and as a Resilience and Thriving Facilitator through Organizational Wellness and Learning Systems.***

## MORE PHOTOS ONLINE

Visit Meri's blog at [www.forwardlegal406.com](http://www.forwardlegal406.com) for all of the photos to accompany this post.

<sup>1</sup> I also know I'm preaching to the choir. When I survey attorneys about why they became a lawyer, a good 20% add the "other" choice to write in "so I can bring my dog to work!" You're my people.

instead his only mode of transportation was a bouncy trot, like a fancy horse. He achieved great feats of athletics and laziness simultaneously, in character with his unusual mix of Labrador and Shar-Pei. He ran and hiked endless miles with the boys and hit enough trails and peaks to write a dog's guide to Montana. He was the best man at our wedding, standing proudly in the wedding party but taking several breaks to get pets and to walk to the lake shore for a drink. He fell asleep in the middle of the dance floor, needing to be dragged off by his feet to make room for the dancing. If he was too lazy to show his exuberance otherwise, he could defy the laws of biomechanics to wag the tip ... just the very last inch but no more ... of his fluffy tail.

He had a busier social calendar than anyone in the family. Our friends fought over who got to take him on hikes after work and even who got to take him camping on the weekends (his human family wasn't even invited!) When he would be recognized on the street by total strangers it was evident he had made dog and people friends in epic proportions.

For nine years Trapper accompanied me to work nearly every minute of every day. He was a highly trained legal assistant. When he greeted every client at the office door I introduced him saying, "this is Trapper, my legal assistant. He does all my typing so we're going to keep this simple." That joke worked every time.

He snuggled people's feet and whenever anyone got agitated he would magically appear with a heavy chin for their knee. His body was scaled, poked, smooshed, pulled, and smothered by numerous babies, puppies, and kittens, none of whom interrupted his #nap-goals. He mastered a technique we called "speed-bumpin" which was to lie in the direct path of any passers-by, so that they would be forced to pet and snuggle him with minimal effort on his part.

In November at the age of 14 he suffered a ruptured spleen, and we received the news that his days were numbered with untreatable cancer. He had surgery and was getting stronger every day, getting back into hikes, walks, and socializing more than he did in his



**Trapper was Meri Althaus's constant companion and legal assistant through the first 13 years of her legal career.**

previous years and we were tricked into thinking he was defying the odds. But just as predicted, something went terribly wrong again in late January and our buddy couldn't make it another day. We were thankful he had one last Christmas, a few last sled trips, many last hikes and playdates, and many, many last snuggles and treats.

After he passed and I returned to work, all by myself, I realized that he summoned optimism, kindness, and presence on a 0.2-hourly basis throughout my day. From time to time I reflexively reached to my feet to twirl his silky ear between my fingers with a "what next, bud?" "well... what do we do with THAT information!?"... "take a break?"... and most importantly... "yes we SHOULD go next door for snacks." He pulled me out of my work-zone and back to the moment with snuggles, pets, and demands to go see friends in our building. He was a constant source of loving mindfulness, the magnitude of which I could only truly realize when there was no longer the weight of that

thoughtful heavy head resting on my shoe. I can only wish that all of you have a person, reminder, companion, or enforcer of well-being in your lives like Trapper was in mine.

So, as I sat with my grief, dreading my days alone at my desk, all I could think of to do to get through the loss was to do this. To write about my very best buddy. To ease my suffering with words and to share his story with you from that first bowl of real food in a real home to the very last wag of the tip of his tail on the veterinarian's floor.

And isn't that what we all do? What the real, universal essence of what being a lawyer is all about?

Maybe sometimes we fight, or sometimes we problem-solve, but at the end of the day, we each do our best to ease suffering with words. To ease suffering by telling stories.

And what a hard-earned privilege that is.

Visit Meri's blog at [www.forward-legal406.com](http://www.forward-legal406.com) for all of the photos to accompany this post.



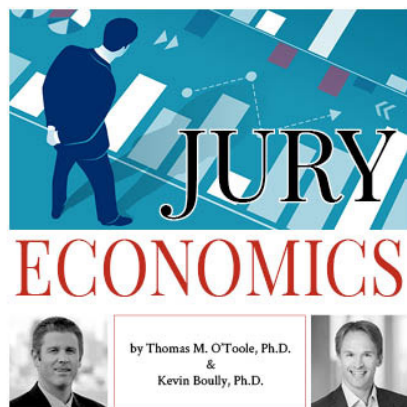
# Finding 'enough truth' in a lot of evidence

By Kevin R. Bouilly, Ph.D.  
and Thomas M. O'Toole, Ph.D.

In a recent interview with Steven Pinker on the podcast "Armchair Expert," Dax Shepard described people who "stay in the truth while also denying the reality." The conversation led to the example of the person who repeatedly tells himself that "one more french fry won't make me fat," while he eats a large serving of french fries. Each decision is made from myopic support, focusing on the reasoning that each time it is only "one more french fry," so how could that be harmful in the grand scheme? This discussion is striking in the way it captures what often happens at trial as jurors try to make sense of the evidence.

The idea of people who stay in the truth while also denying the reality is important because it changes the way we look at "truth" at trial. We often work with attorneys who are overconfident in their case because of their belief that the truth is on their side, but truth is not mutually exclusive or zero sum. It is rare or perhaps non-existent that the truth lies fully on one side. Instead, jurors are often left with two sides that each deliver some truth. Perhaps one side has a little more truth on their side, but that may not be relevant for jurors who only need partial truth to invest their full belief in one side's case.

Consider a breach of contract case involving fraud claims between two businesses. In this case, the plaintiff entered into a deal with the defendant where the plaintiff agreed to pay recurring fees to the defendant in exchange for ongoing services. In this case, the plaintiff is alleging fraud because the contract said the defendant could only raise fees under certain circumstances, which did not arise, yet the defendant still raised fees through a variety of convoluted and deceptive ways. The plaintiff's attorney in this case might feel confident in the case because they can show the fees were charged in convoluted and deceptive ways, but



the defendant has a powerful "partial truth" in its favor: the plaintiffs signed a contract that said the fees could go up. Sure, the contract said the fees could only go up under certain conditions, but the defendant's scheme was complex enough that it might just be easier for jurors to latch on to the simple fact the plaintiff agreed by contract that the fees could increase.

This touches on the first of four reasons jurors often cling to partial truths even when the balance of the truth favors a different conclusion. The first is complexity. Many cases have issues that are difficult to understand and require a lot of mental energy and work on the part of the jurors, but jurors may not have the motivation, energy, or stamina to do that work. If they feel overwhelmed by complexity or the effort required to decode complexity, partial truths become easy shortcuts, substituting hard work and comprehension for easy work and conclusory thinking. In this respect, jurors are cognitive misers, looking for the shortest and easiest path to a satisfying resolution. In the breach of contract/fraud case, the focus on the fact that the contract says fees could go up simplifies things for jurors. They can tell themselves the plaintiff signed up for a deal where they understood the fees could go up and are now complaining that fees went up. This is the reason so many attorneys with complex trial presentations struggle to break through to jurors who may not try very hard to

understand the issues.

The second reason jurors cling to partial truths is to protect their own world views. One of our favorite novelists, Haruki Murakami, once wrote, "Always remember that to argue, and win, is to break down the reality of the person you are arguing against. It is painful to lose your reality, so be kind, even if you are right." Jurors often cling to partial truths that reinforce the principles they hold dear and the way in which they believe the world works.

For example, many jurors tend to believe that large corporations always put profits before safety. Consequently, in a product liability case where the evidence overwhelmingly favors the corporate defendant, but there is a bad internal document or two where the defendant is focused on the profits, jurors might focus on those documents rather than all the evidence that supports the defendant because the story the documents tell reaffirms what those jurors already believe about how corporations act.

The third reason jurors cling to partial truths is they simply do not like one of the parties for any number of totally unrelated reasons. Maybe something the attorney said in voir dire rubbed them the wrong way and they have decided they just don't like that side now. Maybe they have a negative past experience that triggers a negative perception of a party. Now, they are motivated to cling on to any partial truth that reinforces their dislike of the other side. In fact, this is incredibly common in everyday life outside the courtroom. For example, marital discord often boils down to each spouse only focusing on the things the other has done that reinforce what they want to believe about the situation, often disregarding evidence to the contrary.

Finally, jurors often cling to partial truths because they ring true with their own personal experiences. One great example of this that we have seen

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# Don't forget that your nonverbal cues can sometimes cause trouble

The number of times I've observed or heard about a problematic nonverbal interaction with a client, and to which the involved lawyer or staff member was completely oblivious, probably wouldn't surprise anyone. After all, who hasn't walked away from an occasional conversation knowing they haven't been heard, been treated in an unexpected negative way from time to time, or occasionally felt uncomfortable upon entering a room. It happens, and when it does an impression about the interaction is formed. That's a potential problem, particularly if the problematic interaction occurred with a potential new client, current client, or even a referral source. This leads me to ask if nonverbal messages are something worth worrying about. As I see it, you bet they are.

Perhaps a few examples are in order to demonstrate why. I remember visiting a lawyer whose staff literally took dozens of phone messages during our 90-minute meeting, many of which were repeat calls. His clients were calling in five or more times an hour hoping to get through. Staff shared that this was commonplace because this lawyer would only get around to returning a call when doing so could no longer be avoided. In short, over time clients would start to figure out that the only way they could get their lawyer to respond was to be the one who became the biggest annoyance on any given day.

Another memorable situation occurred while I and a potential new client were sitting in the reception area of a small firm located in a rural community. The lawyer in question had been practicing at this firm for years and thus had a number of long-term attorney/client relationships within the community. As a result, the lawyer had developed a certain camaraderie and casual way of interacting with these folks. While we were waiting, one of this lawyer's long-term clients walked into reception

hoping to have a quick question answered. The lawyer happened to see the client enter and immediately walked right up to the client. After a warm "Hello!" and pat on the back he began discussing the established client's legal matter right in the middle of the reception area. The lawyer did this because he knew the established client wouldn't be concerned about discussing the issue in this public space. What was missed, however, was the extreme discomfort the potential new client was feeling by being allowed to overhear a discussion of someone else's legal issue.

A firm visit I will never forget involved experiencing the décor, and I use this term loosely, of a law firm that might be best described as old dusty attic storage. Signs, boxes, files, books, old furniture, you name it were strewn about throughout the firm. A walk down the hall to the conference room was like navigating an obstacle course. Clients were treated to this delightful experience every time they met with one of the firm's lawyers as this was the norm. From all appearances nothing had been cleaned or picked up in years.

In contrast, I once entered a firm's reception area where clients were present and found the space to be welcoming and well maintained. What wasn't was the receptionist. This young woman was slovenly dressed, had her feet on the counter in front of her, and was reading a paperback while chewing away on a wad of gum. I kid you not. I was forced to announce myself in order to be noticed and it was abundantly clear that she was bothered about having to put the book down and do her job. The clients who had arrived ahead of me had received a similar welcome. Their polite smiles and head shaking as I took a seat made that perfectly clear.

Of course, these examples are but a

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MARK BASSINGTHWAIGHTE

***Since 1998, Mark Bassingthwaight, Esq. has been a Risk Manager with ALPS, an attorney's professional liability insurance carrier. In his tenure with the company, Mr. Bassingthwaight has conducted over 1,200 law firm risk management assessment visits, presented over 400 continuing legal education seminars throughout the United States, and written extensively on risk management, ethics, and technology. He is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School***





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few. Poorly written email, an outright dismissal of a client's thoughts or ideas, allowing for multiple interruptions during a client meeting, bills that provide limited to no information, and regularly allowing people to wait in reception for long periods of time are additional examples of nonverbal messages lawyers sometimes send that can all too easily result in a problematic interaction.

My point is this: It's worth taking a little time now and again to think about the nonverbal messages you are sending during your day-to-day interactions. Hopefully, more than a few will be positive messages, but if no thought is ever given to the messages that are being sent, some nonverbal messages may actually be saying something you never intended to say.

Think about it. When a client needs to be the one who screams the loudest in order to have a call returned the message is clear. Clients, as individuals, are not important. Unkempt office space and cluttered desks makes some naturally ask "If these lawyers can't keep their workplace organized, how in the

world can they stay on top of my legal matter?" Lawyers who take shortcuts with their email by writing informally and not taking the time to proofread fail to appreciate that certain recipients may respond to the poorly written email by thinking "Wow, this guy isn't the sharpest tool in the shed." Other clients who happen to overhear another client's name or a discussion about someone else's matter can't help but wonder what other clients might be hearing about them. In fact, my own initial response to the slovenly dressed receptionist was to conclude that her employer couldn't afford to hire anyone who would be competent as a receptionist or simply didn't care enough to spend the money.

Perhaps all of this is of little concern if every legal matter taken on resolves quickly, cheaply, and with the best possible outcome for every single client. Of course, that's the rub, because we all know how often that happens. From a client's perspective, when things don't go quite as planned the mind's going to start to ask what's going on. It's not much of a stretch for some clients to conclude that a disheveled office, challenges in being acknowledged or

affirmed, and/or experiencing unprofessional communication and behaviors as saying something about their lawyer's competency. I'm not saying they'll always literally think their lawyer is incompetent; it's more that they'll conclude their lawyer doesn't really care. If it helps, look at it as halfhearted lawyering. In the end, whatever the problem might end up being, it's going to be your fault and the entirety of their experience will simply confirm it.

Yes. It does take extra effort to keep offices clean, to enforce a rule concerning appropriate dress, to continue emphasizing the importance of confidentiality, and to insist upon courteous, civil, and professional behavior from everyone in the office at all times. Nevertheless, I strongly want to suggest that such efforts are worth it. What we're really talking about here is professionalism. A professional presentation, or lack thereof, does make an implied statement about your competence. Don't minimize the significance of the nonverbal messages being given to clients. As much as some might wish otherwise, nonverbal messages speak volumes and clients will often respond accordingly.

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was a mock juror in a food-borne illness case against a restaurant. The scientific/medical evidence overwhelmingly showed that not enough time had passed between the plaintiff's meal at the restaurant and when they started to get sick for the restaurant to have been the source of the illness, yet one mock juror relied on her own personal experience where she was convinced she had gotten food poisoning shortly after eating

undercooked chicken at a restaurant. This personal experience evoked strong emotions and it was clear she had an axe to grind against that restaurant. More important, her strong belief that her own food poisoning was caused by this one restaurant despite the fact that she got sick only a couple hours later, led her to dismiss the defense arguments that not enough time had passed for it to be the cause. Those defense arguments went against what she wanted to believe about her own personal experience, so she instead latched onto the minimal

evidence that favored the plaintiff.

It is critically important for attorneys to avoid overconfidence based on the belief that the truth is on your side. If we are on the other side, we don't need the whole truth or even most of it; we only need a french fry and a group of jurors with good reasons to cling to that french fry that helps them make their decision.

**Thomas M. O'Toole, Ph.D. is President of Sound Jury Consulting in Seattle. Kevin R. Bouilly, Ph.D. is Senior Consultant at Persuasion Strategies in Denver.**

“ It is critically important for attorneys to avoid overconfidence based on the belief that the truth is on your side. ”

# Campbell, Dahood, delegates to 1972 ConCon, die weeks ahead of anniversary of ratification

Montana lost two of the architects of its Constitution when Bob Campbell and Wade Dahood both died in April.

Campbell and Dahood were both among the 24 lawyers elected as delegates to Montana's 1972 Constitutional Convention. His death came only weeks before the 50th anniversary of the Constitution's ratification by Montana voters in June of 1972. Both were members of the convention's important Bill of Rights Committee.

Campbell, of Missoula, died on April 5 at 81. Dahood, of Anaconda, died April 18 at 94.

Campbell was one of 24 lawyers elected as delegates to Montana's 1972 Constitutional Convention.

As a ConCon delegate, Campbell made a number of significant contributions to the Constitution, particularly its Declaration of Rights as a member of the Bill of Rights Committee and its safeguards for privacy and environmental protections.

He also coauthored the preamble to the Constitution with Mae Nan Ellingson, who was the youngest delegate at the convention and who would go on to become a lawyer herself afterwards.

In a 2015 interview for Butte historian Evan Barrett's "The Crucible of Change" video series, Campbell said he and Ellingson wanted the preamble to reflect the beauty of Montana, the influence of Native Americans, the influence of painter Charlie Russell and author John Steinbeck's love of Montana as described in "Travels with Charley." He said that, inspired by those ideas, the two wrote what would become the preamble over a couple hours on Jan. 27, 1972.

"It was well received," he said. "It still does bring tears to your eyes."

According to Ellingson, Campbell often spoke to students of all ages about the constitution, including addressing elementary-aged children on Law Day and participating in talks with students in constitutional law classes at the law school.

"Bob did more to elevate people's understanding of the Constitution than



**Bob Campbell is shown signing the Montana Constitution in 1972. Seated next to him is delegate Jean Bowman. At right, Wade Dahood stands in the Capitol during the Constitutional Convention.**



anybody else," Ellingson said. "Nobody would allow me enough words to describe him and his influence."

Campbell was born Dec. 21, 1940, in Sidney. After receiving a pharmacy degree from the University of Montana, he earned his J.D. from the UM School of Law in 1967. After law school he practiced law in Missoula before working as a hearings officer for the Montana Workers' Compensation Court. He returned to Missoula upon retirement.

Dahood was born in Brooklyn, N.Y., to immigrants from Lebanon on Dec. 31, 1927. The family moved to Anaconda when he was 6 months old.

During the convention he served as chair of the Bill of Rights Committee.

He earned his J.D. from the University of Montana in 1951 after which he served in the Judge Advocate General Corps with an office in the Pentagon during the Korean Conflict.

After returning from service he joined the firm now known as Knight & Dahood, now carried on by his grandson, Jeffrey Wade Dahood. Other than his time in school and in the armed forces, he spent his entire life in Anaconda. He was a Senior Member of the State Bar of Montana at the time of his death.

There will be a memorial service

for Campbell at 2 p.m. on Friday, June 17, at Garden City Funeral Home in Missoula. It will follow an event in the Capitol in Helena on June 15 and 16 to celebrate the 50th anniversary of the ratification of the Constitution.

In honor of Campbell and his efforts over the past 50 years, UM's Blewett School of Law has established the "For This and Future Generations" Award to be given each year for the best published student paper on the Montana Constitution. The \$1,000 award will go to a graduating law student who published (or has had accepted for publication) an important paper advancing the bench and bar's understanding of Montana constitutional law.

Gifts can be made payable to The University of Montana Foundation and noted for a gift to establish the "For This and Future Generations Award." If enough funding is received, this Award will be endowed. Checks should be mailed to The UM Foundation, P.O. Box 7159, Missoula, MT 59807, or may be given online at [www.SupportUM.org](http://www.SupportUM.org) and note in the comments field that the gift is in memory of Bob Campbell to be designated to the "For This and Future Generations Award."

More details on memorials for Dahood and Campbell will be announced as they are released.

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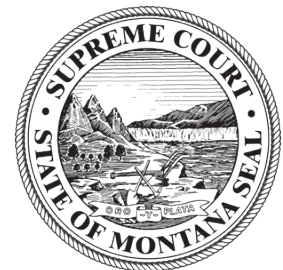
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