

Lawyer

THE STATE BAR OF MONTANA

Bar wants to abolish...

- Some of the Supreme Court's non-citable opinions
- All misleading advertising by out-of-state attorneys

**Board
of
trustees
elects
a new chair**



*After listening to comments
and watching economy flop,
Bar Board opts for a . . .*

dues hike downturn



Dean Eck to step down

On June 30, he'll resign UM Law deanship and return to teaching



**Two more
cy pres awards
for Foundation**





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PRESIDENT'S MESSAGE

Dues increase: Part I

Lawyers helping lawyers

Chris Tweeten

On Oct. 10 the State Bar of Montana filed a petition in the Montana Supreme Court seeking an increase in your bar dues of \$50 per year (see story on next page). The petition also seeks a change in the fees charged to attorneys appearing pro hac vice in Montana courts to an annual fee equal to the Bar dues paid by Montana attorneys. The State Bar has posted the Petition and its exhibits on the State Bar website at www.montanabar.org.

The petition asks the Court to set a period during which Montana attorneys may comment on the requested increases. In the strongest possible terms, I urge you to study the petition and supporting information, to discuss it with your local trustees and other attorneys, and to provide your views to the Court.

After much discussion and deliberation, the trustees voted to seek a dues increase for two reasons. One involves the need for additional revenue to support many bar programs mandated by order of the Supreme Court. I'll write about that issue next month. The other reason revolves around a newly expanded bar program created in 2006, known as the Lawyer Assistance Program, or LAP.

To understand the need for the LAP, consider the facts. It is well known that lawyers are three times more likely to engage in substance abuse, and twice as likely to become depressed, than members of the general public. And, seven Montana lawyers committed suicide in the two-year period encompassing 2005 and 2006.

If you think these issues don't relate to you, let me tell you a true story. About 15 years ago, one of the lawyers in my office committed suicide. No one in the office saw it coming. We walked the same halls, worked on the same cases, talked together about our families, sports, current events, in short related to one another as I'm sure many of you do with colleagues and staff in your own offices. Maybe we should have been more observant, should have seen some telltale clues suggesting that there was a problem. But we didn't.

The LAP is designed to provide a confidential escape hatch for lawyers who have problems and don't know where else to turn. The program director, Mike Larson, is

both an attorney and a qualified counselor on mental health and substance abuse issues. He has appeared many times at gatherings of lawyers across Montana raising awareness of these issues and of the assistance the LAP can provide. Since 2006, Mike has opened more than 60 new matters involving assistance to troubled attorneys, including counseling, referral to treatment, assisting in closing out files of troubled attorneys who leave the practice, and in other ways.

It is distressing that we received comments suggesting that the State Bar has no obligation to prop up lawyers who need it.

Since 2006, the State Bar has funded the expanded LAP by drawing on its reserves in the amount of more than \$40,000 per year. With additional temporary support from ALPS and the State Bar Health Benefits Trust, we were able to budget \$80,000 for the program. The trustees did so knowing that this budget amount was unsustainable within current revenues, and that the LAP budget needs to be increased to

\$120,000 per year to optimize the program's effectiveness. The Bar's expenses, including the LAP and other bar expenses and program costs, exceed its revenues this year by more than \$92,000. A conservative five-year projection shows that without a dues increase the balance of expenses over revenues, including the LAP and other programs, will exceed \$300,000. If the LAP is to continue, we need a general dues increase.

It is distressing to me that we received comment, which some of you may have seen in this magazine, suggesting that the State Bar has no obligation to prop up lawyers who are too "weak" to make it in their chosen areas of practice. With all due respect, the issues of substance abuse and depression have little or nothing to do with weakness, at least not in the sense that the commenter used the term. I don't believe that the seven lawyers who killed themselves in 2005 and 2006, or my colleague who chose to end his own life, suffered from a moral weakness. They suffered from treatable problems, but were unable to seek the help they needed. We can never know whether the LAP might have made a difference in some or all of these cases. We owe it to ourselves as a profession to try to help. ○

The State Bar Board of Trustees voted on Oct. 7 to drop its proposed dues increase for active members from \$75 to \$50. A \$50 dues increase proposal for inactive members stays the same.

The Board re-examined the Bar budget after listening to comments by Bar members and watching the global financial crisis unfold. An increase of \$50 a year for active members would raise about \$207,000, instead of \$290,000 the \$75 increase would have raised. About 60 percent of the original increase proposal would have gone to pay for inflationary increases in the Bar's operating budget, while 40 percent would have gone to support the Bar's Lawyer Assistance Program.

The Bar is going to have to take more "incremental steps" in its budget planning, said Helena attorney Chris Tweeten, who became Bar president in September. The incremental steps and closer examination of the budget "will show that the Bar is responsible with its money," Mr. Tweeten said. He won the Board's approval to appoint a committee to review the State Bar's budget line-by-line to reduce spending.

"But that means we'll have to go back and reconsider another dues increase in three years if we feel that is necessary," he said.

The original \$75 increase was expected to serve the Bar for a longer, six-year period. Mr. Tweeten said a three-year period is more in keeping with the Montana Supreme Court's thoughts about the Bar budget: the Court now requires the Bar to give it a detailed financial summary of the Bar's financial condition every three years (the dues increase was first proposed in the Bar's report to the Court in March 2008).

The Bar's budget forecasts for the next five years are based on the actual numbers from the 2001 through 2008 operating years, said Executive Director Chris Manos.

"But that forecast is still just an estimate," said Mr. Tweeten, the Bar's past secretary-treasurer. "Every year that goes by, the forecast becomes more accurate," a good reason, he said, to revisit the budget in three years instead of six.

The amended dues petition, signed by Mr. Tweeten on Oct. 14, made it clear that the Bar needs at least the \$50 increase to

Bar scales back its dues-increase proposal

carry out its designated mission for three years.

The vote on the Board, however, was a close 7-5 in favor of decreasing the increase. It came during an Oct. 7 conference call in which 12 members participated – 11 is required for a quorum.

Jock Schulte, the Bar's immediate past president,

argued that the original \$75 proposal was made "because we did not want to get into a three-year cycle for dues increases. We felt the \$75 was solid for six years." He said the difference between the \$75 and \$50 increases is very small, "only 6.8 cents a day."

Trustee Ryan Rusche of Wolf Point said having a cushion of cash in the budget is not a bad thing. "I was never uncomfortable with the \$75 increase."

It has been difficult for the Bar to gauge how uncomfortable the membership as a whole have been with the original increase proposal. When announcing the increase in *The Montana Lawyer's* June/July edition, the Bar asked for written comments. In the following two months, it received only about 20 comment letters or e-mails. More face-to-face feedback was gained through this summer's Road Shows. Many lawyers who commented were against the increase, but others supported it, especially the portion to finance the Lawyers Assistance Program. The negative reaction appears to be far less than the dues increase proposed, and received, by the Bar in 2002. Several trustees said they had heard no negative comments from their constituents this time around.

Commenters also felt the lawyers in the public sector should get a smaller increase since their agencies do not pay their Bar dues as many private firms pay for their attorneys. Rusche said on the Oct. 7 conference call that "we should study the public-lawyer issue." And Tweeten suggested that making a study of the overall fairness of the dues structure "is a good idea."

The petition for a \$50 dues increase for active members (from \$150 to \$200), and \$50 for inactive members (from \$75 to \$125) was sent Oct. 14 to the Montana Supreme Court for its approval. The Court can change the amount of the increase, or reject an increase altogether. See the petition at www.montanabar.org. ○

Eck to step down as UM Law dean

E. Edwin Eck, dean of the University of Montana School of Law, announced that he will resign that position on June 30, and return to teaching there.

Dean Eck, who will have been dean of the Law School for 14 years, told *The Montana Lawyer* that he thought "it was time for the institution and for me to

have a change." He said the average tenure of a UM Law School dean before him was about six years.

He said that June 30, after the end of the current school year, was a good time for him to resign because the construction of the new Law School building would be near completion. "The new

building has been known as my big project – it's time for a new dean to take the Law School to the next level."

The new Law School building is expected to be dedicated in September 2009 in conjunction with the State Bar's 2009 Annual Meeting, which has been shifted back to Missoula next year for the dedication. The Annual Meeting will be in Great Falls, which had been scheduled for 2009, in 2010.



An emotional evening

Minutes after joyously dancing with the “Judges Sleep Upright” Singers, above right, Chief Justice Karla Gray gave an emotional thank-you speech for the tribute paid to her at the Annual Meeting banquet, lower right. In her speech, she also made an impassioned plea for all Bar members to work for the cause of access to justice for all Montanans. Above, she is being awarded the glass bowl, that symbolizes the Bar’s new Karla M. Gray Equal Justice Award, for her work on equal justice issues, by Helena attorney Beth Baker, a member of the Bar’s Access to Justice Committee.



‘The Judges Sleep Upright’ gets the crowd rocking

Eight State Bar members, above, “roasted” Chief Justice Karla Gray at her tribute banquet by stealing a song from the nationally known Bar & Grill Singers.

Our group – left to right, Dave Kinnard, Randy Snyder, Tom Singer, Judy Meadows, Bob Griffin, Shane Vannatta, Justice Pat Cotter, and Don Murray – modified the tune “The Jury Sleeps Upright,” sung to the tune of “The Lion Sleeps Tonight,” into “The Judges Sleep Upright.”

Against the chorus and background of O-We-Ma-Way (changed to “I am awake, I am awake”), the lyrics were:

In the courtroom, the somber courtroom, the lawyer makes a speech;

Disquisitions and fine distinctions, the judges fall asleep.

In her office, Judge Karla's office, the judge is reading text

So over-worded, verbose and turgid, it's better than Sominex

I am awake, I am awake, I am

awake, etc.

It gives such grief to read
the briefs that are so
verbose,

Her eyelids close and she
starts to doze, when she
reads the purple prose.

Ingenuity and perspicuity,
that is not what's on her
plate.

Why can't they see that
superfluity, it does not
vitiate.

I am awake, etc. (plus gui-
tar solo and Chief Justice
Gray joining in)

Hush, please whisper, so
you won't disturb this quiet
peaceful sight;

Look around you, don't
make a sound cuz the
judges sleep upright.

AT THE 2008 ANNUAL MEETING

Non-cite opinion ban approved

State Bar members attending the annual Business Meeting Sept. 19 approved a resolution seeking a ban on non-citable opinions delivered by the Montana Supreme Court.

The resolution was passed after it was amended to exclude non-citable memorandum opinions – which make no change in law and delve into no constitutional issues – from the resolutions.

Helena attorney Bruce Spencer, a proponent of the amendment, said that memorandum opinions are “a worthy tool” to help justices ease their workload.

Justice John Warner told the meeting the non-citable opinions other than memorandum opinions are rare. But lawyers argue for the ability to cite all Supreme Court opinions in their cases. Helena attorney Ward Shanahan argued that even memorandum opinions should be citable.

The original resolution, without the memorandum-opinion exclusion, was presented to the members by Conrad attorney Gale Gustafson.

Other resolutions

■ The resolution to abolish common-law marriages failed after the Resolutions Committee determined that it did not meet the mission of the State Bar mission.

■ The resolution to transfer the responsibility for appointing a new judge after a district judge is disqualified – away from the disqualified judge and to an impartial court official – failed after Justices Karla Gray and John Warner argued that there is no present problem.

■ The resolution to support legal-aid services was amended to include recognition of the late MLSA leader Neil Haight and approved.

■ The resolution thanking organizers of the Annual Meeting passed.



BARTENDING – Tending to Bar business during the President's Reception in the Copper King bar, Past President Jock Schulte, left, passes the president's gavel to new President Chris Tweeten.

Quotes from the Karla Gray tribute

The Court Assumption package was not greatly crafted by legislators. Karla took the bull by the horns and through tedious work and contentious sessions she carried the battle in Legislative hearings because she didn't want Court staff to take the heat.

– Justice Jim Nelson

The most telling evidence of her devotion to the job is her difficulty in leaving the job.

– District Judge Katherine Curtis

She has sought the oldest, dustiest files in the Court to find some kind of resolution to them. It's like cleaning out your neighbor's garage.

– Curt Drake, Montana Defense Trial Lawyers

Someone said she could be a poster child for legal aid. Come to think of it, she is.

– Klaus Sitte, Montana Legal Services

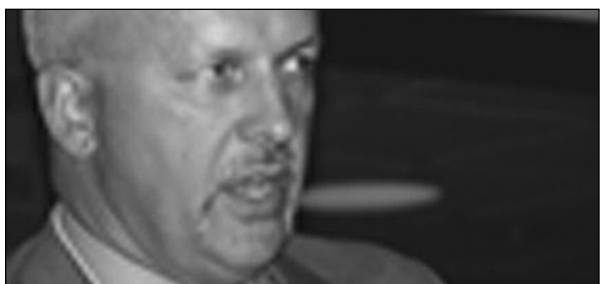
Already serving the next generation of lawyers on UM [Law School's] Board of Visitors, she always asked the right questions for students ... and she came forward with her own money for a scholarship.

– UM School of Law Dean Ed Eck

Her integrity, her mind, and her energy is the human face of justice.

– Magistrate Carolyn Ostby via Magistrate Keith Strong

Faces at the podium



Top row, left to right: John Connor accepting the Jameson Award; Helena attorney Ward Shanahan, among those receiving 50-year Bar membership pins; and Utah Supreme Court Justice Christine

Durham describing the history of the nation's access-to-justice movement during the Banquet keynote address. Lower photo: Max Hansen, a Bar past president who is stepping down as long-time ABA delegate for the Bar, as he tells Banquet attendees about his good feelings regarding his extensive State Bar involvement.

Annual Meeting supporters

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Fleming & O'Leary, Butte
Montana Justice Foundation
Mary Kay Starin, Butte
Commonwealth Law Book Company

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Dillon
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Jed Fitch, Miles City
Leonard Haxby, Butte
Christopher G. Miller, Deer Lodge
Hon. Loren Tucker, Dillon

Door prize winners

The following persons won door prizes from exhibitors at the Annual Meeting, after leaving business cards at the exhibitors' booths for prize drawings:

■ **Tom Ebzery**, a Billings attorney, won an external hard drive, given away by ALPS.

■ **Barbara Bessey**, a paralegal with the Department of Labor & Industry in Helena, won an HP desktop printer from the Corporate Technology Group.

■ **Tina Morin** won the auto care kit donated by the Great American Insurance Group.

Who attended the conference?

About 200 State Bar members and legal assistants attended the 2008 Annual Meeting.

The number attending the Banquet was 218 with family members and other guests added.

The Thursday CLE program drew 176 attendees; the Friday CLE program drew 182.

A total of 53 new lawyers attended the annual Rookie Camp, held the first morning of the Annual Meeting. Thirty-seven of those rookies stayed on for the CLE programs that were open to all lawyers and legal assistants.

"Everyone was happy with the number of attendees this Annual Meeting attracted," said State Bar Executive Director Chris Manos. He also noted the pre-Annual Meeting scare the state Bar staff went through when the Copper King Hotel announced that it was closing for good soon after the meeting.

"The hotel did a nice job for us," he said, despite the fact that hotel staff were about to lose their jobs.

Summary of September trustee meeting

Ban on out-of-state lawyer advertising accepted by Board

The following is a summary of the State Bar's Board of Trustees meeting held Sept. 17 in Butte:

Report from the President – Jock Schulte

President Schulte advised the trustees that third-year law student Mark Lancaster was this year's recipient of the State Bar Scholarship Award that is funded by contributions from members of the Board of Trustees.

Reports Requiring Board Action

- **No out-of-state lawyer ads.** The Board approved amendments to Rule 8.5 of the Montana Rules of Professional Conduct that would prohibit out-of-state attorneys from advertising legal services in Montana. The amendment is mainly aimed at those cable-TV or Internet ads that don't make it clear that lawyers or law firms from Florida or elsewhere don't have legal standing to practice law in Montana, don't have experience or competence to practice in certain legal categories, or are simply part-time-staffed answering services that pass messages on to lawyers about whom the prospective clients know nothing. The amendment also lists the definitions of any kind of misleading lawyer advertising.

Those on the board who opposed the amendments said it would be almost impossible for the Montana Office of Discipline Counsel to enforce the new Rule, a point made at an earlier Board meeting by Discipline Counsel Shaun Thompson. Proponents, however, felt the new Rule would give Montana the leverage to have the disciplinary agencies in the states in which offending lawyers practice take action against those lawyers. The amendment must be sent to the Montana Supreme Court for final approval.

Montana Justice Foundation Report – Damon Gannett

Mr. Gannett said the Foundation now publishes a quarterly e-newsletter that Bar members can receive via e-mail or read on its website. He further reported that IOLTA income is slowly declining due to unforeseen economy issues and additional fundraising efforts will be needed. He said the Foundation had recently received two cy pres monetary awards from Montana civil litigation cases (see story on Page 17). He also noted that the Foundation is supporting the Access to Justice Forum series being held around the state.

Lawyers Assistance Program Report – Mike Larson

Mr. Larson said that a three-member planning committee has been formed to help identify objectives for the LAP pro-



Vannatta elected as chair of the Board

State Bar Trustee Shane Vannatta of Missoula was elected chair of the Bar's Board of Trustees at the Board's September meeting. Mr. Vannatta, who replaces Cynthia Smith as chair (Ms. Smith was elected as the Bar's president-elect), will

hold the position for at least a year.

Mr. Vannatta has a legal practice, focused principally in business law, at the Missoula firm Worden Thane. He first joined Worden Thane as an intern during law school in 1991. Upon graduating, with honors, from the University of Montana Law School in 1993, Mr. Vannatta became an associate of the firm, has been a shareholder since 2001, and served on the firm's Executive Committee from 2004 to 2007.

Mr. Vannatta was president of the Missoula New Lawyers Association, chair of the State Bar New Lawyers Section, and president of the Western Montana Bar Association. He chairs the Professionalism Committee of the State Bar and the WMBA Pro Bono Program.

He works with the United Way of Missoula County, serves as an acting justice of the peace for Missoula County, and was chair of the Chamber of Commerce Leadership Missoula program. He also holds a black belt in Taekwondo.

Mr. Vannatta was raised on his parents' farm north of the small eastern Montana community of Bainville.

gram. The committee also will review other states' policies and the ABA's model guidelines to help establish some policies and guidelines for Montana's program.

Executive Director's Report – Chris Manos

Mr. Manos reported that the Bar is working to revise the pro bono reporting form. Any suggested changes to the form should be directed to Bar staff member Ann Gilkey. There is a VISTA in Helena currently working on a pro bono mediation program that would allow attorneys to receive pro bono hours by assisting with the program.

Mr. Manos also said that ALPS has developed software specifically for attorney trust accounts and Bar members will be able to receive a purchase discount.

○

STATE BAR CALENDAR

October 22

Technology Committee conference call. 10 a.m.

October 23

Access to Justice Forum for the public, 3-5 p.m., Bozeman, Emerson Cultural Center

October 25

Content and advertising deadline for November edition of *Montana Lawyer* magazine.

November 1-8

CLE & Sea, Cozumel, Mexico

November 7

State Bar Executive Committee meeting, 10 a.m., State Bar offices, Helena

November 14

Access to Justice Forum for the public, 3-5 p.m., location to be announced

November 14

CLE Institute meeting, State Bar offices, Helena

November 20

Access to Justice Forum for the public, 3-5 p.m., location to be announced

December 4

State Bar Executive Committee meeting, 6 p.m., Helena

December 5

State Bar Board of Trustees meeting, 10 a.m., State Bar offices, Helena

97 pass the July 2008 Bar Exam

Badanes, Lori	Giuttari, Jennifer	Luther, Jessie	Shepard, Brett
Berens, Brooke	Goodkind, Julia	McConnell, Christopher	Shin, Michael
Berger, Luke	Griffith, Ashley	McKeon, Michael	Simeon, Anne-Marie
Bohn, Craig	Grinde, Erica	McLinden, Ross	Sirrs, Julie
Boris, Marcia	Gumper, Emily	McQuillan, Brendan	Smith, Rebecca
Bosse, Karla	Hammar, Timothy	Mills, Eric	Snell, Grant
Boyd (Jameson), Regan	Hansen, Mary	Mundy, Steven	Snipes, Benny
Brown, Jason	Hinderman, Tammy	Murphy, Erin	Steele II, David
Campbell, Joshua	Hooper, Gary	Nelson, Summer	Stichman, Rennie
Capulong, Eduardo	Hornbein, Melissa	Nelson, William	Sullivan, Paul
Casillas, Joseph	Houston, Joseph	Oitzinger, Hilary	Sweeney, Christopher
Coate, Erik	Hrubes, John	Oja, Joni	Tennant, Michael
DeConcini, Joel	Hubbard, Kelley	Oram, Trent	Thigpen, Helen
Deschene, Kimberly	Jeresek, Jinnifer	Owen, Jennifer	Thilly, Owen
Dubois, Neal	Jetter, Justin	Paisley, Kalah	Travis, Samantha
Edwards, John	Jones, Emily	Palm, Sarah	Turner, Robin
Ellis, Kathleen	Kauffman, Michael	Petaja, Christopher	Ward, Molly
Erickson, Elizabeth	Kilby, Jordan	Phillips, Sarah	Wells, Jamie
Ewan, Jennifer	Kohn, Kathryn	Racicot, Joseph	Wetzsteon, Angela
Farmer, Marta	Knudsen, Austin	Ranta, Katie	Yasenak, Michael
Fasching, Marhya	La Seur, Carrie	Riss, Caroline	Young, Jamie
Fellman, Ted	Leffers, Mary	Sampsel, Mary-Elizabeth	Zendron, Amie
Flahaut, Doug	Loedy, Brant	Schandelson, Brett	
Garab, Alison	Lore, Juliane	Schulte, Dwight	
Gingras, Scott	Lundberg, Jessie	Scott Smith, Amy	

Supreme Court 'user survey' completed

Project to measure the Court's performance polled lawyers, judges and law school faculty

From **Chief Justice Karla M. Gray**

Last month, the Montana Supreme Court asked nearly 1,000 appellate lawyers, as well as all of Montana's District Court judges and the University of Montana Law School teaching faculty, for their thoughts on the Supreme Court's performance. Using an anonymous online survey, respondents rated the Court's performance in areas central to its primary obligations, including whether the Court's decisions are based on facts and applicable law, whether the Court's published opinions explain deviations from established law and the adoption of new developments in law, and whether the Court treats judges and attorneys with courtesy and respect. The survey also inquired about the Court's timeliness in completing its overall workload and issuing opinions.

The survey is part of a larger project, approved by the Supreme Court in September 2007, which will develop a set of measures to gauge the Court's performance. In addition to measuring consumer satisfaction through the survey, "hard data" performance measures currently being considered include on-time case processing, case clearance, and age of pending caseload.

The Court intends to repeat all of the measures periodically to gauge improvements. Justices James C. Nelson and Brian Morris also are on the Supreme Court team working on the initiative.

"Performance measurement for appellate courts is a relatively new concept throughout the nation, but the Court recognized that it was important to be at the forefront of these efforts to identify what we are doing well and what we can improve," said Justice Nelson.

The survey response rate was very good – 46.3 percent of the appellate attorneys, judges, and law school faculty polled took the time to respond. We greatly appreciate the high response rate, and thank all who participated.

A summary of the survey results is available by clicking on the following link:

www.montanacourts.org/supreme/surveys/statistical_summary.pdf

As you will note, over 90 percent of the respondents believe that the Court does a good job in providing information about its roles, procedures, and operations, and that it treats trial

court judges with courtesy and respect. Eight out of ten say that the Court's published opinions clearly state the appropriate rule of law, identify and apply standards of review, and provide instructions on remand; an even higher number agree that the Court treats attorneys with courtesy and respect. Regarding attorney discipline, nearly eight out of ten respondents agree that the Court's attorney-disciplinary process is fair and that sanctions imposed on attorneys are proportionate to the misconduct.

Survey respondents rated the Court lowest in the area of timeliness, an area that obviously needs the Court's earliest attention. Only 38 percent of the respondents felt that the Court completes its overall workload in a timely manner, and only 31 percent said that opinions are issued on time. We have implemented a number of "efficiencies" in recent years, but they have not been enough given our caseload. We know we can – and must – make improvements regarding the overall timeliness of the appellate process; we will do so, but not by sacrificing our strengths.

In any event, we likely will need help from appellate lawyers and additional resources from the Legislative and Executive branches to achieve the timeliness that will satisfy the Court and its primary consumers, and better serve the people of Montana.

The survey results provide us with valuable insights about our strengths and weaknesses. We will use these results, together with the "hard data" measures set out above, to help us identify ways in which the Court can improve, and we

More COURT SURVEY, Page 13

Saturday

DEPOSITIONS IN BILLINGS AREA

JoAnn Corson Bacheller

Registered Diplomat Reporter

Certified Realtime Reporter

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Upcoming CLE seminars for Montana lawyers

October 23 Missoula – Missoula Courthouse

The Law, the Guardian & the Teen-Aged Child 1.0 CLE credits. Presented by the 4th Judicial District Court, (406) 258-4742

October 23 Missoula – Hilton Garden Inn

Land Use Law & Growth Management 4.0 CLE credits.

Presented by New West Publishing, (406) 829-1725

October 28 Billings – Western Clocktower Inn

Probate Practice: The Essential Basics 6.50 CLE credits, including 1.0 Ethics credit. Presented by the National Business Institute, (800) 930-6182

October 29 Billings – Crown Plaza Hotel

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COURT SURVEY, from Page 11

intend to conduct the survey annually to obtain feedback from our primary consumers. We are convinced that by asking "How are we doing?" – and learning from and acting on the responses – the Montana Supreme Court will improve and provide an even stronger system of justice for Montana.

Justice Morris added, "Having the perspectives of those who use our Court, and studying actual hard data, will be

invaluable in helping us identify how to do better."

A parallel project, approved by the District Court Council, is under way for the district courts across the state. The Council appointed the District Court Performance Measurement Advisory Committee, chaired by 11th Judicial District Court Judge Katherine R. Curtis, to lead that project.

Both projects are supported through State Justice Institute grants. The National Center for State Courts is providing technical assistance to both the Supreme Court and district court projects. ○

By **Matt Hagengruber**
of the Billings Gazette

Yellowstone County's five district judges say the justice system is suffering because Clerk of District Court Laura Brent has mostly ignored 11 orders issued by the judges last November. Because of difficulties in implementing a software program called FullCourt and other problems, the judges warned, Brent could face legal trouble.

"We ordered you to appear before us on January 9, 2008, to report as to the status and implementation of FullCourt, jury management and any other court matters," reads an eight-page letter sent to Brent on Aug. 22. "You failed to appear on that date and you have never formally reported as to the status or implementation of FullCourt. Is there some reason you should not be held in contempt for your failure to appear?"

The judges cite a communications

Billings judges lose patience with their clerk of court

breakdown that Brent says is the judges' fault.

Brent has overspent parts of her annual budget three months into the fiscal year, and three-quarters of her staff has left since she was elected in 2004. Exit surveys from some former employees aren't kind.

The Republican is running for re-election against challenger Carol Muessig, a Democrat.

In the letter, the judges say high turnover in Brent's office and a reluctance to communicate have worsened the

situation. They say much of the problem rests on Brent's failure to embrace FullCourt, which is supposed to reduce paperwork for clerks.

The 11 orders sought changes in Brent's handling of documents and schedules. The judges say Brent hasn't complied, and the August letter includes five pages of problems noted by the judges since the orders were issued. The judges say FullCourt should be reducing paperwork problems, because court documents are scanned and more business is done on computers.

In response to a reporter's questions about the judges' letter, Brent on the morning of Oct. 3 released a 14-page letter that says the judges have failed to communicate with her and that they are causing the high turnover in her office. She responded to each of the problems noted by the judges, often by saying

More JUDGES v. CLERK, Page 26

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8:30–10:00 am	Where Have all the Jurors Gone? <ul style="list-style-type: none">• Is there a crisis in confidence?• Jurors—in their own words Jury Deliberations <ul style="list-style-type: none">• How jurors reach conclusions How Jurors Learn <ul style="list-style-type: none">• Crafting a case that hits home• Choosing words that speak volumes
10:00–10:15 am	Break
10:15 am–Noon	Voir Dire—What You Really Need to Know to Make Good Decisions <ul style="list-style-type: none">• What you <i>must</i> ask, what you <i>should</i> ask, and what you should <i>never</i> ask Jury Selection Simplified <ul style="list-style-type: none">• Utilizing a 2-track rating system to simplify jury selection• Evaluating prospective jurors' "influence quotient"
Noon–1:00 pm	MDTL Meeting and Lunch (on your own)
1:00–2:00 pm	Jury Selection from the Judges' Point of View <ul style="list-style-type: none">• Hon. Donald W. Molloy, U.S. District Court (MT)• Hon. Edward P. McLean, 4th Judicial District• Hon. Jeffrey M. Sherlock, 1st Judicial District
2:00–3:15 pm	Jury Selection Simplified (continued) Opening Statements: "Attention!" <ul style="list-style-type: none">• Techniques that make your case come alive• 50 ways to leave an impression
3:15–3:30 pm	Break
3:30–5:00 pm	Opening Statements (continued) Witnesses... "Preparation Makes Perfect" <ul style="list-style-type: none">• Winning tools for witness preparation Closing Argument... "It Ain't Summation" <ul style="list-style-type: none">• Making your last impression resonate in the deliberation room• Motivating jurors to find for your client

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2 new cy pres awards for Justice Foundation

By **Amy Sings In The Timber**, executive director
Montana Justice Foundation

The Montana Justice Foundation (MJF) is recently enjoying the cy pres recognition that some other state and local bar foundations have been experiencing for nearly two decades:

■ Montana attorneys James H. Goetz and J. Devlan Geddes of Goetz, Gallik & Baldwin, and John J. Mudd of Mudd Nelson law firm, negotiated to name the MJF as cy pres recipient in the case of *Montana Land and Mineral Owners Assn., Inc., et. al. vs. Devon Energy Corp., et. al.* After an exhaustive search to identify and locate class members, the MJF received a \$34,917 award.

■ Bozeman attorneys Brian Fay and Chris Angel of Angel, Coil & Bartlett negotiated to name the MJF as recipient of residual funds in a series of insurance stacking cases the two handled. The first of the three cases resulted in a \$5,308 award, (*Dempsey, et. al. vs. Allstate Insurance Co.*), and the second in a \$49,707 award, (*Crown, et.al. vs. Metropolitan Property and Casualty Co.*).

CY PRES COMES from the Norman French term, “cy pres comme possible,” meaning “as near as possible.” The doctrine was originally used as a method of distributing trust funds when the original purpose for which the trust was established had been frustrated. Under cy pres, such funds are distributed in a manner that is keeping “as near as possible” with the original intent of the trust.

In the early 1990s, the cy pres doctrine was revisited, this time as a means for distributing residual funds in class-action law suits.

The underlying premise for class action suits is to make access to justice a reality for those who would otherwise be unable to obtain the protections of our court system. As such, legal service programs commonly represent the next best use of unclaimed funds to indirectly benefit the members of the intended class.

In determining the next best use of residual funds, courts have broad discretionary powers and the MJF’s mission of improving access to justice for the less fortunate makes it a perfect match for class-action cy pres awards.

We are very excited by the MJF’s growing recognition – of its mission, flexibility, and neutrality – as an appropriate cy pres recipient.

The MJF received its first cy pres award in 2005 after being named recipient in the case of *Kimberlee Williams, et. al. vs. Norwest Corp., et. al.*; Helena attorneys Jon Motl and Kim Wilson of Reynolds, Motl & Sherwood negotiated to name the

Matteucci donates her prize


Billings attorney Sherry Matteucci has donated to the Montana Justice Foundation the \$200 in cash that she received when winning the 2008 Haswell Award from the State Bar of Montana, *The Montana Lawyer* has learned.

Ms. Matteucci, the former U.S. attorney for Montana, won the prize by contributing an article on the life of Montana’s first female attorney, Ella Knowles.

The money comes from the interest off an endowment left to the State Bar by the late Montana Supreme Court chief justice Frank J. Haswell, who was interested in maintaining a stream of high-quality content for the magazine. The magazine’s staff feels that Ms. Matteucci’s donation to the Foundation adds greatly to Justice Haswell’s generosity.

MJF as recipient in this case.

For more information on the MJF and cy pres awards, please contact me at (406) 523-3920 or asings@mtjustice.org.

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By Donald R. Lundberg
for Res Gestae magazine

Trust accounts in the time of bank failures

These are scary times. With the stock market's fluctuations many of us find ourselves recalibrating the date when we can afford to retire on a weekly basis. Of late, that date seems to keep getting farther and farther away. But enough about us...

Bank failures

There's more to be worried about. On July 11, federal regulators seized IndyMac, a California bank. It has been described as the second largest bank failure in U.S. history. Reports are that there were almost \$1 billion in uninsured deposits at IndyMac. There have been eight bank failures this year [not counting the failures of AIG, Lehmann Brothers, Merrill Lynch, Wachovia, Washington Mutual and many others since this article was written]. Stresses in the financial services industry cause us to wonder whether other bank failures are in the offing. What if your trust account is at a bank that fails? I don't mean to be unnecessarily alarmist. Most banks are on sound financial footing, but that doesn't mean we can ignore a worst case scenario.

Many lawyers hold substantial client funds in trust – usually in a pooled trust account. Rule of Professional Conduct 1.15 charges us with safekeeping our clients' property, including their money, when it is in our possession. Pooled trust accounts are generally IOLTA accounts. Rule 1.15(f)(4) states: "An IOLTA account may be established with any financial institution ... insured by the Federal Deposit Insurance Corporation or its equivalent..." Our obligation to protect client property would seem to require us to also hold non-IOLTA trust funds in an FDIC or equivalent account.

Insurability of trust funds

How will our client trust funds be protected in an insured account, if the financial institution fails? The Federal

Deposit Insurance Corporation insures accounts up to \$100,000 [since raised to \$250,000, through at least 2009, in the recent bailout plan by Congress] in any one financial institution. Funds in a trust account will generally be fully insured if the overall balance is less than \$100,000 [\$250,000]. But what if the balance exceeds \$100,000 [\$250,000]? It depends.

According to the FDIC, fiduciary accounts, including IOLTA accounts, are insured as though the beneficial owner of the funds had directly deposited them so long as two requirements are met. The standards are at 12 CFR 330.5(b).

First, the fiduciary nature of the account must be disclosed in the account title. This should be nothing new to lawyers. Admis. Disc. R. 23(29)(a)(1) requires that trust funds be held in an account clearly identified as a "trust" or "escrow" account and that the financial institution be informed of the purpose and identity of the account.

Keeping good trust-account records

Second, the identities and interests of the principals must be ascertainable from deposit account records of the bank or records maintained in good faith and in the regular course of business by the fiduciary or someone acting for the fiduciary. This, too, is a requirement that any lawyer with a properly managed trust account should be able to meet. Admis. Disc. R. 23(29)(a)(2) through (4) describe the records lawyers must keep about their trust accounts, including the ledgers link deposits, disbursements and balances to particular clients.

If these requirements are not met, the deposits will be treated as though they

belong to the agent and will be insured only up to a total of \$100,000 [\$250,000] when combined with any other balances in accounts owned by the agent in the same bank.

Different standards apply to multi-tiered fiduciary relationships—when a lawyer holds funds in trust for a client who is, in turn, holding funds for others as a fiduciary. If you find your-

self in this situation, you should consult the regulation. 30 CFR 330.5(b)(3).

A general discussion of this topic is on the FDIC website at: <http://www.fdic.gov/deposit/deposits/financial/fiduciary.html>. That website is full of other helpful information about insurability of funds.

Each client's funds will be insured

With a properly managed trust account, FDIC will insure funds for each client who has funds in trust at the time of any bank failure up to a total of \$100,000 [\$250,000] per client. If no client has funds in trust greater than \$250,000, there will be full coverage, with one exception. If the client has other funds in the failed bank, those other funds will be aggregated with the trust funds for that client to determine insurability. Thus, if a lawyer is holding \$175,000 in trust for a client who also owns another account at the same bank with a balance of \$100,000 and the bank fails, \$25,000 of that client's funds will not be FDIC insured.

If a lawyer holds funds in trust for any one client who would have more than \$250,000 on deposit in that bank, in order to benefit from full insurability of the funds, the funds would need to be spread out over two or more banks so that there is no more than \$250,000 for any one client in any one bank. The cost-benefit analysis of doing so is beyond the scope of this article. But if you find yourself holding client funds in either a single-client or pooled trust account that exceed FDIC insurance limits, it would be prudent to discuss the situation with the client and determine whether an alternative method of hold-

ing the funds is warranted—especially if the funds will be held for a significant period of time or if there is any basis for doubting the bank's solvency.

A non-starter solution

One enterprising solution to the problem of holding funds in excess of \$250,000 in any one bank is a service called CDARS, an acronym for Certificate of Deposit Account Registry Service (<http://www.cdars.com>). Under this program, a participating bank will transfer balances in excess of \$250,000 to a sufficient number of other participating banks so that no single bank

Knowing that some of the funds on deposit for at least one client will not be insured, the lawyer should take great pains to investigate the financial solvency of the bank where the funds are held.

holds more than \$250,000. This is done by agreement with the depositor, but without the depositor's active participation in deciding where the excess funds will be deposited. Voila! All of the funds will be FDIC insured because they are spread out among several banks in increments of less than \$250,000.

While a clever solution for business or individual depositors, this will not work for trust accounts. Under Rule 1.15(f)(4)(iii), a trust account depository must be approved under Admission and Discipline Rule 23(29)(a)(1). The reason for this is to obtain bank or other financial institution agreement to report overdrafts on lawyer trust accounts to the disciplinary commission. An unapproved institution has no such obligation. Because funds in excess of FDIC limits are placed through CDARS in

other banks, even out-of-state banks, without regard to whether they have been approved by the Commission, chances are some of the funds will end up in unapproved financial institutions.

Moreover, IOLTA account deposits must be available for "withdrawal upon request and without delay and without risk to principal by reason of said withdrawal." Rule 1.15(a)(4). Because CDARS places funds in other banks in the form of certificates of deposit, the requirement of immediate availability of funds cannot be satisfied.

If a lawyer decides to keep funds of more than \$250,000 per client in a single trust account, I have one observation and one question.

The importance of due diligence

The observation: Knowing that some of the funds on deposit for at least one client will not be insured, the lawyer should take great pains to investigate the financial solvency of the bank where the funds are held. The FDIC does not, itself, issue public ratings of bank solvency. But there are many bank rating services that will provide reliable information. The FDIC has collected an excellent list of bank rating services on its website at: www.fdic.gov/bank/individual/bank/.

Malpractice liability

The question: If the bank where a lawyer has a trust account fails and there are uninsured losses to a client, is the lawyer liable for the loss? This is an untested question in Indiana and most other jurisdictions. One case addressing the issue is *Bazinet v. Kluge*, 14 A.D.3d 324, 788 N.Y.S.2d 77 (2003). In that case, the lawyer acted as an escrow for funds involved in a real estate transaction. He deposited \$2.73 million in his IOLTA account. While the funds were still on deposit, the bank closed and FDIC became the receiver. Imagine waking up to read that newspaper headline!

One of the parties to the real estate transaction sued the lawyer for the uninsured loss of most of his down payment. The claim was that it was legal malpractice for the lawyer to fail to assure FDIC insurability of all funds or otherwise protect the funds against loss by bank

failure. The appellate court held: "There is no allegation that [the lawyer] violated any statute or regulation, much less that he breached the escrow provisions in the contracts. There is no requirement imposed by law that an attorney-escrow agent place escrow funds in an account fully insured by the FDIC, and there are not allegations that [the lawyer] knew that [the bank] was in danger of closing. The proximate cause of [the depositor's] injury, if any, was [the bank's] unforeseen demise." *Id.* at 325, 788 N.Y.S.2d at 78.

Without predicting how an Indiana court would answer the same question, a similar analysis would likely hold true in Indiana, at least to the extent that Rule 1.15(f)(4)(ii) requires only that the institution be insured by the FDIC or its equivalent, not that all funds in the account be so insured. But at a minimum, this case stands as a powerful incentive for every lawyer to exercise

More ACCOUNTS, Page 31

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Family Law

Corbin Howard

Request to seal



We've been drafting parenting plans for more than 10 years now. On July 1, all our old parenting plan forms became obsolete: they all violate the Montana Supreme Court Rules for Privacy & Public Access to Court Records (hereinafter "Access Rules") because they typically include the names and birthdates of children. See Access Rules as amended by the June 24, 2008 Order of the Montana Supreme Court *In the Matter of Amending the Rules For Public Access and Privacy to Court Records in Montana* filed in AF 06-0377. The Access Rules anticipate Internet access to court records and make the litigant solely responsible for keeping the full names of children and their birth dates out of public view. See Access Rules Section 4.50. Because you will be the representative of one of the parents in these legal proceedings, the responsibility for compliance falls on you.

Once a divorce or parenting plan proceeding begins, the full names and birthdates of children typically appear in multiple places in the court records. At least two parenting plans are filed even in uncontested proceedings: 1) the petitioner's proposed parenting plan filed at the beginning, and 2) the final parenting plan filed at the end. In contested proceedings the respondent files an opposing plan. Section 40-4-234 (1) MCA. In addition, all of these cases require the Court to determine child support and medical support. See §§ 40-4-204 and 40-5-805 M.C.A. Rule 23 of the Montana Child Support Guidelines (ARM 37.62.146) that requires a copy of the Guideline Worksheets be attached to every child support order. The Guideline Worksheets display the name and birth date of each child. Some local district court rules require additional detailed financial information in child support cases as well. See for example, Rule 10, Montana 5th Judicial District Court Rules, and Rule 22, Montana 11th Judicial District Court Rules.

So how do you comply with these information disclosure requirements at the same time you comply with the Access Rules? One option is to prepare the original forms you now use, make a copy of the signed document, redact the confiden-

tial information from the copy, file the redacted copy and move the court to seal the original. A second option, suggested by the comments to the Access Rules, is to use fictitious names and birth year only for the children in your original filed documents. See Access Rules Section 4.60, Comment 3. Minor's names.

My suggestion, however, is that you take advantage of Section 40-4-234 (6) M.C.A. which provides:

"(6) At the request of either parent or appropriate party, the court shall order that the parenting plan be sealed except for access by the parents, guardian, or other person having custody of the child."

If the parenting plan is sealed, all of the information forbidden from public disclosure by the Access Rules is automatically protected. Parenting plans have no mandatory contents, but lots of permissible contents including provisions for child support ("finances to provide for the child's needs") and medical support ("any other factors affecting the physical and emotional health and well-being of the child ..."). See §40-4-234 (2)(d) and (2)(e) MCA. So you may insert within the sealed plan all the information regarding child support and medical support and even attach as an exhibit to the plan your Guideline Worksheets which show how you calculated child support. The order sealing the parenting plan will protect all of that information from public disclosure and specifically protect your client's children from harm via Internet predators.

Sealing the parenting plan means you do not have to worry about failing to redact one of the multiple references to the children's names or birth dates with your felt tip pen. And your client does not have to keep track of some separate document linking a fictitious name of the child in the parenting plan to the real name of the child were you to adopt that alternative.

I have developed a new draft parenting plan form incorporating the request to seal based upon §40-4-234 (6) MCA which I'd be happy to share with you. Just e-mail me at corbinhoward@corbinhoward.com and I'll send you a copy for your comment.

One final thing. My "Montana Rules of Court 2008" published by Thompson/West do not contain the June 24, 2008, amendments to the Access Rules. You can obtain your own copy of the current amended Access Rules by visiting the Montana Supreme Court website at this link: http://courts.mt.gov/crt_records/default.asp.

CORBIN HOWARD practices family law in Billings.

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Negotiation Theory & Practice

Alain Burrese

Understanding cultures when negotiating



I recently returned from a trip to South Korea where I was visiting in-laws, seeing new sights, and furthering my training in Hapkido, the Korean martial art I practice and teach. While there, I thought of the differences between the United States and Korea when it comes to negotiating.

Certain things in Korea, such as items in a grocery store, are just as they are in the U.S. There is a price marked right on the package, and that is the price that your checker will ring up and you pay. You don't stand in line at a supermarket negotiating the price of your groceries. However, there are many other places where negotiating is common. But this is not the element of Korea's society that most U.S. readers will find interesting.

For purposes here, I want to look at the area of negotiating with someone from a different culture. International negotiations occur on many levels, and often the parties end up frustrated dealing in environments so different from their own.

UNFORTUNATELY, MANY Americans mistakenly believe all cultures are basically the same, and that American customs and behaviors are universal. Having lived in both Korea and Japan, and traveled to other parts of Asia, I have too often witnessed the ugly American. In Korea and other Asian countries, American customs and behaviors are definitely not universal. In fact, Koreans sometimes seem to have an attraction or revulsion to foreigners and things foreign.

Koreans have a strong interest for foreign ideas, products and culture. This is evidenced by the many foreign influences abundant in the country. You will see American fast food and other chains scattered among traditional Korean shops. American and Chinese movies fill the theaters, and a Korean girl I glanced at was watching "Desperate Housewives" on her phone on the Seoul subway.

At the same time, Koreans possess a strong nationalistic pride and sometimes resent foreigners and things foreign. I saw this when I witnessed some of the large demonstrations in Seoul over U.S. beef this summer. As an American negotiating or dealing with Koreans, you must be able to determine which parts of American culture are acceptable and which parts are disliked by your Korean counterpart. This is important with any foreign negotiation, not just dealing with people from Korea. Americans must not assume the American customs and behaviors will be accepted universally by citizens of

other nations.

We have cultural differences within our own country, as evidenced by dealing with people from the East and West coasts. When I worked with ALPS as a claims attorney, there was a difference dealing with Eastern claims and Western claims. When we go outside our borders to different countries, the cultural differences compound tremendously. This is especially true when dealing with countries that have not only language differences, but things such as a more collective "group think" rather than the individualistic cultural importance we recognize more in the U.S.

I'VE USED SOME VERY broad generalizations to make my point that cultural differences and understanding the culture of those you negotiate with is extremely important. To be successful in negotiating with people from different cultures, you can do some simple things during your preparation that will pay off greatly.

First, you should try and learn as much as possible about the country and culture of those with whom you wish to negotiate. Obviously, the scope of the negotiation will determine how much time you wish to spend on learning about the country and culture; bigger and more important negotiations will require much more research and learning.

Second, you must be culturally sensitive. Remember that not everyone looks at things as we do in America. Not everyone has the same underlying value system, nor do they share the same hierarchy of importance with people, things, or ideas. Pay attention to this and be sensitive to other viewpoints and value systems.

We must always try to see things from the other side's point of view, and when dealing with people from different cultures this can become more difficult, but is also even more important.

And lastly, build relationships with those you negotiate with. Building international relationship will open doors for future negotiations and deals for you and those you work with. Through understanding of the country and culture of those you negotiate with, you will be able to build relationships that will foster further global opportunities.

In some countries, such as Korea, the process of reaching an agreement is as important at times as the result. Building relationships enables better understanding even during disagreements and thus can keep the harmonious interactions that some cultures focus on more than results.

THE WORLD IS shrinking and more international deals and global negotiations occur every day. To be successful when dealing with people from different countries and cultures, you must understand that culture is important and take the time to understand where your opponent is coming from. If you do this, you will not only avoid frustrations associated with cross-cultural negotiation, but you will enter a fascinating world of multi-cultural deals.

ALAIN BURRESE is a mediator and attorney with Bennett Law Office in Missoula.



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Justice Nelson's scathing response to GOP letter

The following is a letter written on Sept. 23 by Montana Supreme Court Justice Jim Nelson to Erik Iverson, the chair of the Republican Party of Montana. The letter replies to a letter sent to Justice Nelson by Mr. Iverson regarding appointments to the state Districting & Apportionment Commission:

Dear Mr. Iverson,

This will acknowledge receipt of your undated letter, addressed to me personally, which was hand-delivered to the Clerk of Court's office on the afternoon of Thursday, September 18, 2008. The following is my individual response; I am not replying on behalf of the Montana Supreme Court and I do not speak for any other member of the Court.

In my over fifteen years as a member of the Montana Supreme Court, I have never received a request – written or oral – from any partisan, or any other organization, directly attempting to influence my vote on a matter that may come before this Court. Frankly, I am appalled at your attempt to do so. That said, your letter requires a response.

First, your letter is grounded in speculation – surmise that the next Montana Districting and Apportionment Commission (Apportionment Commission) will be unable to appoint its own fifth member, thereby triggering this Court's obligation to select that person under Article V, Section 14(2) of the Montana Constitution; and conjecture that the person whom the Court selects will not be fair and impartial (as, of course, judged from your particular perspective).

Second, I reject your implication that the Montana Supreme Court was responsible for the alleged "fierce partisanship" and "rancor" which you claim characterized the deliberations of the most recent Apportionment Commission. In the first place, I do not know that to be true and, in the second place, by definition, if the four members appointed by the majority and minority parties had not themselves, collectively, been locked in "fierce partisanship" and "rancor" – which the minutes of the Apportionment Commission appear to substantiate – then the Supreme Court would not have been called upon to select the fifth member. Indeed, it appears that your alleged "fierce partisanship" and "rancor" pre-dated the Supreme Court's involvement in the process.

Third, I also reject your implication that the Supreme Court's choice of the fifth member to the most recent Apportionment Commission was somehow improper. I am enclosing with this letter a copy of the Court's August 3, 1999 Order (1999 WL 60866) appointing Dr. Janine Pease-Pretty On Top as the fifth and presiding member of the Apportionment

Commission. This Order was signed by all seven members of the Court. I specially concurred and dissented to our Order. I concurred with our appointment of Dr. Pease-Pretty On Top, but I dissented from the Court's decision to deliberate and make that appointment in a meeting which was not open to the

public. My concurrence and dissent does reflect, however, that this Court fairly considered a number of well-qualified candidates whose names were submitted to the Court. I voted for Dr. Pease-Pretty On Top because, I believed – and continue to believe – that she was the most qualified applicant based on her experience and education and because she represented Montana's largest minority, which had not been represented on any prior Apportionment Commission. Your conclusion that some other make-up of the most recent Apportionment Commission would have avoided what you characterize as "fierce partisanship" and "rancor" is, of course, also grounded in speculation.

Fourth, I also reject your implication that partisan politics influenced this Court's appointment of the fifth member of the most recent Apportionment Commission. In my fifteen-plus years as a member of this Court, I have never known a member of this Court to cast a vote on the basis of, or to argue a legal position grounded in partisan ideology. The members of this Court may disagree on matters of law and interpretation of the records and arguments before us, but individual politics is

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not part of our decision-making calculus. As you indicate, members of the judiciary are elected on a non-partisan basis in Montana, and it has been my experience that Montana's judges and justices scrupulously honor that commitment—despite attempts by others who would politicize the judiciary and the courts.

Fifth, as for your request that I sign the "Pledge of Fairness, Impartiality and Openness" which you enclosed with your letter, I am returning that unsigned. I have never before, and will not now or in the future, sign any pledge or promise to vote or to refrain from voting in any particular manner on a matter pending before, or that may come before, the Montana Supreme Court. Article III, Section 3 of the Montana Constitution (a copy of which I am enclosing) provides the Oath of Office that all members of the Legislature and all executive, ministerial and judicial officers must take. This oath requires that those public officials support, protect and defend the Constitution of the United States and the Constitution of the state of Montana. Indeed, Article III, Section 3, specifically proscribes the taking of any other oath, declaration or test. I took the prescribed Oath of Office and I am committed to that and only to that promise. I have and will continue to cast my vote on matters pending before, or that may come before, this Court in accordance with the provisions of the U.S. and Montana Constitutions and governing statutes, taking into consideration the discussions and deliberations of my colleagues on the matter at issue.

Sixth, and in closing, inasmuch as I am committed to upholding Montanans' right to know, as guaranteed under Article II, Section 9 of our Constitution – which my concurrence and dissent to our August 3, 1999 Order reflects – I am making available to representatives of the media, your letter with enclosures to me, along with this response and enclosures. ○

COURTS

Libby attorney censured for his words

Libby attorney William A. Douglas has been ordered for public censure by the Montana Supreme Court for violating an ethics rule five times, the Court said in a Sept. 24 order.

The Commission on Practice charged that Mr. Douglas violated Rule 8.2 (a) of the Montana Rules of Professional Conduct on five occasions. The Rule states, "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity of the qualifications or integrity of a judge, adjudicatory officer or public legal officer or of a candidate for election or appointment to judicial or legal office." The order did not say about whom Mr. Douglas was making such statements.

The censure will take place Oct. 29 in Helena.

ORAL ARGUMENTS

October 2008

■ Case DA 07-0592 – ROBERT EDWARDS, DANIEL KOHM, JOHN DOE, LOUIS GOAZIOU, DAVID ZROWKA, and RAY ST. ONGE, Plaintiffs and Appellants, v. CASCADE COUNTY SHERIFF'S DEPARTMENT, DAVID CASTLE, in his individual capacity, and CLYDE "BLUE" CORNELIUSEN, in his individual capacity, and CASCADE COUNTY, Defendants and Appellees.

Oral argument is set for Wednesday, Oct. 29, at 1:30 p.m. in the courtroom of the Montana Supreme Court, Helena.

JUDGES v. CLERK, from Page 13

clerks in her office had erred. In other cases, she said missing files "mysteriously appeared." Brent said her clerks handle documents accurately more than 99.9 percent of the time.

"Besides low wages, the biggest factor recently in my office turnover is the stress my clerks are subjected to from the actions of your offices and your attempts to point out mistakes they make as an indication that I am not doing my job correctly," Brent wrote. "Your letter is filled with innuendoes, mistakes, as well as misleading and false statements. Forgive me if I am doubtful that your intent in writing it was to improve 'communications' between your offices and mine."

District Judge Gregory Todd said Brent didn't respond to the judges' letter until Oct. 2. He said Brent's office has been using FullCourt for months, so some kinks should be worked out. The judges are frustrated, Todd said, when Brent sends temporary employees to work as courtroom clerks.

"These people try hard, but many of them have no experience in the legal system," Todd said. "They have to learn legal terminology and it puts them into a very difficult position. (It might be better) if she would utilize the FullCourt system properly, and she's had six months to do it, and to train the staff properly. But with the massive turnover, it hasn't happened. The other districts in the state are utilizing FullCourt, and to my

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knowledge not experiencing any sorts of these problems."

At least 20 employees have come and gone from the clerk's office since Brent became clerk, including 10 full-time employees since 2007. Only five of the 18 employees in the office now worked there before Brent was elected four years ago.

Brent, who makes \$77,345 a year, was appointed clerk in 2003 after the previous clerk retired. She was elected to a four-year term the next year. Brent's office has had 17 full-time employees since she was elected, and the county is authorized another clerk this year.

Two clerks left in 2004 and one in 2005. In 2006, four full-time clerks quit. In 2007, five clerks left, and five have left in 2008. Four temporary employees have left this year.

Since 2004, annual turnover has averaged about 20 percent. Dwight Vigness, county human resources director, said the county's average turnover is 10 to 18 percent a year. In fiscal year 2008, the county had an 11 percent turnover rate.

Brent said employees leave her office

because of low pay or health reasons. Several have transferred to work in the County Attorney's Office.

"I have had three people leave this office who have not been happy, but it wasn't necessarily with me. It was with other employees," Brent said. "People who are unhappy here and can't get along with others should try to find another job."

Exit surveys, which are anonymous, tell a different story. Of the eight surveys on file for Brent's office, five are negative and three are positive.

One person cited "mental abuse" as the reason for leaving. Another wrote that "the supervisor degrades and physically abuses staff (mostly the new trainees). No one complains because they feel the retribution that would follow would make the situation worse."

Another wrote as a reason for leaving: "Constant harassment from co-workers who are longtime employees and vindictive to the point of becoming physically ill." Another wrote: "The supervisory methods of Brent and (name redacted) have been based on intimidation tactics

and management by humiliation."

In the past two years, Brent has had to rely on temporary help in the office. Brent spent nearly \$12,000 on temporary employees from July 2007 to July 2008 and has already spent more than \$14,000 in the first quarter of this fiscal year, which ended Sept. 30; in her 2009 budget request, she asked for \$1,000 for temporary clerks for the entire year.

She has also used up her \$9,000 annual overtime budget and spent an additional \$6,278 three months into the fiscal year. Last year, she spent \$36,168 on overtime. At the current pace, spending on overtime in her department will top \$60,000 by next June.

Brent said the software program requires extra hours.

"It's really quiet in the office after hours, so people love to work in the evenings because it's quiet," she said. "I figured it was necessary to do all the overtime that we have done. I hope I come in at budget ... in the five years that I've been here, I have always come in under budget. So I think that speaks for my management of my budget." ○

NEWS ABOUT MEMBERS

The 1st Judicial District Bar Association has chosen new officers for the 2008-2009 term. **David (Kim) Wilson**, a partner at Reynolds, Motl & Sherwood in Helena, will be president. Mr. Wilson, a 1985 graduate of the University of Montana Law School, has been at Reynolds, Motl & Sherwood since 1985, where he specializes in environmental and land-use law and consumer rights. **Jessica Brubaker** will be the new treasurer. Ms. Brubaker, a 2006 graduate of William & Mary School of Law, is an associate at Gough, Shanahan, Johnson & Waterman. Originally from Wisconsin, Ms. Brubaker spent her college summers working on Flathead Lake and moved to Montana as soon as she could following law school.

Jeffrey T. Dickson has joined the Missoula law firm of Christian, Samson, Jones & Chisholm as an associate attorney. Mr. Dickson was born and raised in Burlington, Vt., and received his BA from Colby College in 2003. He graduated with honors from the University of Montana School of Law in 2007. Prior to joining Christian, Samson, Jones & Chisholm, Mr. Dickson completed a one-year clerkship with Justice Jim Rice of the Montana Supreme Court. Mr. Dickson's practice will focus on real estate, land use, and civil litigation.

The law firm of Crowley, Haughey, Hanson, Toole & Dietrich announced that four attorneys have become new associates

with the firm:

■ **G. Trenton Hooper** graduated from Weber State University in 2005 with a BA in Economics and Political Science. In addition, he graduated from Gonzaga University School of Law in 2008. He will practice in the Litigation Department in the Billings Office.

■ **Trent (TJ) Oram** graduated summa cum laude from the University of Great Falls in 2004 with a BS in Business Administration. He subsequently graduated cum laude with a JD from the University of Idaho and an MBA from Washington State University in 2008. During law school, Mr. Oram served as the *Idaho Law Review* business editor and interned with the Davidson Companies and with Holland & Hart. He will practice in the Commercial Department in the Billings Office.

■ **Grant S. Snell** graduated cum laude from Seattle University School of Law in 2008. He received a BA in Economics and a BBA in Finance from the University of Texas at Austin in 2003, where he graduated with honors. Mr. Snell practices in the Commercial Department in the Kalispell office.

■ **Michael J. Tennant** graduated from Montana State University in 2005 with a BS in Accounting, the University of Montana with an MBA and master's of accounting in 2008, and the University of Montana School of Law in 2008. He will

practice in the Commercial Department in the Billings office.

Jeffrey Weldon, a Billings attorney who specializes in school law, has been named to the board of directors of the Northwest Regional Educational Laboratory (NWREL) in Portland, Ore. Mr. Weldon is one of 29 directors governing NWREL, a private, nonprofit corporation that works to improve learning by building capacity in schools, families, and communities through applied research and development. Mr. Weldon has been legal counsel for the Montana Office of Public Instruction and for Billings Public Schools. He also served four years in the Montana State Senate. Mr. Weldon received his juris doctorate from the University of Montana, as well as a master's of Public Administration from the same institution.

"Following the grandchildren," Missoula attorney **Art Lusse** and **Montana Mediators** announced the relocation of its offices to Billings. Mr. Lusse will offer mediation services for family cases including a co-mediation model with his wife Kitty. The "Institute," the educational arm of Montana Mediators, will continue to offer workshops, trainings, CLE programs in civil and family mediation, negotiation, and advanced topics. For the past 12 years, Mr. Lusse has taught as an adjunct professor at the UM School of Law teaching ADR,

advanced and family mediation, Negotiation and supervising the school's mediation clinic. With Professor Bill Corbett, they created the Board of Regents Certificate Program in ADR which has seen some 25 students graduate with ADR certificates. This past year, Mr. Lusse he was honored by the Law School as Outstanding Adjunct Professor. Mr. Lusse is now teaching interdisciplinary courses at Rocky Mountain College in Billings – negotiation in the fall and mediation in the spring semester. He can be reached at artlusse@hotmail.com or (406) 839-3323. You can visit www.Montana-mediators.com

Longtime Bozeman lawyer **Mike Sand** has joined The Collection Sotheby's International Realty, making a career change. As a sales associate for Sotheby's, Mr. Sand will specialize in recreational and ranch properties, as well as luxury homes. He has handled many real-estate transactions during his 31-year tenure as a lawyer. As a lawyer, Mr. Sand served on the board of directors and was president of the Montana Trial Lawyers Association, was on the staff at Gerry Spence's Trial Lawyers College at Dubois, Wyo., and also served as a member of the Board of Bar Examiners for the State Bar of Montana. He has worked as a private mediator in civil litigation and as an adjunct professor of business law at Montana State University.

CLASSIFIEDS

CLASSIFIEDS POLICY: There is a minimum charge of \$35 for all ads, even for State Bar of Montana members. All ads over 50 words are charged at 70 cents per word.

Send classified ads to *The Montana Lawyer* magazine, P.O. Box 577, Helena MT 59624; or fax to (406) 442-7763; or e-mail to cwood@montanabar.org. Please include billing address. The deadline for the November issue is Oct. 25. Call (406) 447-2200 for more information.

ATTORNEY POSITIONS

DEPUTY COUNTY ATTORNEY: The Madison County Attorney is accepting applications for the full time position of deputy county attorney. Applicants must be qualified as per Title 7, Chapter 4, Part 27, MCA. The successful applicant must reside in Madison County or be willing to relocate to Madison County within three months of appointment to the office. This position is

open until filled. Please send resume to: Madison County Attorney's Office, PO Box 73, Virginia City MT 59755, call (406) 843-4233 or e-mail to pdavis@madison.mt.gov

ASSOCIATE: Flathead Valley law firm seeks associate attorney to help with busy real estate, land use, and litigation practice. Experience is preferred but we are willing to train the right person who possesses a strong work ethic, desire to learn and improve, and writing and analytical skills. Compensation and benefits are very competitive. Submit your cover letter, resume, transcript, and writing sample to Ken Kalvig, Kalvig & LeDuc PC, PO Box 1675, Kalispell MT 59903-1678.

CHIEF DEPUTY COUNTY ATTORNEY: The Hill County Attorney's Office is hiring a full-time chief deputy county attorney. The chief deputy will primarily handle civil issues with some criminal prosecution. Applicant must be licensed to practice law in Montana. Three years of experience in civil law,

criminal law and trial experience is preferred. Salary \$50,000 to \$61,000 per year, depending on experience. Position is open until filled. Submit a letter of introduction, resume, transcript and writing sample to: Hill County Attorney's Office, 315 4th Street, Havre MT 59501. A complete job description can be obtained by contacting personnel@co.hill.mt.us or 406-265-5481, ext. 239.

CITY ATTORNEY: The City of Bozeman is recruiting for a city attorney, who provides leadership and plans, supervises, organizes, and directs all legal operations and activities of the City. \$5,688-\$6,290 per month, depending on qualifications. Excellent benefits. OTF with priority given to apps received by Oct. 31, 2008. City application required. Contact Bozeman Job Service at (406) 582-9200 or visit www.bozeman.net/personnel/Jobs/aspx.

DEPUTY COUNTY ATTORNEY: The Hill County Attorney's Office is seeking a full-time deputy attorney. Must have

JD from accredited law school, admitted to Montana bar or making admission. Experience in criminal law and trial experience is preferred. For a detailed job description, contact the Hill County Personnel Office at (406) 265-5481, ext. 239 or e-mail personnel@co.hill.mt.us Salary depends on experience, plus benefits. Submit a letter of interest, transcript, resume and references to the Hill County Attorney's Office, Hill County Courthouse, 315 4th Street, Havre MT 59501. Deadline: open until filled.

COMMISSION VACANCY: A vacancy exists on the Montana Uniform Law Commission. See 1-12-101 through 1-12-104, MCA. By Nov. 3, interested attorneys should submit a letter of interest and a brief resume to Susan Fox, Executive Director, Legislative Services Division, P.O. Box 201706, Helena MT 59620-1706.

ATTORNEY: Dawson County Domestic Violence Program is seeking a full-time civil legal attorney to work in Eastern Montana. Caseload will be divided between family law and sexual assault cases. May participate in outreach and community legal education. Salary depends on experience. Send a resume and a sample of your legal writing. Applicants must be admitted to practice in Montana. Send to: Dawson County Domestic Violence Program, PO Box 505, Glendive MT 59330.

ATTORNEY: The Stacey & Funyak law firm, a busy litigation firm in Billings, is seeking an associate attorney. Our practice is extremely diverse, and we handle both plaintiff and defense cases. We are seeking an associate attorney who is self-motivated. The salary for this position is negotiable based upon experience, and comes with a full benefit package. All applications will be kept strictly confidential. Please submit a letter of application, resume, writing sample and law school transcript to Stacey & Funyak, Attention: Kevin M. Funyak, PO Box 1139, Billings MT 59103.

ATTORNEY: Busy Kalispell Law Firm seeks a litigation attorney with some interest in Social Security and estate planning. Some experience helpful. Salary, benefits and profit sharing

depends on experience. Write to The Montana Lawyer #9-13, PO Box 577, Helena MT 59624.

MLSA STAFF ATTORNEY: The Montana Legal Services Association has an opening for a staff attorney in Helena to serve as MLSA's advocacy coordinator. This position will be responsible for coordinating a broad range of proactive client advocacy strategies. More information is available at www.mtlsa.org. MLSA is funded in part by the Montana Justice Foundation. Salary depends on experience. Send a letter of interest, resume, and three references to: Montana Legal Services Association, 616 Helena Ave., Suite 100, Helena MT 59601, or hiring@mtlsa.org.

DEPUTY COUNTY ATTORNEY: The Lincoln County Attorney's Office is hiring a full-time, permanent deputy county attorney. Applicant must be licensed to practice law in Montana. Experience in criminal law and trial experience is preferred, including experience as a legal intern, and familiarity with computerized legal research and word processing. Salary – \$40,000-\$48,000 per year – depending on experience, plus excellent benefits. Position is available Oct. 1, 2008, and is open until filled. Submit a letter of interest, Public Sector Job Application, and two letters of recommendation to: Kootenai Job Service, 417 Mineral Ave., Suite 4, Libby MT 59923. (406) 293-6282.

ASSOCIATE: Great Falls firm seeks full-time associate attorney interested in civil litigation practice. Prior experience preferred. All applications will be kept confidential. Please submit cover letter, resume, writing sample and transcript to Stephanie Hollar at Smith, Walsh, Clarke & Gregoire PLLP, PO Box 2227, Great Falls MT 59403.

PUBLIC DEFENDER ATTORNEY: Office of the State Public Defender. \$40,000 to \$50,000 plus state benefits. Locations may include Missoula, Kalispell, Helena, Billings, Butte, Great Falls, Bozeman and other rural areas. Perform public defender work for indigent clients. Contact Barb Kain, Human Resource Officer, bkain@mt.gov for further information and application requirements.

ATTORNEY POSITIONS SOUGHT

LAWYER AVAILABLE: Montana lawyer available for projects as an independent contractor: Memos, research, motions, briefs, jury instructions, pleadings, contract clauses, demand letters, discovery, trial preparation, etc. Fees are negotiable. mark@markfrisbie.com or (406) 924.6945.

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LEGAL ASSISTANTS & OTHER PROFESSIONALS

PARALEGAL: The Montana Legal Services Association has an opening for a paralegal in Helena. More information available at www.mtlsa.org. Send a letter of interest, resume and three references to: Montana Legal Services Association, 616 Helena Ave., Suite 100, Helena, MT 59601, or hiring@mtlsa.org.

LEGAL ASSISTANT: Jackson, Murdo & Grant PC has an opening for an

experienced legal assistant in a Helena general practice law firm. Challenging work, competitive salary and benefits. Please send resume with references to Kathryn Connors, Office Administrator, Jackson, Murdo & Grant PC, 203 N. Ewing Street, Helena MT 59601.

PARALEGAL: The Montana Legal Services Association has an opening for a paralegal in Missoula. More information available at www.mtlsa.org. Send a letter of interest, resume and three references to: Montana Legal Services Association, 616 Helena Ave., Suite 100, Helena, MT 59601, or hiring@mtlsa.org.

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WATER RIGHTS LITIGATION

SUPPORT: Surface & groundwater evaluations, expert witness testimony, modeling and permitting. Geomatrix Consultants. Contact: Cam Stringer PG, (406) 542-0129 (Missoula Office); or Larry Brown, Hydrologist, (406) 442-0860 (Helena Office). www.geomatrix.com

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ACCOUNTS, from Page 19

due diligence to ensure that the bank where they have their trust account is financially sound.

The special case of credit unions

A footnote on credit unions. The definition of "financial institution" at Admis. Disc. R. 23(29)(g)(1) includes credit unions. It seems from this that the Supreme Court did not consider credit unions to be off limits for trust accounts. That said, lawyers should be acutely aware that there are insurability concerns about funds in credit union trust accounts. Credit unions are membership organizations, and the lawyer who has a trust account in a credit union will need to be a member to open the account. So far so good. One problem is that under National Credit Union Administration rules, a member should be eligible to open an agency account only if all of the beneficial owners of the funds in the account are also members of that credit union. NCUA Opinion Letter 96-0841. That's only the eligibility side, something some credit unions apparently disregard.

But what about insurability of funds? Much like with the FDIC, when funds are held in a credit union by an agent, they are insurable as though they were deposited in the name of the principal. Here's the rub, though: if the beneficial owner of funds in trust is not also a credit union member, those funds will not be insured. It is difficult to imagine that a lawyer will wish to restrict taking trust funds only from those clients who happen to be members of the same credit union. This means that the funds in trust of any client who is not, as is likely, a member of the credit union will be entirely uninsured. This is certainly something lawyers will want to keep in mind as they consider having their trust account at a credit union. ○

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