

# MONTANA LAWYER

State Bar  
— of —  
Montana

May 2017 | Vol. 42, No. 7

## BIG CHANGES IN CRIMINAL LAW



2017 Legislature's overhaul of sentencing rules, OPD administration, sex crime and family crime laws left big impact on criminal practice



### Also in this edition

- > Former Supreme Court Justice John C. 'Skeff' Sheehy dies at 99
- > Working group to study Limited License Legal Technician in Montana
- > Bankruptcy Section launches scholarship to honor longtime judges
- > Meet the candidates in contested State Bar Trustee elections
- > Applicants sought for 7th Judicial District judge, Work Comp Court judge

The official magazine of the State Bar of Montana published every month except January and July by the State Bar of Montana, 7 W. Sixth Ave., Suite 2B, P.O. Box 577, Helena MT 59624. 406-442-7660; Fax 406-442-7763. E-mail: jmenden@montanabar.org

**State Bar Officers**

President  
*Bruce M. Spencer, Helena*

President-Elect  
*Leslie Halligan, Missoula*

Secretary-Treasurer  
*Jason Holden, Great Falls*

Immediate Past President  
*Matthew Thiel, Missoula*

Chair of the Board  
*Juli Pierce, Billings*

**Board of Trustees**

- Elizabeth Brennan, Missoula*
- Brian C. Smith, Missoula*
- David Steele, Missoula*
- Kaylan Minor, Kalispell*
- Jessica Polan, Anaconda*
- Channing Hartelius, Great Falls*
- Paul Haffeman, Great Falls*
- Kent Sipe, Roundup*
- Mike Talia, Helena*
- Kate Ellis, Helena*
- J. Stuart Segrest, Helena*
- Christopher Gray, Bozeman*
- Lynda White, Bozeman*
- Ross McLinden, Billings*
- Eric Nord, Billings*
- Juli Pierce, Billings*

**ABA Delegates**

- Damon L. Gannett, Billings*
- Shane Vannatta, Missoula*

**Montana Lawyer Staff**

Publisher | *Christopher L. Manos*  
Editor | *Joe Menden*  
406-447-2200; fax: 442-7763  
email: editormontanabar.org

**Subscriptions** are a benefit of State Bar membership.

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

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

# INDEX

## May 2017

### Cover Story

Legislature Made Major Changes in Criminal Law ..... 12

### Feature Stories

State Bar Election Candidates ..... 8

Law Firm Security Series ..... 16

AG's Authority Over Charitable Trusts ..... 18

Making Sense of Medicare, Medicaid ..... 24

Managing Client Trust Accounts ..... 26

MJF Has Big Impact on Montanans in Need ..... 28

### Regular Features

Member News ..... 4

Court orders ..... 7

State Bar News ..... 11

CLE ..... 15

Obituaries ..... 29

Job Postings/Classifieds ..... 31



State Bar of Montana  
President Bruce Spencer  
is a solo practitioner  
based in Helena. His  
practice areas empha-  
size, governmental rela-  
tions, creditors' rights,  
commercial law, auto-  
motive law,  
insurance law, and  
health care law.

# Support Legal Services funding – our justice system depends on it

As I write this I am in Washington, D.C., representing the State Bar of Montana at ABA Days. As always when I tell people where I am from, they wax poetic about Montana. I, of course, agree. However, there are many of our neighbors who are not able to enjoy some of the fruits of our magnificent state.

Montana ranks fifth in the nation for rural residents, seniors and veterans. Our state has 158,620 living in poverty. These are the populations that are susceptible to unmet legal needs. There is one entity that always takes the lead in serving these legal needs, Montana Legal Services Association.

A large part of the funding for Montana Legal Services is provided by Legal Services Corporation. Currently the President's budget zeros out federal funding for Montana Legal Services. While in D.C., your State Bar of Montana delegation met with Sen. Steve Daines and Sen. Jon Tester. Both expressed optimism that eventually LSC would retain some funding. We as lawyers can greatly assist in that effort.

I am asking you to write to our senators and inform them of the vital need for this funding. Did you know that without a lawyer the chance that a victim of domestic violence will, obtain a restraining order is 32 percent, and that with one it raises to 83 percent? Lawyers make a difference and the poor deserve representation.

Please contact Sen. Daines and Sen. Tester and ask them to support funding of the Legal Services Corporation. Ask each to write you back and acknowledge your correspondence and state their position on the issue. If you don't receive a reply, please write again.

Our system of justice, and thus our livelihoods, only works when there is equal justice for all.

## Contacting your senators

### Office of Senator Steve Daines

320 Hart Senate Office Building  
Washington, D.C. 20510

Phone: 202-224-2651

Or send an email message at: <https://www.daines.senate.gov/connect/email-steve>

### Office of Senator Jon Tester

311 Hart Senate Office Building  
Washington, DC 20510-2604

Phone: 202-224-2644

Or send an email message at: [https://www.testersenate.gov/?p=email\\_senator](https://www.testersenate.gov/?p=email_senator)

### Henry, Ewan join as managing partner, senior counsel with Michael Best in Missoula

Michael Best has opened an office in Missoula and welcomed two attorneys to the office.

Joel Henry has joined as the managing partner at the Missoula office, focusing his practice on counseling start-up and growth phase companies regarding the development and protection of their intellectual property. Henry guides start-ups and clients in business formation, contracts, and intellectual property, including patents, trademarks, trade secrets, and licensing. As one of the few lawyers in the country with a Ph.D. in computer science, he provides strategic counsel in the intersecting realms of law and technology.

Henry is co-founder and president of Agile Data Solutions, which provides clients with data collection, review, and production tools and services. He has successfully prevented and mitigated data breaches that included HIPAA, FERPA, and multiple state regulations regarding data exposure. Throughout his career, he has focused on the transition of research to practical use, including work for NASA, the U.S. Department of Defense, Lockheed Martin, and Siemens.



Henry



Ewan

Henry earned his Ph.D. in computer science from Virginia Tech and his J.D. from the University of Montana School of Law. He is a member of various legal and technology-focused professional organizations, including the IEEE Computer Society, The Sedona Conference, and the Association for Computing Machinery.

Jennifer Ewan joins the office as senior counsel in the firm's Corporate & Transactional Practice Group. Ewan provides guidance and support to startup and growth phase companies, as well as advice on a wide variety of employment, corporate and venture-related matters. In 2017, she completed Level I and II Title IX investigator training through Atixa and is now certified to fully investigate Title IX complaints.

Prior to joining Michael Best, Ewan worked at the Missoula Economic Partnership (MEP), where she proactively identified and courted related investment and business development opportunities, scoped, implemented, and led MEP special projects, especially those focused on data science/technology.

Ewan was previously a field director and counsel with former Chairman of the U.S. Finance Committee, Sen. Max Baucus. She also prosecuted for the City of Missoula Attorney's Office, and is an external review panel member for the City of Missoula's Police Department, reviewing felony sexual assault cases.

She received her J.D. from the University of Montana Alexander Blewett III School of Law and her B.A. from the

University of Montana. She also attended the China University of Political Science and Law.

Based in Milwaukee, Michael Best also has offices in Washington, D.C., Chicago, Denver, Salt Lake City, Austin, Texas, Madison, Wis., Manitowic, Wis., Waukesha, Wis., and Raleigh, N.C.

### Milodragovich, Dale & Steinbrenner announces Stone, Dailey as new shareholders in firm

Milodragovich, Dale & Steinbrenner, P.C., welcomes Hannah Stone and Tim Dailey as our newest shareholders.



Stone



Dailey

Both Stone and Dailey interned at MDS while attending law school at the University of Montana. After graduating, both have been outstanding associates at the firm, and have tried multiple cases to verdict. Stone and Dailey have each developed well-rounded areas of expertise. Stone's practice areas include representing individuals, small business owners and corporations in cases involving liquor liability, employment, insurance coverage and defense, medical negligence, workers' compensation, personal injury and wrongful death. Dailey's practice areas include personal injury, insurance law, commercial litigation, construction litigation, employment law, and creditors' rights.

Stone and Dailey are active in the local community. Dailey has successfully coached the University of Montana School of Law Trial Team for the past two years. Stone is the 2016-2017 president of the Western Montana Bar Association, and is an active board member for Children's Museum Missoula.

### Capp & Jenks law firm in Missoula welcomes attorney Fred Simpson

Capp & Jenks, P.C. is pleased to announce that Fred Simpson joined the firm on April 1.



Simpson

Simpson entered the practice in 1995 and focuses on litigation representing individuals and businesses regarding insurance tort defense, insurance coverage, professional liability, and commercial litigation. In recent years his practice has expanded into commercial transactions and other business-related matters.

Simpson is licensed in Montana state and federal district courts, as well as the 9th Circuit Court of Appeals. He has tried numerous jury trials to verdict and has handled appeals to the Montana Supreme

Court and the 9th Circuit Court of Appeals. He is rated “BV Distinguished” by Martindale-Hubbell’s peer review rating service.

Effective April 1, the law firm’s name has changed to Capp, Jenks & Simpson, P.C. The firm will continue to focus on general litigation including insurance defense, real estate and commercial transactions, along with estate planning and probate matters.

### Whitefish Chamber of Commerce honors Tornow as Citizen of the Year



Tornow

Whitefish Attorney Thomas Tornow received the 2017 Citizen of the Year award from the Whitefish Chamber of Commerce in recognition of his long record of community involvement and leadership in the areas of affordable and workforce housing.

Tornow is currently the Chairman of the Whitefish Chamber’s Workforce Housing Taskforce and a Director of Trust Montana.

### Governor appoints several Montana attorneys to state boards and councils

Several attorneys were among appointments to state boards and councils that Gov. Steve Bullock in April.

**Board of Crime Control:** Jared Cobell, Great Falls, assistant U.S. attorney and tribal liaison for the U.S. Attorney’s Office; Custer County Attorney Wyatt Glade, Miles City; Dawson County Attorney Olivia Rieger, Glendive;

**Fish and Wildlife Commission:** Matthew Tourtlotte, Billings, partner at Brown Law Firm;

**Board of Housing:** Pat Melby, Helena, retired attorney.

### Have Member News to Submit?

Do you have news you would like to share with the Montana legal community? The Montana Lawyer welcomes submissions from Montana attorneys about new jobs, honors, publications, and other accomplishments, which are free to submit. Please send member news and photo submissions to [editor@montanabar.org](mailto:editor@montanabar.org). Email or call 406-447-2200 with any questions about submissions.

## Olson completes book series on Montana courthouse tales

Former Montana attorney Eric Olson has completed his four-book series of “Montana Courthouse Tales.”

The fourth and final book, “Courting Law,” is currently being formatted for publication and will be in print on or before June 1.

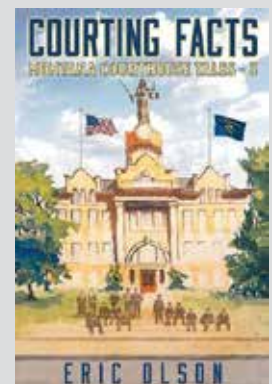
The first book in the series, “Courting Truth,” was published in 2014, followed by “Courting Justice” in 2015 and “Courting Facts” in 2016.

In the course of developing, researching, and writing the stories at the heart of this series he perused thousands of case files, read hundreds of newspaper articles and other secondary sources, and interviewed dozens of witnesses (including district judges, court clerks, sheriffs, deputies, witnesses, historians, and others). Traveling back and forth across Montana between 2013 and 2017 I logged more than 30,000 miles and visited every courthouse in the state.

Olson was the chief public defender in Great Falls for 10 years before helping found the Montana Office of the Public Defender in 2006. For the next eight years (2006-2014) he was the statewide training coordinator for the Montana public defender system. He retired in January of 2014 after 37 years of trial practice.

The Montana Courthouse Tales books are available in both paperback and ebook format from Amazon, Barnes & Noble, and elsewhere, including local bookstores around Montana and at the Montana Historical Society bookstore in Helena.

Olson also has written a novel, “Undone Justice,” which is also available in digital form from Amazon, Barnes and Noble, and other online book distributors.



### Coyle & Fanning firm opens in Bozeman

Colleen Coyle and William Fanning have opened their new law firm Coyle & Fanning PLLC in Bozeman. The firm specializes in water rights and related property matters including water right adjudication cases, permits and changes of use, and water right due diligence for real estate transactions. Coyle & Fanning represent a range of clients including agricultural operators and landowners, water users associations, irrigation districts, canal companies, and municipalities. Both Coyle and Fanning are former water masters with the Montana Water Court who combined their solo practices into the new firm in April 2017.



Coyle



Fanning

Coyle has 20 years of experience in Western water rights. She served for 14 years as a senior water master, conducting hearings and settlement processes in Montana's general stream adjudication and coordinating statewide water right enforcement efforts. She brings experience as a settlement master, mediator and facilitator. She holds a B.A. and J.D. from the University of Montana.

She also is a subject matter expert for Ponderosa Advisors LLC, advising on water rights and policy issues regarding development of Water Sage, an interactive mapping platform for water and land data.

At the Water Court, Fanning gained practical experience by adjudicating water rights, mediating complex cases, and assisting the local district courts in water distribution disputes. He holds a B.A. from the University of New Hampshire and an M.A. from St. John's College. Before earning a law degree at the University of Montana, he worked as a firefighter, carpenter and teacher. He is admitted to practice in Montana's state and federal courts.

You can reach the firm at 406-551-4868 or by email at [office@coylefanninglaw.com](mailto:office@coylefanninglaw.com); [colleen@coylefanninglaw.com](mailto:colleen@coylefanninglaw.com); or [william@coylefanninglaw.com](mailto:william@coylefanninglaw.com).

## Your Bar Benefit



### Legal Research brought to you by the State Bar

All Active Attorney and Paralegal Section members of the State Bar of Montana and members of the Montana Magistrates Association have free access to the Fastcase legal research system. This exclusive member benefit provides access to one of the largest law libraries in the world and a variety of Montana legal materials, including case law, statutes, regulations, court rules and attorney general opinions, as well as a 50-state and federal legal database.

Fastcase offers three options for webinar training hosted by a Fastcase attorney: Introduction to Fastcase, Boolean (Keyword) Searching and Advanced Tips for Enhanced Legal Research.

Many of the webinars carry free CLE credit from Montana and other states.

If you have any technical questions about Fastcase, visit [www.montanabar.org/?page=AboutFastcase](http://www.montanabar.org/?page=AboutFastcase),

email [support@fastcase.com](mailto:support@fastcase.com) or call toll free at 866-773-2782.

### May-June Webinars

(All webinars 11 a.m. to 1 p.m. MT. See the calendar at [www.montanabar.org](http://www.montanabar.org) for links to registration.)

**Thursday, May 4 –**

Introduction to Legal Research on Fastcase

**Thursday, May 11 –**

Advanced Legal Research on Fastcase

**Thursday, May 18 –**

Introduction to Boolean (Keyword) Searches

**Thursday, June 1 –**

Introduction to Legal Research on Fastcase

**Thursday, June 8 –** Advanced Legal Research on Fastcase

**Thursday, June 15 –**

Introduction to Boolean (Keyword) Searches

# 406-683-6525

## Montana's Lawyers Assistance Program Hotline

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

# Court creates working group to study Limited License Legal Technician

A working group created by the Montana Supreme Court will study the idea of a Limited License Legal Technician (LLLT) for Montana in order to address challenges related to self-represented litigants and litigants of modest means.

The idea is based on a category of legal providers the Washington Supreme Court created in 2015 to help meet the needs of people who can't afford an attorney. LLLTs in Washington are currently limited to practice in the area of family law.

The State Bar of Montana, the State Bar's Paralegal Section and the Supreme Court's Access to Justice Commission requested the study.

According to the Washington State Bar Association's website, legal technicians in their program are not fully licensed lawyers, but they are licensed to assist clients in certain limited legal matters. They differ from attorneys in three primary ways: They cannot represent clients in court, they cannot negotiate on behalf of a client, and they can only prepare legal

documents that have been approved by the Limited License Legal Technician Board.

Technicians in the Washington program must have an associate's degree or higher, complete 45 credit hours from an approved legal program, complete applicable practice area courses offered through the University of Washington School of Law, complete 3,000 hours of paralegal experience under a lawyer's supervision.

Justice Patricia Cotter, who retired from the Montana Supreme Court in January, will serve as chair of the working group. Also appointed to the group are Shanni Berry, chair of the Paralegal Section; Professor Larry Howell from the University of Montana's Alexander Blewett III School of Law; Deborah Kottel, professor of paralegal studies at the University of Great Falls; and attorney Jason Holden, representative of the State Bar of Montana; Mel Fisher from Montana Legal Services Association; and Georgette Boggio of the Access to Justice Commission will also be appointed to the working group.

**Absolutely.  
Positively.  
Neutral.**



BRADLEY D. BONNER

**YELLOWSTONE  
MEDIATION**

WWW.YELLOWSTONEMEDIATION.COM



1102 BECK AVENUE  
CODY, WYOMING 82414

7 CANYON VIEW DRIVE  
SHERIDAN, WYOMING 82801

**307.586.4135**

# 2017 Bar Election candidate profiles

Ballots for the State Bar of Montana's 2017 elections were mailed on Monday, May 1.

Ballots must be returned, postmarked or hand-delivered, by **Monday, May 22**. Ballots will be counted on June 2. The results will be released after candidates are informed.

To help members get to know the candidates, we asked each of them to answer a questionnaire. Printed below are the responses we received from the candidates in this year's only contested race, Area H Trustee.

On page 10 are the responses from Eric Nord, who is unopposed for President-Elect.

## Trustee Candidates

### Area H (Yellowstone, Big Horn, Carbon and Stillwater Counties)

#### Shane P. Coleman

##### What do you feel you will bring to this position?

I will bring enthusiasm and the perspective of a lawyer who has practiced in Billings for nearly two decades.

##### What can you tell us about your Area?

I have practiced for 19 years, nearly all of which has been in Billings. I have served on the YABA Board and the State Bar's Fee Arbitration Committee. Currently, I am involved with the State Bar's new Intellectual Property Section.

##### Tell us about yourself

I have a general commercial litigation practice that emphasizes intellectual property and bankruptcy matters. I also handle some intellectual property transaction work. I have been with Holland & Hart in Billings for the last 12 years. Before that, I practiced in Billings and Missoula with Dorsey & Whitney. I graduated from UM Law School in 1998 and from undergrad at MSU in 1995.

#### Juli Pierce

##### What do you feel you will bring to this position?

I have been a Trustee for Area H since September 2013 and hope to continue serving as a Trustee for many years to come. I wholeheartedly believe in the mission of the State Bar: to lead the legal profession and serve the public interest.

In March 2017, I took over as chair of the Board of Trustees. As the chair, I am responsible for developing the agendas for the meetings and overseeing the meetings. In this role, I have a vision for holding true to the objectives of the State Bar at every meeting, and I plan on implementing a self-assessment process after every meeting to further this objective.

I have the energy and desire to continue my service on the Board. I believe it is very beneficial to have someone with my institutional knowledge on the Board. With that said, though, I am always looking beyond the status quo and I always welcome new or differing viewpoints.

**What would your goals or objectives be as an officer of the State Bar?**

## Unopposed elections

The following candidates for State Bar Officer and Trustee positions are running unopposed:

**President-Elect:** Eric Nord, Billings

**Secretary-Treasurer:** Jason Holden, Great Falls

**Area E Trustee** (Blaine, Carter, Chouteau, Custer, Daniels, Dawson, Fallon, Fergus, Garfield, Golden Valley, Hill, Judith Basin, Liberty, McCone, Meagher, Musselshell, Petroleum, Phillips, Prairie, Powder River, Richland, Roosevelt, Rosebud, Sheridan, Treasure, Valley, Wheatland and Wibaux Counties): Kent Sipe, Lewistown

**Area F Trustee** (Lewis and Clark and Broadwater Counties): Kate McGrath Ellis, Helena; Stuart Segrest, Helena; Mike Talia, Helena)

One of the important objectives I see is to be relevant to all of the State Bar's membership across the state and to improve services to all of the membership. I have been a part of the Board's actions to bring Fastcase, Clio, MyCase and the ABA Bar Dues Pilot to the membership, all of which has received positive feedback.

Moving forward, I want to continue improving communication between the State Bar and the Yellowstone Area Bar Association (YABA). I also want to explore ways in which the State Bar can be more involved and helpful to public sector attorneys. I know our current President, Bruce Spencer, has put together a working group for this purpose, and I applaud him for it.

##### Tell us about yourself

I am a prosecutor at the Yellowstone County Attorney's Office. I have worked here since I became an attorney in 2004. I have been Chief Deputy since January 2015. I specialize in prosecuting violent crimes against women and children. For stress relief, I teach Jazzercise and I love to travel and golf.

#### Ben Sather

##### What do you feel you will bring to this position?

I will bring an attitude of caring and willingness to improve my local bar and the State Bar. I have a genuine desire to improve my profession and serve as a conduit for the Yellowstone Area Bar Association members to the State Bar of Montana. Not only do I work closely with attorneys in Billings; but I maintain a statewide practice and work well with attorneys and judges throughout the State.

##### What can you tell us about your Area?

I served on the Yellowstone Area Bar Association board of directors from 2009-2013. In 2013-2014, I served as the President of the Yellowstone Area Bar Association and as past president in 2014-2015. I greatly enjoyed my time getting to know the local bar and its members. I helped organize monthly



CLE opportunities, annual meetings, attorney memorial events and represented YABA in dealing with the community in general. I continue to organize the local bar's annual meeting held every May, on behalf of YABA.

I am very familiar with the local bar, its members and events. Not only have I litigated with or against most all members of the local bar in some capacity, I have gotten to know many more through my work with the Yellowstone Area Bar Association. I have a positive reputation in the legal community and make a point of practicing law in a professional manner, with courtesy. I believe respect for clients, opposing counsel and parties and the courts is the paramount priority in my job.

#### **Tell us about yourself.**

I have been in practice since 2006, after graduating from the University of Montana School of Law. I was a law clerk for the Montana Supreme Court for one year and have been practicing civil litigation in Billings since August 2007. For the last four years, I have practiced in a two-attorney firm (Sather & Holm, PLLC), specializing in civil litigation. I have extensive experience with both judicial districts in Area H and have practiced in front of all of the judges in Yellowstone, Stillwater, Carbon and Big Horn Counties.

#### **Antoinette Tease**

##### **What do you feel you will bring to this position?**

I have been a member of the Montana State Bar for more than 20 years and have had the opportunity to practice in a number of different settings – first, with a large law firm, then in-house with a software development company, and then as a solo practitioner. In each of these positions, I have experienced and appreciated the unique collegiality of our Bar and the creativity and resourcefulness of Montana clients. I would bring to this position the perspective of someone who has worked with individual inventors and small businesses to protect and defend their intellectual property, who has served in various leadership positions in the American Bar Association Section of Intellectual Property law, and who has testified before the federal and state legislatures on intellectual property-related legislation. I have been a frequent speaker on intellectual property issues at ABA and State Bar of Montana CLE programs and am currently serving my second term on the CLE Institute. Like many other attorneys in Montana, I know what it means to build a practice from the ground up, from a single computer in the basement of our home to our current office in downtown Billings, from a handful of clients to hundreds of clients in 35 states and a dozen foreign countries, and the particular geographic, technological and personnel challenges involved in such an endeavor. I have developed a worldwide network of foreign associates to handle international patent and trademark filings on behalf of our clients, and I currently advise Montana companies on international legal issues as a member of the Montana World Trade Center “TechEx” expert team. In sum, I believe I would bring a particularly entrepreneurial, business-oriented and international perspective to the State Bar trustee position.

##### **What can you tell us about your Area?**

My husband and I have both practiced law in Billings for over 20 years, and there is hardly an attorney in Yellowstone, Big Horn, Stillwater or Carbon County that we do not know. I have clients in each of these counties. Because I have a specialized practice, I often

refer matters to other Montana attorneys or receive referrals from them. As a result, my interactions with other Montana attorneys tend to be collaborative rather than adversarial. I have been active in the Montana State Bar for a number of years, am currently serving my second term on the CLE Institute, and am an Inaugural Member and Council Member of the State Bar Intellectual Property Law Section. I have moderated and/or presented numerous programs for the State Bar of Montana, including, most recently, the Eastern Montana CLE in Miles City and Managing a Law Practice in Great Falls. I also do a great deal of outreach to non-attorney groups; for example, I have given presentations on intellectual property law for Skyview High School and the entire Lockwood School District and a presentation on art law at the Yellowstone Art Museum. I have also served on the MSU-Billings College of Business Advisory Board and the Board of Advisors for Montana Business Incubator in Billings. One of the highlights of my year is U.S. Sen. Mike Enzi's annual Inventors Conference, at which I have had the privilege of speaking for nearly a decade. At the invitation of Sen. Steve Daines, I spoke about women inventors at the U.S. Congressional Inventions Caucus in Washington, D.C., in March of this year.

#### **Tell us about yourself**

I grew up in Connecticut, went to college in Boston and law school in Connecticut, and then clerked for a U.S. District Court judge in Hawaii. This judge took me to Billings, Montana, where I met my husband. Leif and I spent three years working in Washington, D.C., before moving back to Montana. I was fortunate to join the Crowley law firm, where I became partner and started the firm's Intellectual Property and Technology Law practice group. In 2001, I had an opportunity to work as general counsel for a software development company with its headquarters in Billings. After three years as in-house counsel, I decided to hang my shingle. I worked at home raising two sons for nine years and then moved into our offices in downtown Billings. We learned after moving to Montana that my relatives had homesteaded north of Terry, Montana (by Little Sheep Mountain).

The framers of the U.S. Constitution struck a balance between fostering innovation and promoting competition, and I view myself as a foot soldier in that cause. Trademarks affect literally every business on the planet, and I have handled patents for clients in industries as wide-ranging as agriculture, medical, automotive, hunting and fishing, e-commerce, and oil and gas. In terms of notable career accomplishments, I filed the first anti-cybersquatting lawsuit ever to be filed in Montana, I testified as an expert witness on patent issues in a multibillion-dollar infringement case involving a medical device, and I believe I am the only Montana attorney to take a patent infringement case to the U.S. Court of Appeals for the Federal Circuit (and win). Our client in the latter case was a family-owned business built around a piece of agricultural equipment invented years ago by three brothers. I am proud to be working with MSU-Billings to build its patent portfolio from the ground up. If you want to know what makes me tick — what I enjoy doing on a daily basis — it is traveling all over the state to meet with inventors so that they can show me their inventions (from cattle feeders to semiconductor equipment to trampoline mount systems) and I can learn how they work. These people represent the true spirit of Montana — resourceful and problem-solving, with an eye to the future.

## Commission accepting applications for judicial openings

### Simonton retiring as 7th Judicial District judge

The Honorable Richard Simonton of Glendive has announced that he will retire as 7th Judicial District judge effective July 14.

The Judicial Nomination Commission is now accepting applications for a replacement to Judge Simonton. The commission will accept applications from any lawyer in good standing who has the qualifications set forth by law for holding the position of district court judge. The application form is available electronically at [http://courts.mt.gov/supreme/boards/jud\\_nomination](http://courts.mt.gov/supreme/boards/jud_nomination).

Applications must be submitted electronically as well as in hard copy. **The deadline for submitting applications is 5 p.m. on Sunday, May 28.** The commission will announce the names of the applicants thereafter.

There will be a public comment period on the applicants from May 29 through June 28.

The commission will forward the names of three to five nominees to Gov. Steve Bullock for appointment after reviewing the applications, receiving public comment, and interviewing the applicants if necessary. The position is subject to election in 2018. The successful candidate will serve a six-year term. The annual salary for the position will be \$132,567.

Judge Simonton has been on the bench since the late 1990s, making him one of the longest-serving Montana district court

judges.

The 7th Judicial District covers Dawson, McCone, Prairie, Richland, and Wibaux counties.

### Work comp judge's term expires on Sept. 7

Chief Justice Mike McGrath has notified the Judicial Nomination Commission that the term of office for the Hon. David Sandler, Workers' Compensation Judge, expires on Sept. 7.

The Commission is now accepting applications from any lawyer in good standing who has the qualifications set forth by law for holding the position of Workers' Compensation Judge. The application form is available electronically at [http://courts.mt.gov/supreme/boards/jud\\_nomination](http://courts.mt.gov/supreme/boards/jud_nomination). Applications must be submitted electronically as well as in hard copy. **The deadline for submitting applications is 5 p.m., Thursday, June 1.** The commission will announce the names of the applicants thereafter.

The Commission will forward the names of three to five nominees to the Governor for appointment after reviewing the applications, receiving public comment, and interviewing the applicants if necessary. The person appointed by the Governor will serve a six-year term subject to Senate confirmation at the next special or regular legislative session. The annual salary for the position will be \$132,567.

Alexander Blewett III

SCHOOL OF LAW

UNIVERSITY OF MONTANA

## SUMMER AMERICAN INDIAN AND INDIGENOUS LAW PROGRAM

June 5 - August 11, 2017 • Nine Week-Long Courses with CLE Options

Indian Law Research June 5 - 9

Mastering American Indian Law June 12 - 16\*

Economic Development in Indian Country: Tribal Business Law June 19 - 23

Environmental Justice in Indian Country June 26 - 30

Criminal Jurisdiction in Indian Country July 10 - 14

Good Native Governance July 17 - 21

Indigenous Cultural Preservation: Sacred Sites and Religious Freedom July 24 - 28

Indian Child Welfare Act and Indian Civil Rights July 31 - August 4

Taxation and Finance in Indian Country August 7 - 11

All courses run from 9:00 - 11:30 a.m. with the exception of Mastering American Indian Law, which has an additional afternoon session from 1:00 - 3:00 p.m. CLE credit will be requested for each course and can be viewed on the program webpage. CLE registration fees are \$650 for all courses except Mastering American Indian Law, which is \$1300.

View descriptions and registration info online at [umt.edu/indianlaw](http://umt.edu/indianlaw)

# Bankruptcy Judges Scholarship honors longtime judges

A scholarship organized by the State Bar of Montana's Bankruptcy Section will honor the legacy of Montana's two longtime U.S. Bankruptcy Court judges and –section members hope – encourage future lawyers to aspire to their example.

The Bankruptcy Judges' Scholarship, a permanently endowed scholarship, was created at the University of Montana's Alexander Blewett III School of Law in honor of the Honorable Ralph B. Kirscher and the Honorable John L. Peterson. The scholarship will be awarded to a law student or students at the law school with an expressed interest in bankruptcy law, debtor-creditor law, corporate turnaround and related topics.

The new scholarship was announced at Judge Kirscher's retirement dinner on Feb. 24.

Bankruptcy Section member Doug James of Billings said that when Kirscher announced his retirement last year after 18 years as bankruptcy judge, section members realized how privileged they had been to only have two bankruptcy judges since the court was created in 1985.

"They have been our role models," James said. "They are the giants of the bankruptcy profession. We decided that we wanted to do something to highlight their service, expertise, and professionalism. We decided that the best way that we could do that would be to tell future generations of lawyers about them with the hope and expectation that more lawyers will follow their example."

The Bankruptcy Section reports that more than 100 law firms and individuals have donated more than \$37,000 toward the permanent endowed scholarship, with donations coming from Montana, California, Idaho, North Dakota, Wyoming and Washington, D.C.

Kirscher and Peterson both earned their undergraduate and law degrees from the University of Montana, and both spent their entire careers in Montana.

A Butte native who lived his entire life in The Mining City other than his time at the University of Montana, Peterson worked to move the Bankruptcy Court and Clerk's office from Great Falls to Butte when he became Montana's first U.S. Bankruptcy Court judge in 1985.

When he retired in 1999, Peterson was the longest serving bankruptcy judge in the U.S.

Even after Kirscher succeeded him on the bench, Peterson continued to serve on recall status, overseeing all of his successor's conflict cases. He didn't fully retire until 2015.

Kirscher served as bankruptcy judge in Montana for 18 years. He was appointed on Nov. 18, 1999 and reappointed to a second term on May 18, 2014. He retired as chief bankruptcy judge for the District of Montana on Jan. 31

While on the bench, Kirscher continued to serve as an adjunct lecturer in bankruptcy at the University of Montana School of Law. He is a member and former chair of the Ninth Circuit Conference of Chief Bankruptcy Judges, which advises the Judicial Council of the Ninth Circuit on governance and other matters. Judge Kirscher has served on various other Ninth



Peterson



Kirscher

## How to donate

Fundraising for the scholarship is ongoing. The law school has set up a website where people can learn more and donate: [www.umt.edu/law/alumni/bankruptcy-judges-scholarship.php](http://www.umt.edu/law/alumni/bankruptcy-judges-scholarship.php).

Circuit committees, including the Court-Council Committee on Bankruptcy Judge Appointments, the Bankruptcy Judges Education Committee, and the Public Information and Community Outreach Committee, now known as the Courts and Community Committee.

More recently, he was selected to serve on the United States Bankruptcy Appellate Panel for the Ninth Circuit from May 1, 2010, through November of 2016, and he was inducted into the American College of Bankruptcy in 2011.

## MEDIATION AND ARBITRATION SERVICES

Charles R. Cashmore

Cashmore & Grant, P.C., Billings, MT

• Available for Mediation & Arbitration Statewide

*No Charge for Travel Time*

• 40+ Years Litigation and Trial Experience;  
Including 20+ Years Mediation and Arbitration

• Conference Facilities Provided in Billings

(406) 294-3107 direct

ccashlaw@aol.com

# Legislature enacts major changes to state criminal justice system

Public defender system overhaul, sentencing reform among substantial legal changes in session

By SEN. CYNTHIA WOLKEN, REP. KIMBERLY DUDIK  
and REP. NATE MCCONNELL

Sweeping bipartisan legislative reforms affected many areas of criminal and child protection law during the 65th Legislative Session. Many of these reforms were the result of nearly two years of bipartisan interim legislative work. Three committees in particular focused their work to bring forth many of these legal changes: the Office of State Public Defender Task Force, the Sentencing Commission, and the Law and Justice Interim Committee. Additional bills addressing criminal law that passed were not part of these three committees.

This article provides a comprehensive update of the legal changes coming as a result of these legal changes. Some bills were not included because they were or are expected to be vetoed by Gov. Steve Bullock.

## Sentencing Commission Bills

The Sentencing Commission was created in the 2015 Legislative Session. The legislators who served on the budget section that oversees the budgets of the public safety agencies, including the Department of Corrections, Department of Justice, the Judiciary, and the Office of the Public Defender, had seen an exponential growth in those budgets over the past several sessions. While Montana's index crime rate remained stable and relatively low regionally, Montana's court cases and prison and jail population rose substantially. After analyzing these factors, the legislators on Subsection D (which oversaw these budgets) decided to take a different approach to impacting justice delivery in Montana and created the Sentencing Commission and the Office of State Public Defender Task Force.

The Sentencing Commission brought together stakeholders in the criminal justice system to gather data and learn why we were spending more money for worse outcomes in the justice system and to develop policy to re-right the ship. It was the first time in two decades that the legislature took a comprehensive look at the system at all levels. Sen. Wolken,



Dudik



McConnell



Wolken

D-Missoula, chaired the Commission. Go to <http://leg.mt.gov/css/Committees/Interim/2015-2016/Sentencing/default.asp> for more information.

The Sentencing Commission coincided with a national Justice Reinvestment movement, using data and evidence-based programming to hold offenders accountable, reduce recidivism, and save money. The commission worked alongside the Council of State Governments Justice Center, a nonpartisan, non-profit organization that has worked successfully in many other states. The Commission put forth several pieces of policy unique to Montana to improve our justice system. If you want to learn more, please read the complete Justice Reinvestment report at [https://csgjusticecenter.org/wp-content/uploads/2017/01/Justice-Reinvestment-in-Montana\\_Final-Report1.pdf](https://csgjusticecenter.org/wp-content/uploads/2017/01/Justice-Reinvestment-in-Montana_Final-Report1.pdf). The Council of State Governments and the involved legislators will be working with the State in the next 18 months to ensure these polities are successfully implemented.

Wolken carried and passed the following bills:

**1. SB 59:** Administered through the Court Administrator, this bill creates and funds an evidence-based pre-trial supervision program to use risk in determining release conditions. It also sets up an Oversight Council to oversee implementation of all the Commission bills, measure outcomes, and report back to the legislature next session.

**2. SB 60:** This funds new, dedicated pre-sentence investigation (PSI) writers, to speed up the time an inmate spends in county jail awaiting sentencing. This bill streamlines the process, with the goal of thirty days for completion of PSIs, rather than the three to four months they are currently taking.

**3. SB 62:** This allows peer support mentors to be licensed by the state, allowing them to receive reimbursement for their work. This will significantly increase access and affordability in the community for those struggling with mental health and substance abuse issues.

**4. SB 63:** This bill allows for swift and certain sanctions on offenders who violate the terms of their probation and focuses



## Criminal Law Webinar CLE is May 10

Want to know how changes from the 2017 Legislative Session will impact your criminal law practice? Missoula attorney Brian C. Smith will get you up to speed with a webinar at noon on Wednesday, May 10. Register at [www.montanabar.org](http://www.montanabar.org).

A recording of the webinar will also be at [montana.inreachce.com](http://montana.inreachce.com).

resources on those most at risk of reoffending. It also allows for intermediary sanctions for some offenses before full prison sentences are imposed, and streamlines the revocation process.

**5. SB 64:** This bill modernizes the Board of Pardons & Parole, professionalizing the board members and requiring a structured grid for decision-making to increase consistency, transparency, and predictability for victims.

**6. SB 65:** On any given day, numerous paroled inmates sit in prison, at a minimum cost of \$3,600 per month, because they cannot secure housing on the outside while in prison. This bill provides a housing voucher for up to three months for those in need, at a significant savings to the state, and frees up bed space for those waiting to enter prison.

**7. SB 67:** This bill revises the batterers' intervention programming (BIP), requiring it to be meaningful and evidence-based, and increasing its availability throughout the state, particularly in rural areas. This is in response to frustration by domestic violence victim advocates and lower court judges that quality BIP is lacking in many communities.

**8. SJ 3:** This bill directs the legislature to conduct an interim study on the disproportionate incarceration of Native Americans. The study will examine ways Native Americans can be better supported on community supervision, and receive culturally-appropriate treatment and programming.

**HB 133**, carried by Rep. McConnell, D-Missoula, fundamentally changes Montana's justice system regarding how it handles people convicted of acts ranging from child sexual assault to driving without a license. The new law saves taxpayer money by reducing pressure on local jail populations, courts of limited jurisdiction, and the Office of the State Public Defender. At the same time, treatment is provided for people with chemical addiction and mental health problems as a way to reduce recidivism. HB 133 allows judges to impose evidence-based treatment as part of a sentence while using state resources in the most cost effective way to achieve public safety and offender rehabilitation. Treatment-based supervision is a key element of HB 133. Rather than limit a judge's options to prerelease facilities, a sentence now includes the option of releasing an inmate to chemical dependency programs (MCA 46-18-201). How Marsy's Law will fully interact with these changes is unknown at this time. The highlights of this comprehensive bill are provided below.

**Property Crimes:** For property crimes, tiered sentencing based on the value of the stolen property was created. Fines are reduced so that victims will have a better chance for repayment. Jail time for a first offender of the lowest tier is removed in an effort to reduce pressure on cities and counties while removing the possibility of requiring a costly public defender for these low-level defendants. Deferred imposition of sentence is also possible if certain factors are met.

**Misdemeanors & Drug Crimes:** Multiple offenses no longer carry the possibility of jail time, including public nuisance (45-8-111) and the possession (45-9-102) and distribution (45-9-101) of minor amounts of marijuana. For offenders convicted of possessing marijuana with the intent to distribute (45-9-103), the mandatory minimum sentence is removed and the cap is reduced from 20 years to five years. The mandatory minimum for a conviction of criminal production or manufacture of dangerous drugs (45-9-110) was also removed. Disorderly conduct (45-8-101) no longer holds the possibility of jail for first offenders. HB 133 also changes the failure to disperse law (45-8-102) by reducing the number of people liable under the law to one or more. People charged with criminal endangerment (45-5-207) are no longer presumed liable due to a high blood alcohol concentration.

**Driving Offenses:** Defendants convicted of driving without a license (61-5-102) are no longer subject to jail time, and the penalty is capped at \$500. People convicted of driving on a suspended license (61-5-212) for the first time are no longer subject to jail time; second and subsequent offenders face up to six months in jail. Driving without proof of insurance (61-6-302) carries no possibility of jail time until a third offense under the new law (61-6-304). Convictions for a fourth or subsequent driving under the influence ("DUI") (61-8-731) will now result in the option of placement in a treatment court program. Chemical dependency assessments will be required for a conviction of aggravated DUI (61-8-732).

**Persistent Felony Offender:** The use of Persistent Felony Offender offense was reduced and is now allowed only on a third felony and if one of the felonies is a sexual or violent offense, as defined in 46-23-502.

**Child Rape Exception:** HB 133 removes the exception in Montana law that permitted placement in a community for treatment (46-18-222) when the victim of a crime is 12 years old or younger and the crime was sexual intercourse without consent (45-5-503); incest (45-5-507); and sexual abuse of children (45-5-625).

### Office of State Public Defender Task Force Bills

The Montana Constitution requires state government to provide public legal defense to individuals who cannot afford their own legal counsel when they are charged with crimes involving imprisonment, facing involuntary commitment because of a mental disorder placing them or another at risk, or facing loss of parental rights.

The Legislators tasked with overseeing this Office of State Public Defender (OPD) budget, including Rep. Dudik, D-Missoula, Sen. Wolken and fellow attorney Sen. Kris Hansen, R-Havre, formed the Task Force following the 2015 session to address concerns regarding steep increases in the OPD's budget and its ability to effectively provide essential justice services

for Montanans. Go to <http://leg.mt.gov/css/Committees/Interim/2015-2016/Public-Defender/> for a more in-depth look at the Task Force's work.

The goal of the Task Force was to receive extensive employee input and involve the public in finding solutions to improve the defense of indigent Montanans. The Task Force was to ensure State dollars were responsibly used to support the Agency and that justice is served through our judicial system. This was the first time the Agency was examined in this regard since its creation in 2005.

Five bills made changes to the OPD structure and to Montana law are intended to improve OPD's functioning and delivery of essential services. Seven bills resulting from the Task Force were introduced during the Legislature with two of the bills later incorporated into other Task Force bills. The five bills are:

**1. HB 89, by Rep. Dudik, D-Missoula:** This bill to establish a "holistic defense" pilot project in up to four locations within the state public defender system is an exciting approach to modifying indigent defense in Montana. This model is designed to address the root causes of a large part of criminal behavior, including chemical dependency and mental health issues. This model of non-recidivist, holistic criminal defense is client-centered and was modeled after the Tribal Defenders program at the Confederated Salish and Kootenai reservation.

**2. HB77, by Rep. Randy Brodehl, R-Kalispell:** Makes a large administrative addition, providing for an OPD director hired by the Department of Administration. This bill incorporated the requirement of a workload study from HB 58 as well as reforms to the eligibility determination from HB 57 (both by Dudik). This OPD Director position was created to deliver strong leadership and put one person comprehensively in charge of and accountable for OPD's entire service delivery and fiscal expenditures; prior to this change a volunteer commission had these duties. This director will be in charge of ensuring that a workload study is performed and that a consistent and thorough eligibility determination is implemented statewide.

**3. HB 62, by Brodehl:** Changed the collection of fees for public defender services from OPD, which did not have the infrastructure to collect these fees, to the Department of Revenue, which has the capability to track and collect these fees.

**4. HB 65, by Ken Holmlund, R-Miles City:** Eliminates the budget consultation requirement between the appellate public defender and trial division of OPD.

**5. HB 59, by Dudik:** Revises the appointment of a public defender for putative father in abuse and neglect cases.

The changes made from the passage of this legislation aim to improve the work environment for OPD employees, the delivery of indigent defense in Montana, and ultimately the safety of Montana citizens.

### **Other laws impacting criminal justice and child abuse and neglect cases**

Additional laws were passed that impact child abuse and neglect cases and child welfare.

**1. HB 64, by Dudik:** Allows child protection specialists to work longer with families to address abuse and neglect issues voluntarily without having to file a court action for up to 6

months. This is one step forward in trying to keep Montana children safe and address the steep increase in children being removed from their homes and placed in foster care. The focus and overriding principle of this is the safety of the child and what is in that child's best interests.

**2. HB 173, by Dudik:** Provides a deadline for treatment plans and permanency hearings in child abuse and neglect cases.

**3. HB 298, by Rep. Ed Greef, R-Florence:** Requires an emphasis on sexual abuse awareness and prevention in elementary schools.

**4. HB 351, Dudik:** Revises laws relating to permanency of youth in foster care.

**5. HB 517, by Dudik:** Requires the Department of Public Health and Human Services to develop a strategic plan with measurable goals by mid-August of 2018 to reduce child abuse and neglect within five years.

**6. HB 303, by Rep. Kathy Kelker, D-Billings:** Creates a child abuse and neglect review commission.

**7. HJ 6, by Ellie Hill Smith, D-Missoula:** Provides for an interim study of the effects of methamphetamine and opioid use on state and local services.

**8. SB 113 by Frederick (Eric) Moore, R-Miles City:** Provides for disclosure of specific child and family services records to legislators in a strictly controlled manner following a detailed procedure while still following the confidentiality requirements for these records.

**9. SB 229, by Moore:** Requires release of case records if a child is exposed to dangerous drugs.

### **Sexual or Family Crime Laws:**

The Legislature passed additional laws regarding sexual assault, a large focus of the Law and Justice Interim Committee. In addition to these, other bills were passed that impact sexual crime and family crime laws in Montana. Those include the following:

**1. HB 247 by Dudik:** Revises laws on sexual abuse of children to make a felony the "grooming" behavior of exposing children to sexually explicit materials or sexual acts prior to sexually assaulting the child.

**2. HB 248, by Dudik:** Revises Montana's anti-bullying laws to make clear that law enforcement may be contacted at any time regarding a bullying incident without exhausting administrative remedies.

**3. HB 482 by Rep. Jenny Eck, D-Helena:** Revises incest laws so that consent is not a defense and that a person younger than 18 is not guilty of incest if the other person is older.

**4. HB 600, by Frank Garner, R-Kalispell:** Revises victims' rights laws.

**5. SB 17, by Sen. Nels Swandal, R-Wilsall:** Revises laws related to juvenile offenders and registration as sex offenders.

**6. SB 22, by Sen. Sue Malek, D-Missoula:** Enables rape victims who conceive a child to pursue civil litigation to terminate the rapist's parental rights.

**7. SB 26, by Malek:** Changes the maximum prison time for sexual intercourse without consent from 100 years to five years when the offender is 18 years old or younger and the survivor is 14 years old or older, so long as it is a first offense and no force was used. It also provides that the offender in these circumstances would not have to register as a sexual offender.

**8. SB 29, by Sen. Diane Sands, D-Missoula:** Revises laws regarding sexual crimes. It updates the definition of consent for aggravated sexual assault cases. This clarifies the law, as well as gives more legal protections to victims.

**9. SB 30, by Sands:** Extends the statute of limitations for sexual crimes of minors to 20 years after the victim reaches 18 years of age.

**10. SB 153, by Sen. Margaret MacDonald, D-Billings:** Revises laws on strangulation of a partner of family member, making this a separate felony.

**11. SB 197, by Sen. Terry Gauthier, R-Helena:** Encourages the Office of Public Instruction to prevent child sex trafficking.

### **Criminal Procedure Laws:**

Laws passed impacting criminal procedure and other criminal laws in general.

**1. HB 40 by Rep. Kim Abbott, D-Helena:** Allows dissemination of confidential criminal justice information to the Adjutant General.

**2. HB 45, by Dudik:** Revises the state Medical Examiner Laws.

**3. HB 79 by Rep. Willis Curdy, D-Missoula:** Modifies when a military member may be turned over to civil authorities for trial.

**4. HB 135, by Dudik:** Revises the Youth Court Act to allow information sharing with the Department of Corrections.

**5. HB 168, by Rep. Zach Brown, D-Bozeman:** provides for the expungement of criminal records for misdemeanors.

**6. HB 208, by Rep. Kirk Wagoner, R-Montana City:** Provides that it is unlawful to retaliate against whistleblowers.

**7. HB 258, by Hill Smith:** Requires detention centers to

allow inmates free calls to their attorney.

**8. HB 333, by Garner:** Adopts the Help Save Lives from Overdose Act.

**9. SB 111, by Keith Regier, R-Kalispell:** Provides that it is unlawful to feed wild turkeys.

**10. SB 167, by Sen. Chaz Vincent, R-Libby:** Revises laws pertaining to insurance offences.

**11. SB 187, by Sen. Jill Cohenour, D-East Helena:** Prohibits importing certain animal body parts from chronic wasting disease states.

**12. SB 228, by Duane Ankney, R-Colstrip:** Exempts needle and syringe exchange programs from drug paraphernalia laws.

**13. SB 250, by Swandal:** Revises laws for prosecutorial immunity for Marsy's Law.

**14. SB 258, by Swandal:** Provides a procedure for electronically issued search warrants.

**15. SB 310, by Sen. Lea Whitford, D-Cut Bank:** Revises laws related to criminal jurisdiction on the Flathead Indian Reservation regarding the prosecution of felonies.

**16. SB 325, by Sen. Brian Hoven, R-Cascade County:** Gives safe harbor for employers hiring certain criminals.

We look forward to working in the interim to make sure the criminal justice reinvestment policies are successfully implemented. Although a few good bills died in the legislature dealing with criminal justice in various ways, it was a great session for justice reform. As always, there is always more work to be done in the Montana Legislature and in improving the laws of Montana to better serve the people of our state.

*Rep. Kimberly Dudik, Rep. Nate McConnell and Sen. Cynthia Wolken are all attorneys and legislators from Missoula.*

## **Continuing Legal Education**

**For more information** about upcoming State Bar CLEs, contact Meagan Caprara at [mcaprara@montanabar.org](mailto:mcaprara@montanabar.org). You can also find more info and register at [www.montanabar.org](http://www.montanabar.org). Just click in the Calendar on the upper left of the home page to find links to registration for CLE events.

## **Family Law CLE features Supreme Court, legislative updates**

A Montana Supreme Court case law update and a legislative review from a Montana legislator are among the highlights of the Family Law Section Update CLE on May 12 in Helena.

The seminar at the Radisson Colonial Hotel in Helena is approved for 6.5 Montana CLE credits, including 1.0 Ethics.

Montana Supreme Court Justice Beth Baker will provide an update on family law from the Supreme Court. Four-term attorney-legislator Rep. Ellie Hill of Missoula will tell attendees what the 2017 Montana Legislature means for Family Law.

The seminar also features presentations on:

- Issues in Family Law Post

Obergefell v. Hodges;

- CSED's Child Support Update;

- Frequently Asked Questions,

Internet Reviews and Relationships Gone Bad; and

- E-Filing Task Force Update.

### **Other Upcoming CLE**

**Webinar -- Recent Criminal Law Changes:** Wednesday, May 10, noon.

**2017 Roadshow:** Friday, June 23, Great Falls. Free Ethics CLE! Details pending.

**2017 Annual Bankruptcy CLE:** Friday, Aug. 10, Great Northern Hotel, Helena.

**2017 Annual Meeting:** Fairmont Hot Springs. Thursday-Friday, Sept. 21-22.

### **Domestic Violence CLE series now available on demand**

Did you miss our four-part series Domestic Violence Webinar Series? Recordings of all four are now available online. See all four for the price of three!

Part 1: How to Create a Safety Plan and Screen for Domestic Violence in Civil Legal Cases.

Part 2: Identifying, Assessing and Managing Risk for Victims.

Part 3: The Impact of Domestic Violence on Children.

Part 4: Domestic Violence in Indian Country

See our complete catalog of recorded CLE at [montana.inreachce.com](http://montana.inreachce.com).



# LawPay Security Series

## ABOUT THE SERIES

December/January - Step 1: Identify Your Cyber Assets

February 2017 - Step 2: Strengthen Your Passwords

March 2017 - Step 3: Fortify Your Network

April 2017 - Step 4: Protect Internal Systems

May 2017 - Step 5: Secure Your Sensitive Data

## Security Step 5: Secure Your Sensitive Data

The security and integrity of your data is of paramount importance, as practices typically have large amounts of confidential and sensitive information about clients. Not only do you have an ethical responsibility to protect this information, but a legal responsibility as well.

So, what are some things you can do to meet these obligations?

### Data in Motion

When handling sensitive information within a web browser, always make sure the web address starts with “https,” which indicates a secured connection. Data transmitted over a properly secured connection is encrypted and prevents an attacker from tampering with or accessing the information sent. Most browsers will highlight the address bar in green or show a closed lock to indicate that the connection is secure.

Beware of websites that may have misconfigured or outdated security. Avoid using any website that the browser flags as having an untrusted certificate, as the site or the connection may be compromised. For example, the browser might display a message stating “There is a problem with this website’s security certificate.”

### Data at Rest

Data stored on your computer or a network storage device also must be secured. Most modern operating systems support “whole drive” or “whole disk” encryption. Once enabled, you can be comfortable knowing that if your computer is ever lost or stolen, the data stored on it cannot be accessed by anyone else. To get started using whole drive encryption, search for “BitLocker” from the Start Menu on Windows Professional, or FileVault on Mac OS X.

For data that is backed up off of your computer, or that needs to be transmitted to other parties, file encryption is a must. Applications such as SecureZIP and OpenPGP implementations

like Gpg4win (Windows) can secure your own data for storage, as well as ensure protected communication to third parties.

### Data in the Cloud

Confidential information stored in cloud services, whether for archival or operating purposes, must usually meet requirements imposed by industry governing bodies. The PCI Security Standards Council mandates minimum encryption standards for payment data that is processed or stored, and HIPAA rules mandate minimum standards for healthcare data. These standards often require ongoing audits by external parties to ensure continuing compliance. When in doubt about the ways a service provider protects your confidential information, always ask for their security practices and certifications.

### Parting Thoughts

Over our past five security tips, we have examined several steps you can take to secure the cyber assets in your office. From your network to your passwords, systems, and data, your firm should now be on a stronger security footing. Unfortunately, security is not a one-time event. Technology changes and new threats continue to emerge, but the practices discussed in this series continue to apply. As your office changes over time, keep your asset inventory up-to-date, and use the steps of this series as a simple checklist for maintaining the security of your practice.

***LawPay is proud to be the preferred payment partner of more than 35,000 law firms, providing attorneys with a simple, secure, and online way to accept credit cards in their practice. The LawPay platform was designed specifically to correctly separate earned and unearned payments, giving attorneys peace of mind that their credit card transactions are always handled correctly.***

***Members of the State Bar of Montana typically save 20-25 percent off standard credit card fees. To learn more, call (866) 376-0950 or visit <https://lawpay.com/montanabar/>.***



# LAWPAY<sup>®</sup>

AN AFFINIPAY SOLUTION

STATE BAR OF MONTANA



Proud Member Benefit Provider

**Integrated Planning and Solutions for Individuals and Their Businesses**

Year	Percentage
2010	35%
2013	47%
2016	55%
2019 (EST)	75%

IT'S ESTIMATED THAT OVER 75% OF BILLS WILL BE PAID ONLINE BY 2019.

PCI Compliant

**Invoice Payment**

**Payment Detail**

Amount to Pay\*  
Invoice Number  
Matter Number

**Cardholder Information**

Name  
Month Year

**Pay Invoice**

VISA MasterCard AMERICAN EXPRESS DISCOVER

## THE EXPERTS IN LEGAL PAYMENTS

### The proven payment solution for lawyers.

Managing payments and growing revenue for over 40,000 law firms in the US, LawPay is the only payment solution offered as a member benefit through the State Bar of Montana. Developed specifically for law firms, LawPay guarantees complete separation of earned and unearned fees, giving you the confidence and peace of mind your credit card transactions are handled the right way.

TRUSTED BY MORE THAN 35,000 FIRMS

RECOMMENDED BY 46 STATE BARS

ONLY PAYMENT SOLUTION OFFERED BY THE ABA ADVANTAGE PROGRAM



**LawPay.com/montanabar | 866.376.0950**

LawPay is a registered ISO of Merrick Bank, South Jordan UT.

# MT AG Office's authority over charitable trusts Part 2: The MNCA and UPMIFA

**Editor's Note:** This is the second installment of a look at the Montana Attorney General's Office's authority over charitable trusts. Part one in the April issue discussed the Montana Uniform Trust Code. Part two discusses the Montana Nonprofit Corporation Act and the Uniform Prudent Management of Institutional Funds Act.

By ED ECK

## Montana's Nonprofit Corporation Act

Montana's Nonprofit Corporation Act (MNCA), Mont. Code Ann. §§ 35-2-113 et seq., sets forth the rules governing nonprofit corporations from their initial incorporation to their dissolution and all acts affecting their governance. To a great extent, the MNCA is based upon the American Bar Association's (ABA) "Revised Model Nonprofit Corporation Act" of 1987.<sup>1</sup> Since the ABA proposed the 1987 Act, the ABA has proposed a third version of the Model Nonprofit Corporation Act in 2008. Montana has not adopted this third version.

Many of the same concepts applicable to charitable trusts also apply to nonprofit corporations. The MNCA imposes two broad fiduciary duties upon directors of nonprofit corporations, namely a duty of care and a duty of loyalty.

**Duty of Care.** Directors are expected to actively participate in organizational planning and decision-making, and to make sound and informed judgments. Mont. Code Ann. § 35-2-416(1) provides in pertinent part:

A director shall discharge the duties as a director, including the director's duties as a member of a committee:

- a. in good faith;
- b. with the care an ordinarily prudent person in a similar position would exercise under similar circumstances; and
- c. in a manner the director reasonably believes to be in the best interests of the corporation.

**Duty of Loyalty.** When acting on behalf of the nonprofit corporation, directors must put the interests of the nonprofit

before any personal or professional concerns and avoid potential conflicts of interest. Mont. Code Ann. § 35-2-418 includes provisions relating to the ratification, approval, and authorization of conflicts of interest under limited, specified circumstances. Thus, nonprofit corporations have developed conflict-of-interest policies that focus on financial, business, investment, and employment relationships involving officers and directors. For example, many conflict-of-interest policies prevent the nonprofit corporation from selling corporate assets to an officer or director and, in some circumstances, prevent sales to family members and those with close social relationships with officers and directors. More rigorous policies address the mere appearance of a conflict of interest. For example, a nonprofit corporation may contract with a vendor to provide IT services. The nonprofit's conflict-of-interest policy may prevent the IT vendor's employment of a director's child as a summer intern because it creates the appearance of a conflict of interest.

The Attorney General's authority under MNCA focuses on the directors' performance of the above two duties. Specific provisions of the MNCA:

- require that nonprofit corporations give the Attorney General notice of specified transactions and specified proposed transactions<sup>2</sup>;
- provide that the Attorney General has authority to petition a district court to seek specified types of relief<sup>3</sup>; and
- permit the Attorney General to revoke a foreign nonprofit corporation's certificate of authority.<sup>4</sup>

## A. Extraordinary Transactions Requiring Notice to the Attorney General

Three extraordinary transactions by nonprofit corporations require notice to the Attorney General. They include: (1) the dissolution of the corporation; (2) the sale of all (or substantially all) of the corporation's assets; and (3) specified mergers of the corporation.

Mont. Code Ann. § 35-2-131(2)<sup>5</sup> provides in part:

Whenever a provision of this chapter requires that notice be given to the attorney general before or after commencing a proceeding . . . , the attorney general may take appropriate action including but not limited to seeking injunctive relief.

<sup>2</sup> See Mont. Code Ann. §§ 35-2-609, 35-2-617(7), and 35-2-722.

<sup>3</sup> See Mont. Code Ann. §§ 35-2-130(1), 35-2-132, 35-2-423(1), 35-2-528, 35-2-728(1), and 35-2-1302(3).

<sup>4</sup> See Mont. Code Ann. §§ 35-2-833(2).

<sup>5</sup> Mont. Code Ann. § 35-2-131(2) is derived from § 1.70(b) of the Revised Model Nonprofit Corporation Act (1987).

Thus, a proposed dissolution, a proposed sale of assets, and some proposed mergers permit the Attorney General to seek injunctive relief.

### 1. Dissolution

A majority of the board of directors of a nonprofit corporation that does not have members may dissolve the nonprofit corporation by filing articles of dissolution with the Montana Secretary of State [“Secretary of State”]. Mont. Code Ann. § 35-2-720.<sup>6</sup> Mont. Code Ann. § 35-2-723<sup>7</sup> sets forth the required contents of the articles of dissolution. The dissolution is subject to satisfying any additional requirements for dissolution imposed by the articles of incorporation and the bylaws.

The directors must adopt a plan of dissolution indicating the proposed distribution of assets after creditors have been paid. The distribution must be consistent with the corporation’s articles of incorporation and bylaws. Different rules apply to public benefit and religious corporations on one hand and mutual benefit corporations on the other.

#### Public benefit or religious corporations.

A nonprofit corporation must designate itself as a public benefit corporation, a mutual benefit corporation or a religious corporation in the corporation’s articles of incorporation.<sup>8</sup>

- If the dissolving nonprofit corporation is a public benefit corporation or a religious corporation described in IRC § 501(c)(3), and if no provision has been made for the distribution of assets in the corporation’s articles of incorporation or bylaws, the distribution should be to a IRC § 501(c)(3) entity. Mont. Code Ann. § 35-2-725(1)(f)(i).<sup>9</sup>
- If the dissolving nonprofit corporation is a public benefit corporation or a religious corporation not described in IRC § 501(c)(3), and if no provision has been made for the distribution of assets in the corporation’s articles of incorporation or bylaws, the distribution should be to a public benefit corporation or a religious corporation. Mont. Code Ann. § 35-2-725(1)(f)(ii).<sup>10</sup>

In both of the immediately preceding circumstances, the principle of *cy pres* applies. The remaining charitable assets, if any, must be distributed to an entity with a charitable purpose reasonably approximating the originally-designated purpose of the dissolving nonprofit corporation. Examination of the dissolving nonprofit corporation’s governing documents, mission statement, and past practices should reveal that purpose. Many nonprofit corporations use their charitable assets within a defined geographic location. Thus, the dissolving corporation’s assets should be distributed to a nonprofit corporation that will benefit the same geographic area.

**Example.** A nonprofit homeless shelter provides housing to people primarily within an identifiable geographic area. Thus, a proposal to devote the dissolving shelter’s assets to research on the causes of homelessness would likely not, by itself, meet the *cy pres* requirements. However, a proposal to devote the remaining charitable assets to another homeless shelter serving people within the dissolving shelter’s service area would likely meet the *cy pres* requirement.

A distribution of the nonprofit corporation’s assets to an existing charity or foundation, as opposed to a new foundation, could save substantial, reoccurring expenses. However, if no such charity or foundation exists, or if the charity or foundation is unwilling to accept the dissolving nonprofit corporation’s assets, the directors could consider establishing a new foundation for that purpose.

Mutual benefit corporation. If the dissolving nonprofit corporation is a mutual benefit corporation, and if no provision has been made for the distribution of assets in the corporation’s articles of incorporation or bylaws, the distribution should be made to the corporation’s members, if any. If the corporation does not have members, the corporation should transfer assets to those persons whom the corporation is designed to benefit or serves. Mont. Code Ann. § 35-2-725(1)(g).<sup>11</sup>

At or before the time the corporation delivers the articles of dissolution to the Secretary of State, a public benefit corporation or a religious corporation must give the Attorney General notice that it intends to dissolve. Mont. Code Ann. § 35-2-722.<sup>12</sup> As indicated above, whenever notice to the Attorney General is required, the Attorney General may take appropriate action, including seeking injunctive relief.<sup>13</sup>

Additionally, the nonprofit corporation must provide the Attorney General with the plan of dissolution, or provide a summary of that plan. The Attorney General requires this information be submitted on a form entitled “Notice of Dissolution of a Nonprofit Corporation,” available on the Department of Justice’s website. See <https://media.dojmt.gov/wp-content/uploads/N-Notice-of-Dissolution-of-Nonprofit-Corporation.pdf>.

The directors of a nonprofit corporation are faced with numerous decisions concerning the management of the nonprofit’s affairs. When considering the dissolution of the corporation, they are tasked with additional decisions:

- a. Would an ordinarily prudent person under similar circumstances decide to dissolve the nonprofit corporation?
- b. Does any director have a personal interest in the dissolution or have any other conflict of interest? If so, how will the conflict be handled?
- c. What should be done with the nonprofit corporation’s assets?

<sup>6</sup> Mont. Code Ann. § 35-2-720 is derived from § 14.01 of the Revised Model Nonprofit Corporation Act (1987).

<sup>7</sup> Mont. Code Ann. § 35-2-723 is derived from § 14.04 of the Revised Model Nonprofit Corporation Act (1987).

<sup>8</sup> Mont. Code Ann. § 35-2-126(1)(a).

<sup>9</sup> Mont. Code Ann. § 35-2-725(1)(f)(i), is derived from § 14.06(a)(6)(i) of the Revised Model Nonprofit Corporation Act (1987).

<sup>10</sup> Mont. Code Ann. § 35-2-725(1)(f)(ii) is derived from § 14.06(a)(6)(ii) of the Revised Model Nonprofit Corporation Act (1987).

<sup>11</sup> Mont. Code Ann. § 35-2-725(1)(g) is derived from § 14.06(a)(7) of the Revised Model Nonprofit Corporation Act (1987).

<sup>12</sup> Mont. Code Ann. § 35-2-722 is derived from § 14.03 of the Revised Model Nonprofit Corporation Act (1987).

<sup>13</sup> Mont. Code Ann. § 35-2-131(2).

## Practice Suggestion.

The corporation should maintain minutes or other records that demonstrate the directors' prudent decision-making process. The Attorney General will focus on whether a fair and thorough process was followed and accesses whether:

- a. the Board considered relevant data-driven factors;
- b. alternatives other than dissolution were thoughtfully considered; and
- c. the Board appropriately debated the pros and cons of dissolution.

If it is likely the dissolving corporation will have remaining assets to distribute, the dissolving corporation should contact the Attorney General early in the process in regard to its distribution proposals. Directors should investigate whether there are one or more existing charities or existing foundations that could utilize those funds in a *cy pres* purpose.

## Practice Suggestion.

When acting on an unusual matter, such as the sale of substantially all of the nonprofit's assets, the directors of large nonprofit corporations should use knowledgeable consultants who can assist with the decision to sell, and if a sale is to be pursued, who can assist locating qualified buyers. Consultant reports should be maintained as part of the nonprofit's corporate records.

As to the disposition of the sales proceeds, directors must be guided by the legal concept of *cy pres*. The same *cy pres* considerations noted in the context of the dissolution of a nonprofit corporation, apply to the disposition of the proceeds from the sale of the corporation's assets. If the directors conclude there is no existing charity or foundation satisfying *cy pres* requirements, a new foundation could be considered. In that event, directors should avoid even the appearance of a conflict of interest. For example, a serious conflict issue may be raised when a nonprofit corporation decides to include one or more of its board members on the board of the new foundation receiving the sales proceeds. The power and prestige associated with making grants from the new foundation could be significant enough to affect a nonprofit board member's vote to sell the assets in the first place. The mere appearance of this conflict of interest can tarnish the operations of the new foundation, as well as that of the asset-selling nonprofit corporation.

### 3. Merger

Mont. Code Ann. § 35-2-609<sup>15</sup> provides that without prior court approval, public benefit corporations and religious corporations may only merge with:

- a. Other domestic or foreign public benefit or religious corporations;
- b. Domestic or foreign business or mutual benefit corporations, provided that the public benefit corporation or religious corporation is the surviving corporation and it continues to be a public benefit corporation or religious corporation after the merger; or
- c. A business or mutual benefit corporation can become the surviving entity only if the additional requirements of Mont. Code Ann. § 35-2-609(1)(d) are satisfied and the Attorney General is provided notice at least 20 days prior to the merger. The additional requirements are designed to avoid a "sweetheart" merger in which a business or mutual benefit corporation acquires a nonprofit corporation's assets for less than their fair market value.

Mont. Code Ann. § 35-2-608<sup>16</sup> requires a plan of merger and sets forth the requirements for the plan. Mont. Code Ann. § 35-2-610<sup>17</sup> sets forth the requirements for board approval and member approval, if there are members. Mont. Code Ann.

## 2. Sale of All (or substantially all) of a Nonprofit Corporation's Assets

Mont. Code Ann. § 35-2-617<sup>14</sup> governs the sale of a nonprofit corporation's assets other than in the regular course of business. Mont. Code Ann. § 35-2-617(2) details the voting requirements of the board of directors and the members, if the corporation has members, and the notice requirements for the board of directors and the members. Mont. Code Ann. § 35-2-617(7) requires public benefit nonprofit corporations and religious nonprofit corporations to give notice to the Attorney General 20 days before the corporation sells, leases, exchanges, or otherwise disposes of all, or substantially all, of its assets if the transaction is not in the usual and regular course of its activities.

When the directors are considering the sale of all (or substantially all) of the corporation's assets, they must ask themselves questions similar to those that would be asked if the corporation were considering a dissolution.

- a. Would an ordinarily prudent person under similar circumstances decide to sell the assets?
- b. Would an ordinarily prudent person under similar circumstances select this particular purchaser?
- c. Would an ordinarily prudent person under similar circumstances sell the assets at the price offered by the purchaser?
- d. Do the directors reasonably believe their decisions are in the best interests of the corporation?
- e. Does any director have a personal interest in the proposed sale or have any other conflict of interest? [The board of directors should have a robust conflict of interest policy that is followed by the board. When potential conflicts are disclosed, the potentially conflicted directors should be excused from the meeting and related discussions; the conflicted directors should not vote on the matter; and the minutes should reflect those facts.]
- f. What should be done with the sales proceeds?

<sup>14</sup> Mont. Code Ann. § 35-2-617 is derived from § 12.02 of the Revised Model Nonprofit Corporation Act (1987).

<sup>15</sup> Mont. Code Ann. § 35-2-609 is derived from § 11.02 of the Revised Model Nonprofit Corporation Act (1987).

<sup>16</sup> Mont. Code Ann. § 35-2-608 is derived from § 11.01 of the Revised Model Nonprofit Corporation Act (1987).

<sup>17</sup> Mont. Code Ann. § 35-2-610 is derived from § 11.03 of the Revised Model Nonprofit Corporation Act (1987).

§ 35-2-611(1)<sup>18</sup> requires articles of merger be filed with the Secretary of State and other provisions of Mont. Code Ann. § 35-2-611 detail the required contents of the articles of merger. Mont. Code Ann. § 35-2-612 and Mont. Code Ann. § 35-2-613 cover other aspects of nonprofit mergers.

A director considering merger of the nonprofit is subject to the same fiduciary standards applicable to the director analyzing the disposition of all (or substantially all) of the nonprofit's assets. Similar questions should be asked.

- a. Would an ordinarily prudent director under similar circumstances decide to merge the nonprofit?
  - What benefits will each organization realize through merger?
  - What are the burdens or risks associated with a possible merger?
- b. Would an ordinarily prudent director under similar circumstances select this particular corporation with which to merge?
  - How similar are the purposes of the merging corporations?
  - How well managed is the other corporation?
  - What is the state of the other corporation's finances?
- c. Do the directors reasonably believe their decisions are in the best interests of the nonprofit corporation?
- d. Does any director have a personal interest in the merger or have any other conflict of interest? If so, how will the conflict be handled?
- e. What will be the governance structure of the merged organization and who will populate the board and key staff positions?

### Practice Suggestion.

Suggestions similar to those offered above when the corporation is considering dissolution or the sale of all of its assets apply to a corporation considering merger. Again, the corporation should maintain minutes and other records that demonstrate the directors' prudent decision making.

## B. The Attorney General's Authority to Petition a District Court

In addition to requiring notice to the Attorney General of three extraordinary transactions discussed above, the MNCA gives the Attorney General authority to petition a district court to seek specified types of relief.<sup>19</sup> They include:

1. Judicial Dissolution. Mont. Code Ann. § 35-2-728(1)

18 Mont. Code Ann. § 35-2-611 is derived from § 11.04 of the Revised Model Nonprofit Corporation Act (1987).

19 The Attorney General has additional authority when the nonprofit corporation is a "health entity" and proposes to convert to a for-profit (or mutual benefit) corporation. Montana statutes dealing with the conversion of a nonprofit health entity to a for-profit corporation, or a mutual benefit corporation, are much more comprehensive than provisions included in the MNCA. These conversion statutes, found in Mont. Code Ann. §§ 50-4-701 et seq., apply only to the conversion of "health service corporations" and "health maintenance corporations," such as the former nonprofit insurer, Blue Cross Blue Shield of Montana.

lists the grounds for judicial dissolution in a proceeding brought by the Attorney General.<sup>20</sup>

2. Removal of Directors. Mont. Code Ann. § 35-2-423(1) permits the Attorney General to petition the district court to remove a director. If a proceeding to remove a director is commenced by a public benefit corporation or its members, the party seeking removal must give notice of the proceeding to the Attorney General. Mont. Code Ann. § 35-2-423(4).<sup>21</sup>
3. Judicial Relief. If it is impractical or impossible for a corporation to call or conduct a meeting in the manner prescribed by its governing documents, Mont. Code Ann. § 35-2-130(1) permits the Attorney General to petition the district court to order a meeting of the corporation's members or directors or provide a written ballot without a meeting.<sup>22</sup>
4. Court-Ordered Meeting. Mont. Code Ann. § 35-2-528 permits the Attorney General to petition the district court to require that a public benefit corporation hold a meeting (annual, regular, or special) under specified circumstances. For example, if an annual meeting was not held within the earlier of (i) 6 months after the end of the corporation's fiscal year or (ii) 15 months after its last annual meeting, the Attorney General may petition the district court to require such a meeting.<sup>23</sup>
5. Derivative Proceeding.<sup>24</sup> Mont. Code Ann. § 35-2-1302(3) requires a complainant commencing a derivative proceeding to notify the Attorney General prior to commencing a proceeding if the proceeding involves a public benefit corporation or assets held in charitable trust by a mutual benefit corporation.<sup>25</sup>

Ultra Vires.<sup>26</sup> Mont. Code Ann. § 35-2-132(2) permits the Attorney General to challenge a corporation's power to act in a derivative proceeding. The section further permits the Attorney General to challenge a public benefit corporation's power to act by commencing a proceeding against an incumbent or former director, officer, employee, or agent.

## C. Revocation of Certificate of Authority of Foreign Corporation

Finally, the MNCA permits the Secretary of State and Attorney General to revoke a foreign corporation's certificate of authority, without the Attorney General petitioning the district court.

20 This subsection is derived from § 14.30(a) of the Revised Model Nonprofit Corporation Act (1987).

21 Mont. Code Ann. § 35-2-423 is derived from § 8.10 of the Revised Model Nonprofit Corporation Act (1987).

22 This subsection is derived from § 1.60(a) of the Revised Model Nonprofit Corporation Act (1987).

23 This subsection is derived from § 7.03 of the Revised Model Nonprofit Corporation Act (1987).

24 The derivative provisions found in Mont. Code Ann. §§ 35-2-1301 through 35-2-1307 are derived in part from the Revised Model Nonprofit Corporation Act (1987) and the Revised Model Business Corporation Act as amended. See 45 Bus. Law. 1241 (May 1990).

25 This subsection is derived from § 6.30(f) of the Revised Model Nonprofit Corporation Act (1987). Unlike § 6.30(f) which requires notices ten days after commencing a proceeding, Mont. Code Ann. § 35-2-1302(3) requires notice prior to commencing a proceeding.

26 Mont. Code Ann. § 35-2-132 is derived from § 3.04 of the Revised Model Nonprofit Corporation Act (1987).

Mont. Code Ann. § 35-2-833(2) permits the Attorney General to determine that grounds exist to revoke a foreign corporation's certificate of authority and to cause the Secretary of State to serve the corporation with notice of the Attorney General's determination. If within 60 days of the notice, the foreign corporation does not correct the cited ground for revocation or does not demonstrate to the Attorney General's satisfaction that no such grounds exist, the Secretary of State may revoke the certificate of authority.

In summary, specified nonprofit corporations are required to notify the Attorney General in advance of dissolution, sale of substantially all of their assets, and certain mergers. Because the Attorney General may seek injunctive relief to prevent the proposed transaction, nonprofit corporations should contact the Attorney General more than the 20-days in advance of the proposed transaction. Additionally, the Attorney General has the other rights and powers over nonprofit corporations, which are summarized above.

### Uniform Prudent Management of Institutional Funds Act (UPMIFA)

Mont. Code Ann. § 72-30-101 et seq.

The Uniform Prudent Management of Institutional Funds Act (UPMIFA) provides standards for managing and investing charitable funds by nonprofit corporations, specified trusts, and certain governmental agencies. UPMIFA applies these standards to what it defines as "institutional funds." These funds are often restricted in their use, and UPMIFA permits the release or modification of some restrictions.

**Example.** An endowment fund created in the 1940s to fund research at a non-profit university for the development of an effective vaccine against polio, would prove to be unnecessary in the mid-1950s after such a vaccine was developed. Assuming this contingency is not addressed in the gift instrument, the university is faced with the question of how the assets remaining in the fund should be applied.

UPMIFA sets forth four different procedures which would permit the release of some restrictions. The Attorney General has a role in three of the four procedures and must be given notice in Procedures One, Two, and Three, which follow.

**Procedure One.** Mont. Code Ann. § 72-30-207(4) permits an institution to release or modify a restriction in a gift instrument without instituting a court action if:

- (a) the institutional fund has a value of less than \$25,000 or (b) more than 20 years have elapsed since the fund was established<sup>27</sup>, and
- the institution uses the property in a manner consistent with the charitable purpose expressed in the gift instrument.

<sup>27</sup> The Montana version of Uniform Prudent Management of Institutional Funds Act differs from the corresponding act as promulgated by the Uniform Law Commission. [http://www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa\\_final\\_06.pdf](http://www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa_final_06.pdf). The later act includes the above two elements in the conjunctive rather than the disjunctive.

Example One. Montana law would permit the release or modification of a restriction shortly after the fund's creation, so long as the fund's value is less than \$25,000. The Uniform Act would not. More than 20 years must elapse after the fund's creation.

Example Two. Montana law would permit the release or modification of a restriction of a very large fund, perhaps valued \$1 million or more, so long as more than 20 years have elapsed since the fund's creation. The Uniform Act would not. The fund's value must be less than \$25,000.

### Practice Suggestion.

The institution should contact the Attorney General and provide the facts relevant to the application of Mont. Code Ann. § 72-30-207(4). If the Attorney General agrees that the institution has satisfied the required elements of this subsection, particularly that the proposed use of the funds satisfies *cy pres* principles, the Attorney General is unlikely to petition the district court to set aside the proposed release or modification of the restriction.

**Procedure Two.** Mont. Code Ann. § 72-30-207(2) adopts the *equitable deviation* doctrine, which permits a district court to modify a management or investment restriction "if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund." The institution seeking the modification is required to notify the Attorney General of the application and the Attorney General is given the opportunity to be heard.

### Practice Suggestion.

The institution should contact the Attorney General in advance of a district court petition and provide the Attorney General with:

- a copy of the gift instrument,
- the facts, if any, causing the institution to conclude the restriction has become impracticable or wasteful,
- the facts, if any, causing the institution to conclude the restriction impairs the management or investment of the fund,
- the facts, if any, causing the institution to conclude that, because of circumstances not anticipated by the donor, a modification would further the purposes of the fund, and
- an explanation of why the proposed modification is in accordance with the donor's probable intention.

The institution should indicate what other possible modifications were considered and rejected. Such a pre-petition effort will likely save all of the parties' time and energy and will likely lead to the parties agreeing to a proposed modification.

**Procedure Three.** Mont. Code Ann. § 72-30-207(3) adopts the *cy pres doctrine*. It permits a court to modify a restriction in the gift instrument and even modify the fund's purpose if the restriction or purpose becomes "unlawful, impracticable, impossible to achieve, or wasteful." The lifting of the restriction or the change of purpose must be consistent with the donor's expressed general charitable purposes. As is the situation in Mont. Code Ann. § 72-30-207(2), the institution seeking the modification is required to notify the Attorney General of the petition and the Attorney General is given the opportunity to be heard.

## Practice Suggestion.

The institution should contact the Attorney General in advance of such a petition and provide the relevant facts as suggested in the preceding discussion of equitable deviation under Mont. Code Ann. § 72-30-207(2) in Procedure Two above.

Procedure Four. Mont. Code Ann. § 72-30-207(1) permits the release or modification of the restriction without any notice to the Attorney General and without court action under specified circumstances. If the donor is still alive and competent, the donor may consent to the release or modification, so long as the fund will be used for a purpose that falls within the charitable purpose of the institution. Thus, as in the prior example, the university and donor could release the requirement that the fund be used for research on a polio vaccine and, instead, the fund could be devoted to some other healthcare research conducted by the university.

## Practice Suggestion.

Document the exchange between the charitable organization and the donor releasing the restriction.

Application of UPMIFA to Trusts. As noted above, UPMIFA provides standards for specified trusts. UPMIFA applies only to charitable trusts when a charity acts as trustee. Mont. Code Ann. § 70-30-102(5)(b) reads:

The term [“institutional fund”] does not include. . .  
. (ii) a fund held for an institution by a trustee that is not an institution.

“Institution” is defined as “a person . . . organized and operated exclusively for charitable purposes.”<sup>28</sup> Although an individual or a for-profit corporation could serve as a trustee of a charitable trust, the fund held in such trust would not be an “institutional fund” subject to UPMIFA. Rather, trust law would apply.

The comments drafted by the Uniform Law Commission reinforce the conclusion that UPMIFA does not apply to trusts managed by for-profit corporate or individual trustees. See [http://www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa\\_final\\_06.pdf](http://www.uniformlaws.org/shared/docs/prudent%20mgt%20of%20institutional%20funds/upmifa_final_06.pdf). The

28 Mont. Code Ann. § 70-30-102(4)(a).

following is found on page two of the comments:

As under UMIFA, the new Act [UPMIFA] applies to charities organized as charitable trusts, as nonprofit corporations, or in some other manner, but the rules do not apply to funds managed by trustees that are not charities. Thus, the Act does not apply to trusts managed by corporate or individual trustees, but the Act does apply to trusts managed by charities.

Page nine of the comments includes the following:

The term [“institution”] includes a trust organized and operated exclusively for charitable purposes, but only if a charity acts as trustee.

Although UPMIFA’s *equitable deviation* doctrine, the *cy pres* doctrine, and the other provisions of Mont. Code Ann. § 72-30-207 permitting the release or modification of restrictions, do not apply when a non-charity acts as trustee, the MT UTC includes provisions for the release and modification of some restrictions. Further, the MT UTC and the Montana Uniform Principal and Income Act (Mont. Code Ann. § 72-34-421 et seq.) govern other aspects of charitable trust administration.

In summary, the Attorney General has a significant role in three of the four procedures that permit the modification of an endowment or other restriction on an institutional fund. No notice is required to the Attorney General only in the circumstance when the donor is alive, competent, and consents to the proposed modification or release. UPMIFA applies to charitable institutions holding restricted funds for their own charitable uses. Thus, an individual or a commercial trust company that is a trustee of a charitable trust is not subject to UPMIFA.

## Conclusion

In addition to the Attorney General’s common law authority over charities under the *parens patriae* doctrine, the Montana Uniform Trust Code, the Montana Nonprofit Corporation Act, and Montana’s Uniform Prudent Management of Institutional Funds Act grant the Attorney General many specific statutory powers that can be used to protect the public’s interest in the charitable assets. Knowledge of these statutory powers by trustees of charitable trusts, directors of nonprofit corporations, managers of institutional funds, and their counsel should facilitate their interaction with the Office of the Attorney General.

***Ed Eck is a professor emeritus and past dean of the University of Montana’s Alexander Blewett III School of Law and served as chief of the Montana Department of Justice’s Consumer Protection Office.***



## FIND THE BEST TALENT FOR YOUR FIRM

### Looking to hire? Look no further.

Your job listing on the State Bar of Montana Career Center can reach hundreds of active and passive job seekers every day. 30-day listings start at \$99. Place your listing today at: **JOBS.MONTANABAR.ORG**



# Making sense of Medicare, Medicaid can be tough for novice practitioners

By JESSICA FEHR

For practitioners who don't regularly deal with Medicaid and Medicare in their practices, the first real exposure to the two programs can be confusing. Medicare and Medicaid were both first authorized in 1965 by Title XIX of the Social Security Act.

Medicare is a federal insurance program for individuals over age 65; younger people with disabilities; and individuals with end-stage renal disease. Medicare consists generally of four parts: Part A covers inpatient care including skilled nursing and hospice; Part B covers outpatient services and medical supplies; Part C covers Medicare Advantage Plans; and Part D deals with prescription drug coverage. Medicare is run by the Centers for Medicare & Medicaid Services (CMS), a branch of the Department of Health and Human Services. Medicare is funded through two trust funds held by the U.S. Treasury.<sup>1</sup> In 2015, the Medicare program spent approximately \$620 million.<sup>2</sup> In 2016, an estimated 37 million people were enrolled in Medicare nationally.<sup>3</sup> Montana had

approximately 167,000 Medicare enrollees in 2016.<sup>4</sup>

On the other hand, Medicaid is a joint federal and state program that receives roughly 66 percent of its funding from the federal government and 34 percent from the state governments. The funding percentages vary depending on the type of services covered and federal directives for coverage.<sup>5</sup> Medicaid is designed to help individuals with limited income and resources, including programs focused on disabled people, pregnant women, the elderly and children. Medicaid also offers some coverage for other benefits, not usually covered by Medicare, like nursing home care and personal care services.<sup>6</sup> In addition to monitoring Medicare, CMS also monitors Medicaid programs offered by each state. In 2015, it was estimated Medicaid nationally spent in excess of \$532 billion and Montana in excess of \$1 billion.<sup>7</sup> In 2017, it was estimated that 69 million people were enrolled in Medicaid nationally.<sup>8</sup>

1 See generally, [www.Medicare.gov](http://www.Medicare.gov) (last visited April 14, 2017, 2022).

2 See <https://www.hhs.gov/about/budget/fy2015/budget-in-brief/cms/program-integrity/index.html> (last visited April 14, 2017, 2028).

3 See <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Dashboard/Medicare-Enrollment/Enrollment%20Dashboard.html> (last visited April 15, 2017, 2300).

4 See <https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/Dashboard/Medicare-Enrollment/Enrollment%20Dashboard.html> (last visited April 14, 2017, 2100).

5 See <https://dphhs.mt.gov/Portals/85/Documents/2015MedicaidReport.pdf>.

6 See <https://www.medicare.gov/your-medicare-costs/help-paying-costs/medicaid/medicaid.html> (last visited April 15, 2017, 2009).

7 See <http://kff.org/medicaid/state-indicator/total-medicaid-spending/?currentTI=meframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited April 14, 2017, 2100).

8 See <https://www.medicaid.gov/medicaid/index.html> (last visited April 15, 2017, 2012).



As of January 2017, Montana had 246,548 individuals enrolled in Medicaid and the Children's Health Insurance Plan (CHIP).<sup>9</sup>

Montana's Department of Public Health and Human Services (DPHHS) manages the Montana Medicaid Program and is tasked with adopting appropriate rules to administer the program and ensure its compliance with federal laws and regulations. The Montana Medicaid Program is administered under Montana Code Annotated § 53-6-101. In response, DPHHS has adopted rules found in Title 37 of the Administrative Rules of Montana (ARM) for managing and monitoring the Montana Medicaid Program.

### The Recovery Audit Contractors

The Affordable Care Act contained provisions that amended the Social Security Act and established that states and territories had to develop Medicaid Recovery Audit Contractor (RAC) programs. The purpose of the RACs is to identify overpayments and underpayments and to recover overpayments from Medicaid providers.<sup>10</sup> RACs work in conjunction with Medicaid Integrity Contractors and, when fraud is identified, the appropriate state's Medicaid Fraud Control Unit. RACs are paid on a contingency fee basis. The amount of the contingency fee is a percentage of the improper payment recovered from providers. The base contingency fees range from 9 percent to 12.5 percent for all claim types, except for claims related to durable medical equipment (DME). The contingency fees for DME claims range from 14 percent to 17.5 percent. The RAC must return the contingency fee if an improper payment determination is overturned at any level of appeal – meaning RACs get paid prior to the exhaustion of a provider's appeal in the process.<sup>11</sup> DPHHS has contracted with Health Management Systems (HMS) to act as its RAC since December 15, 2012.<sup>12</sup> HMS is a wholly owned subsidiary of HMS Holdings Corp. HMS is publicly traded on the NASDAQ as "HMSY".<sup>13</sup>

Currently, three issues are approved in Montana for RAC review: (1) inpatient hospital reviews – appropriateness of setting; (2) long-term-care-facility reviews; and (3) hospital readmissions within 24 hours.<sup>14</sup> Once the RAC has identified a situation where it believes a provider has been paid too much for the services rendered (an overpayment), the provider is notified and given the option to request an administrative review of the alleged overpayment. An administrative review allows either a review of the already submitted records and any new records that may support the provider's case or a telephonic "desk" review where the provider can speak with a representative about the audit and discuss the objections to the audit. If the provider loses at the administrative review stage, the provider may make a fair hearing request, where the process is elevated to Montana's administrative law judges and the overpayment demand is prosecuted by attorneys

9 See <https://www.medicaid.gov/medicaid/by-state/stateprofile.html?state=montana> (last visited April 15, 2017, 2200).

10 See <https://www.federalregister.gov/documents/2011/09/16/2011-23695/medicaid-program-recovery-audit-contractors> (last visited April 17, 2017, 1034).

11 See <https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/Recovery-Audit-Program/Downloads/FY2015-Medicare-FFS-RAC-Report-to-Congress.pdf> (last visited April 17, 1426).

12 See <http://hms.com/medicaid-recovery-audit-contractor/#> (last visited April 17, 2017, 1033); <http://dphhs.mt.gov/qad/PC/PCRAC.aspx> (last visited April 10, 2017, 2300).

13 See <http://hms.com/about/> (last visited April 12, 2017, 2210).

14 See <http://hms.com/us/mt-providers/home/> (last visited April 17, 1117).

with the Montana Attorney General's Office.

### Clinical v. Billing

With respect to reviewing the appropriateness of inpatient hospital stays, there seems to have been a flurry of activity over the last 12 to 18 months in Montana. These reviews focus on whether the treating physician's decision to admit a Medicaid patient as an inpatient, rather than as an outpatient with observation status, was medically necessary. One might ask if there is a distinction with a difference between an inpatient admission and outpatient with observation status. The answer is emphatically yes – in some cases the reimbursement rate for an inpatient admission can amount to more than triple the reimbursement rate for an admission to outpatient observation status. This is an obvious reason for the inclusion of the issue on HMS's approved issues for review.

The ARM provides that Medicaid shall only make payment for services that are "medically necessary."<sup>15</sup> A "medically necessary" service is defined as: "A service or item reimbursable under the Montana Medicaid program which is reasonably calculated to prevent, diagnose, correct, cure, alleviate, or prevent the worsening of conditions in a patient, which endangers life, causes suffering or pain, results in illness or infirmity, threatens to cause or aggravate a handicap or causes physical deformity or malfunction."<sup>16</sup> It is also clear from the regulations that the physician or other medical provider is responsible for deciding whether the patient should be admitted as an inpatient.<sup>17</sup> The real distinction between inpatient and outpatient admission status seems to be whether the care the patient received should have, in hindsight, been provided as effectively, in a more conservative or substantially less costly manner in an outpatient setting.<sup>18</sup> Either way, the patient is admitted to the same hospital bed and treated as required by their condition upon admission and their co-morbidities. The designation as inpatient simply ensures that the hospital is paid for the higher level of care the patient will require during the stay.

The basis for each of the RAC's overpayment demands is that the facility was overpaid because less intense services would have been more appropriate. The RAC typically attacks the provider's medical judgment and argues that the procedures, testing, consults and monitoring offered to the identified patients could have been safely performed with the patients designated as outpatients with less monitoring and hands-on care from medical providers and staff. However, there is no clear statutory or regulatory definition that defines what care qualifies for the outpatient setting and what care is most appropriately administered as an inpatient. It could be argued that no such guidance exists because the treating physician who physically sees the patient should be the one to determine what is medically appropriate and necessary. Instead, the current RAC audit system uses experts who review records in retrospect for a company that profits directly from overpayment demands.

The current structure employed by Medicare and Medicaid to

**MEDICARE**, page 27

15 See Administrative Rules of Montana § 37.85.410.

16 The Montana Medicaid Hospital Inpatient Services Manual, dated December 2010, Appendix B.1; ARM § 37.82.102(18).

17 ARM § 37.86.2901(26) and (27).

18 The Montana Medicaid Hospital Inpatient Services Manual, dated December 2010, Appendix B.1; ARM § 37.85.410 (Determination of Medical Necessity).



# REMEMBER, IT'S NOT YOUR MONEY!

## Lawyers must take great care in managing trusts

By **MARK BASSINGTHWAIGHTE, ESQ.**  
Risk Manager, ALPS

Theft of client property remains a serious concern for the legal profession but trust account problems aren't just about rogue lawyers. The real problem is that far too often an attorney was less than diligent about maintaining proper and appropriate financial practices in the office and things simply got out of hand. Also, be aware that lack of intent, shoddy record-keeping practices, and restitution are not effective defenses to a misappropriation or conversion of client funds complaint. With this in mind, here are a few tips that if taken to heart can help keep you on the straight and narrow path when it comes to being responsible for other people's money.

First, and most importantly, there are no circumstances under which it would be acceptable to borrow funds from your client trust account, temporarily or otherwise, and yes unfortunately this does need to be said. Trying to make payroll, covering a quarterly tax payment, paying your bar dues, borrowing from one client to cover a check paid to another, or needing to take care of a necessary personal expense don't pass muster. Similarly, an attorney may not keep an unearned advance fee, hold onto non-disputed client funds as leverage over disputed earnings, or apply a client's current funds to that client's outstanding bill from a previous matter.

Second, make certain that you keep

undeposited checks and cash in a locked drawer or cabinet even if you intend to deposit the money later in the day. I have walked into numerous firms for a risk visit and found no one in the reception area. It would take only a minute to walk behind the receptionist's desk, open the top right hand desk drawer, remove the bank deposit envelope that too many still place there, and leave the office completely unnoticed. In addition and upon receipt, restrictively endorse and create a log of all checks that have come in and keep the log in a separate place from where the checks are held. If any checks are ever stolen, lost, or destroyed this will enable you to know whose checks are gone thus giving you the opportunity to inform the affected clients or other payers. Also, since those checks were restrictively endorsed, they should be much easier to have replaced.

Third, never disburse the proceeds of any check prior to that check clearing. Here's why. There is a difference between funds being available, which typically occurs within 24 hours on domestic checks, and those funds being collected funds (meaning the check has cleared), which can take several days and potentially quite a bit longer. Checks can fail to clear for a variety of reasons including a missing, insufficient, or incorrect endorsement; insufficient funds; a drafting error; a bank error; or because it was a forged check just to name a few. If you disburse the proceeds of a

### More on trust account management

If you want to learn more about properly managing your trust accounts, check out Carl Mendenhall's CLE "Trust Account Management." The recorded program is available on demand at **montana.inreachce.com**. It is approved for 1.0 Montana Ethics CLE credit.

**TRUST**, next page

**TRUST**, from previous page

check and that check eventually bounces, you have commingled client funds because another client's funds have been used to cover the check that bounced. This would be true even if the firm covers the shortfall with its own money and no one appears to be harmed. Making matters worse, what if the firm doesn't have sufficient funds available to cover the bounced check? This does happen! In a zero-tolerance jurisdiction, your license to practice could be suspended for just such an occurrence. A hold time of five to seven business days will protect you in most situations. Wait longer if the check is drawn on a foreign bank account or something just doesn't feel right because a number of lawyers have been successfully scammed out of large amounts of money by authorizing deposited funds to be transferred after five to seven days only to find the initial check bounced two weeks after being deposited.

Fourth, never commingle funds in the trust account. For example, non-disputed client funds and earned attorney funds are not to be left sitting together in the trust account for an extended period of time nor should the trust account ever be used as the employee Christmas savings account. That said – and only if this would be permissible in your jurisdiction – you might consider keeping a small amount of firm funds in the trust account to cover any account fees or charges. This is one way to prevent client funds from being used to pay a firm expense. A recommended amount would be \$50 and should never exceed \$200.

Fifth, consider handling trust account withdrawals as follows. Once you earn a fee, send the client a bill reflecting the deduction from the amount remaining in trust. The bill should state that if there is a question on the bill the client should contact the firm within 10 days otherwise the firm will make the indicated withdrawal at the end of that time. You are going to wait for 20 days from the day the bill was sent, 10 days for the bill to be delivered and 10 days to see if the bill is disputed, before actually withdrawing the earned fee. Too many attorneys withdraw earned monies at the same time that a bill is sent and this can create a cash flow problem should a client ever dispute their bill. The reason for this is that disputed funds must be placed back in trust until the dispute is resolved. If you make a significant withdrawal at the same time the bill is sent, perhaps to pay personal and professional bills, and then you are unable to come up with those funds if the bill is disputed, you've got a serious problem.

Sixth, trust account records must include a general ledger as well as separate subaccount ledger that can track all account activity by individual client. The individual client ledger must detail every receipt and disbursement, the date of the transaction, a notation on the nature of the transaction, the individual account balance in trust, and the client's name and address. Each month you must reconcile the bank statement in two ways. First reconcile the bank statement with the general ledger and then reconcile the bank statement with the individual sub account ledger. These separate reconciliations should balance with each other to the penny. If they don't, figure out why and correct the problem then and there. Understand that it is going to be much easier to determine where a misstep occurred at the time it occurred as opposed to trying to figure out what happened years later during an audit by the Bar.

Finally, support staff never should open the trust account bank statement. This envelope should be given to the attorney responsible for monitoring trust account activity. Under the rules of professional conduct, you have a duty to monitor the activity in your client trust account. Your license is on the line with this account, so stay on top of it. To do so, look at the bank statement and make certain that there is a corresponding check for every debit noted there, review the signature on every cleared check for authenticity, and make certain that every debit in the account is appropriate and understood. Once this is completed, the bank statement may go to the staff person responsible for account reconciliation. When the reconciliation is complete, have the reconciliation report returned to you so that you may do a review of the numbers and check this report against the original bank statement. Then sign and date the report and bank statement in order to document attorney oversight of client funds.

The trust account's bank statement must be reviewed each month and you should review the reconciliation report and bank statement together at least quarterly. Generally speaking, you should maintain all trust account records for at least five years after termination of the representation although the exact time frame may differ among jurisdictions.

**ALPS Risk Manager Mark Bassingthwaight, Esq., has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology. You can contact him at: mbass@alpsnet.com.**



**MEDICARE**, from page 25

review medical billing to federal programs encourages duplicative work by the various private contractors and incentivizes aggressive identification of overpayments without support from the patient records. That is not to say that overpayments don't occur or that some providers don't take advantage of the programs. However, experience dictates it is a small percentage of the whole. Fiscal responsibility should be weighed against the growing and erosive nature of the aggressive and time-consuming billing and auditing requirements of third party payors like insurance companies and Medicaid. The most recent, large-scale and sweeping changes in the federal regulatory landscape have only added to the pull on

medical providers away from a focus on providing holistic, quality patient care and onto the new and additional 60,000-plus ICD-10 diagnosis codes, ever expanding CPT codes and RAC-approved issues for review. An improved audit system should be sought in which providers can again be clinicians first and medical coding experts a distant second.

**Jessica Fehr is a shareholder at Moulton Bellingham PC, in Billings, Montana. Jessica's litigation practice focuses on medical malpractice defense, medical regulatory defense, and white collar criminal defense. Jessica can be reached at Jessica.Fehr@moultonbellingham.com or 406-248-7731.**



# Attorneys: Thank you for diligence on IOLTA

## The Montana Justice Foundation

The Montana Justice Foundation and the State Bar of Montana recently closed the 2016 IOLTA compliance reporting period. Thank you to Montana attorneys for completing the certification process! This was the second year Montana Justice Foundation and the State Bar used an online system for the reporting process. The online system makes it easier for attorneys to report and allows for more efficient coordination with Montana Justice Foundation's other IOLTA management systems. We have continued to work on some final glitches in the system and appreciate all of your patience and feedback during this transition phase.

Attorneys' diligence in maintaining trust accounts and reporting every year leads to big impacts in our civil justice system. With the funds generated through IOLTA, Montana Justice Foundation supports and fosters the availability and accessibility of legal services to vulnerable and under-served populations by providing grant funding to eligible organizations across our state. Since 1986 — when the Montana Supreme Court initiated a mandatory IOLTA program — the Montana Justice Foundation has given \$5.97 million in funding to civil legal programs across the state. IOLTA funds help low-income families, survivors of domestic violence and sexual abuse, veterans, the elderly, and children in need of legal advocacy and services.

One recent example of IOLTA funds making a big difference comes from first-time grantee YWCA Billings. YWCA Billings saw a need in the Billings community and, with the help of an IOLTA-funded grant in 2016, created a new legal services program that focuses on providing free civil legal advocacy, representation, and referrals for survivors of domestic violence and sexual assault. YWCA Billings has long addressed the non-legal needs of domestic violence victims by providing emergency shelter

MONTANANS IN NEED

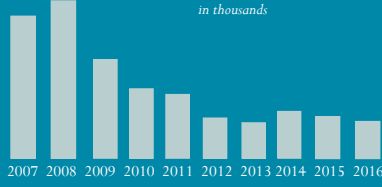


182,000 Montanans — 18% of our state's population — qualify for civil legal aid at or below 125% of the federal poverty level

---

IOLTA REVENUE

\$682	\$775	\$429	\$297	\$281	\$188	\$171	\$202	\$194	\$179
in thousands									




---

230 INDIVIDUALS

AND

84 LAW FIRMS

---

DONATED TO MJF IN 2015

---

To learn more about the Montana Justice Foundation or to support our work with a tax-deductible donation, please contact us at: (406) 523-3920 • PO Box 1917 Helena, MT 59624  
[www.mtjustice.org](http://www.mtjustice.org)

and advocacy services. However, as the 2014 Supreme Court “The Justice Gap In Montana” report indicates, individuals experiencing domestic violence and sexual assault are also frequently in need of additional civil legal services. Recognizing that individuals experiencing one legal need often experience multiple and related civil legal needs, YWCA Billings’ new program provides critical resources and services that holistically address the various issues survivors face.

For example, one client came to YWCA Billings for help obtaining an Order of Protection after she was sexually

assaulted. In addition to the YWCA Billings attorney helping the client secure a permanent Order of Protection, the client received free counseling from the YWCA Billings therapist to help her cope with the trauma of sexual violence, and YWCA Billings assisted in getting her case referred to the Yellowstone County Attorney’s Office for possible prosecution.

As YWCA Billings Executive Director Erin Lambert says, “YWCA’s unique program model allows us to provide services to meet more than one need a victim of domestic or sexual violence may be facing.”

With all the good work that IOLTA funding has accomplished, Montana’s low-income populations still face significant barriers to justice. Due to a severe drop in interest rates, IOLTA revenue has dwindled to a fraction of what it once was. In 2008, revenue from Montana IOLTA accounts totaled nearly \$775,000; in 2016, these revenues were just \$179,000.

Due to this sharp decline, the Montana Justice Foundation and our grantee organizations have been even more strategic in serving Montana’s low-income populations. Each and every dollar generated through lawyers’ trust accounts means even more for closing the gaps to justice, and in the face of declining revenues and potential nationwide budget cuts in legal services, attorney compliance is more important than ever before to accomplish the IOLTA program’s goal of achieving justice for all.

The Montana Justice Foundation is proud to support the valuable work YWCA Billings and all of our other grantees do and the progress they make toward closing the gaps to justice in our state. The IOLTA program makes a significant impact in our state, and the Montana Justice Foundation is immensely grateful to Montana attorneys who make this work possible by certifying and maintaining their IOLTA accounts

# Sheehy, Supreme Court justice and winner of State Bar's Jameson Award, dies at age 99

John C. "Skeff" Sheehy, a former longtime Montana Supreme Court justice and the winner of the State Bar of Montana's 2005 William J. Jameson Award, died April 7 in Helena. He was 99.

Sheehy was appointed to the Supreme Court in 1978 by Gov. Thomas Judge. He won re-election twice before retiring in 1991.

Sheehy was a prolific writer. He wrote the most majority opinions and the most dissents of any justice during his tenure on the court.

He said his most memorable opinion was for the 1980 decision in *Commonwealth Edison v. Montana*, validating Montana's 30 percent coal trust severance tax to set up a trust fund for future needs.

"It was just a perfect way to balance off the loss of that great asset, the coal, and provide for a lot of things that we need in the future," Sheehy said of the trust fund in a 2005 interview for the Bob Brown Oral History Collection.

The U.S. Supreme Court upheld that decision.

Sheehy was born in Butte on Jan. 27, 1918, the first of seven children.

He married Rita Ann Schiltz in 1945. In



**Justice John C. 'Skeff' Sheehy**

1947, they moved to Billings, Rita's hometown. Skeff began a 30-year law practice with his brother-in-law and great friend, Jack Schiltz. They tried all manner of cases and represented all sorts of clients. They also had a lot of fun. Schiltz and Sheehy were responsible for most of the skits, songs and frivolity at Billings Bar meetings for decades.

Over time, others joined Schiltz and Sheehy in the practice, including George Hutton, R. G. Wigenhorn, and Brent

Cromley. Skeff's professional accomplishments were recognized by the State Bar of Montana in 2005 with the Jameson Award, and by the Montana Trial Lawyers Association last summer with a lifetime achievement award.

He was also a longtime Montana legislator, serving in both the House and Senate between 1959 and 1970.

Sheehy noted that, having also served as chief deputy insurance commissioner and as chief of the Montana Securities Commission, he was one of the few people in history to serve in both branches of Montana government. Another was Jean Turnage, who was chief justice during Sheehy's tenure on the court.

In addition to his own legacy, Sheehy's family tree looms large in Montana law. Three of his 11 children are lawyers: Martha Sheehy, a former president of the State Bar of Montana (1997-98), is a sole practitioner in Billings; Patrick Sheehy is a partner at Halverson & Sheehy in Billings; Anne Yegen practices in Park City. Another daughter, Mary Sheehy Moe, is a former legislator and a member of the Supreme Court's Commission of Continuing Legal Education.

## C.B. McNeil

Longtime Polson District Judge C.B. McNeil died on April 20 after a brief illness. He was 80.

McNeil was elected in 1985 to the newly created 20th Judicial District. He was re-elected five times, serving until his retirement in 2013. Upon his retirement, the courtroom in the Lake County Courthouse was named the C.B. McNeil District Court Room.

McNeil was born Feb. 17, 1937, in Anaconda and was proud to be a fifth-generation Montanan. After attending the School of Mines in Butte, he completed his Bachelor of Science in metallurgical engineering at the University of Alaska-Fairbanks in 1959. While in school he was in Army ROTC, and earned his pilot wings before his commission

as a second lieutenant.

His love for the outdoors, fishing, hunting, skiing and all that Montana has to offer led him and his wife of 58 years, JoAnn,



**McNeil**

to move to Missoula, where he graduated from the University of Montana School of Law in 1966. After law school, C.B. and JoAnn moved to Polson.

He practiced law with Jean Turnage and later with John Mercer in Polson until 1984, when McNeil was elected district judge and Turnage was elected to the Montana Supreme Court. Mercer was also elected to the Montana House of Representatives on the same day. Upon being honored with his

50-year pin from the State Bar of Montana in September 2016, McNeil told the bar he believed that was the first time in history that voters had dissolved an entire firm in one election.

During McNeil's 29 years on the bench, he presided over 27,266 district court cases, including 223 jury trials to verdict. He was a delegate to the 1972 Montana Constitutional Convention and was proud to have helped author many of the environmental protections afforded to Montana citizens under the Montana Constitution.

The family suggests that in lieu of flowers, donations can be made to the Court Appointed Special Advocates (CASA) in Lake and Sanders counties, which McNeil helped establish in his court, at P.O. Box 511, Polson, MT 59860; or to a charity of your choice.

## Job Postings and Classified Advertisements

**CLASSIFIEDS** | List an opening or see additional job listings at [jobs.montanabar.org](http://jobs.montanabar.org). Basic 30-day listing is \$99 (includes Montana Lawyer classified ad for State Bar of Montana members). For ads for legal services, office space, mediation, or consultants and experts, email [jmenden@montanabar.org](mailto:jmenden@montanabar.org) or call 406-447-2200.

### ATTORNEYS

**EXECUTIVE DIRECTOR:** The State Bar of Montana is seeking an Executive Director with a start date of January 2, 2018. The State Bar is a unified, integrated bar organized in 1975 by the Montana Supreme Court. Membership represents the entire spectrum of the Montana legal community from private practitioners to judges, government and legal services attorneys and corporate counsel. Direct letters of interest, inquiries and resumes by July 1, 2017, to [cmanos@montanabar.org](mailto:cmanos@montanabar.org). See full listing at [jobs.montanabar.org](http://jobs.montanabar.org).

**CHIEF DISCIPLINARY COUNSEL:** Office of Disciplinary Counsel, Helena, seeks chief disciplinary counsel. Please forward a cover letter, resume, the names of three professional references and a legal writing sample to the: Montana Supreme Court, Court Administrator's Office HR, P.O. Box 203005, Helena, Montana 59620-3005. This position will close and application materials must be postmarked by May 15, 2017. See full listing at [jobs.montanabar.org](http://jobs.montanabar.org).

**ASSOCIATE ATTORNEY:** Silverman Law Office, PLLC ([www.mttax-law.com](http://www.mttax-law.com)) has an associate attorney position available for the Helena Office. We believe that customer service and best business practices are a key to a successful legal practice. Applicants must have strong communication, teamwork and people skills and an ability to provide customer service to a wide array of clients. Our practice focuses on business/tax/transactional/estate planning in a rapidly expanding business environment, with an unbelievable support team that provides a positive work and life atmosphere. Applicants must be admitted to practice or in the process of obtaining admission to practice in Montana, and an LLM in Taxation is preferred. We offer a highly competitive compensation and benefits package. Please send your cover letter, resume, references and writing sample to [Julie@mttaxlaw.com](mailto:Julie@mttaxlaw.com).

**ASSOCIATE ATTORNEY:** Hendrickson Law Firm, P.C. seeks one or two attorneys with excellent academic, writing, and personal skills to do transaction and litigation work, with the opportunity to be a major part of a small, well established, highly rated, general practice firm in Billings. Several members are at or nearing retirement and want to keep their good clients in capable hands. This is an opportunity for immediate client involvement, experienced mentoring, developing your own areas of practice, and financial success primarily based on productivity, while keeping a strong emphasis on professionalism. Some experience is preferred but quality new graduates will be considered. Please send letter of application, references, resume, transcript, and writing sample to [katie@hendricksonlawmt.com](mailto:katie@hendricksonlawmt.com).

**ASSOCIATE:** Bozeman Law Firm seeking junior attorney to assist in its growing litigation and transactional practice. Experience preferred. Competitive compensation, based on qualifications and performance. Please email resume and writing sample to [classifieds@montanabar.org](mailto:classifieds@montanabar.org) with a subject line of Box 1705-01.

**LITIGATION ATTORNEY:** Knight Nicastro, LLC is a regional litigation firm with offices in Billings, Colorado and Missouri and has immediate need for attorneys with litigation experience. The preferred candidate would have 2-4 years of litigation experience. Candidates

with more experience will also be considered. Candidates must be licensed to practice in Montana, have excellent communication skills, attention to detail and a strong work ethic. The firm offers competitive compensation, CLE and marketing budget and excellent benefits. Please send resume, cover letter and references to Jan McMinn at [mcminn@kgn-law](mailto:mcminn@kgn-law).

**JUDGE PRO TEMPORE:** Missoula Municipal Court is looking for attorneys who are interested in serving as Judge Pro Tempore. To qualify, you must be a member of the bar in good standing and must not appear regularly in Missoula Municipal Court. Experience in Criminal Law is preferred. Please send letters of interest to Judge Kathleen Jenks, 435 Ryman St., Missoula, MT 59802 or email to [kjenks@ci.missoula.mt.us](mailto:kjenks@ci.missoula.mt.us).

**TRANSACTIONAL/COMMERCIAL LAWYER:** Datsopoulos, MacDonald & Lind, P.C. of Missoula, Montana desires to engage an experienced transactional/commercial lawyer with four to five years of experience in private practice to work as an independent contractor or associate on exciting and sophisticated real estate development, business and commercial transactions. Our firm offers a strong, collegial and productive work environment and excellent compensation. The ideal candidate would be a lawyer with a positive, can-do attitude and a diligent work ethic. Some basic requirements include being a current member of the Montana Bar, superior writing skills and familiarity with a myriad of transactional structures and documents. We look forward to hearing from you! Please send cover letter, resume and references.

### PARALEGALS/LEGAL ASSISTANTS

**PARALEGAL:** Are you looking to work with a great, hard-working team where you will expand your skills and knowledge within the industry? Silverman Law Office is seeking an experienced and passionate full-time paralegal to strengthen our Helena team. As a member of our team, you will assist attorneys and clients regarding tribal law, trademarks, probate, estate planning, business, and transactional matters. This position requires expertise in use of Microsoft Word and Excel, as well as outstanding proofreading and writing skills. The right candidate must possess knowledge of legal procedures, organizational skills, ability to prioritize workflow assigned by numerous team-members, and the ability to work independently. Paralegal Degree, NALS legal assistant/paralegal certification, other paralegal certification, or work equivalent is preferred. We offer a highly competitive compensation and benefits package. Please send a resume, cover letter, and writing sample to [Julie@mttaxlaw.com](mailto:Julie@mttaxlaw.com).

**LITIGATION PARALEGAL:** Missoula Law Firm seeks an experienced litigation paralegal. Must have excellent written/verbal communication and organizational skills, good work ethic, the ability to multi-task, work independently as well as a team. Must be able to work in a fast paced, deadline driven environment with attention to detail. This is a unique opportunity as positions rarely open in this established firm which prides itself on a family friendly and professional environment. Send resumes to: P.O. Box 8869 Missoula, MT 59801.

**LEGAL ASSISTANT:** Team-oriented, progressive Great Falls law firm

Scott, Tokerud & McCarty seeks a positive, professional and friendly addition to the office. Responsibilities include meeting with clients, gathering and organizing asset information, drafting documents and communicating with third parties such as accountants and financial institutions. If you enjoy interacting with people and producing high-quality work, this position is for you. You must be computer literate, personable, and able to understand documents relating to clients' assets. Preferably you will have experience with an accounting office, real estate office, title company, bank financial institution or law firm. You must demonstrate an ability to work with others, an attention to detail and a desire to learn and grow professionally. You must possess above-average written and oral communication skills and a genuine interest and compassion in the service of others. Email your resume, salary requirements and a paragraph on why you qualify for this position to [TanyaB@MontanaEstateLawyer.com](mailto:TanyaB@MontanaEstateLawyer.com).

**LEGAL ASSISTANT / ASSOCIATION MANAGER:** A Helena-based law firm is seeking a qualified, motivated candidate for the full-time dual position of Legal Assistant and Association Assistant. Required qualifications include two or more years' experience in a law firm and/or legal assistant/paralegal college degree and/or NALS legal assistant/paralegal certification. Must be proficient in Word, Excel, Outlook, Quickbooks, and Adobe Acrobat, and able to perform basic troubleshooting for office computers, phones, copy/scanner/fax machines, printers, and the internet. Must be EXTREMELY detail oriented, conscientious, personable, a quick learner, highly motivated, able to take direction, work in a high-stress environment, and require little supervision. Email resume to [thunderdomelaw2@gmail.com](mailto:thunderdomelaw2@gmail.com). Full listing at [jobs.montanabar.org](http://jobs.montanabar.org).

## ATTORNEY SUPPORT/RESEARCH/WRITING

**DO YOU NEED HELP** in your busy criminal defense or family law practice? Over 20 years experience in criminal and family law. LEGAL RESEARCH & WRITING: motions, pleadings, discovery, and appeals. [moiramurphylaw@gmail.com](mailto:moiramurphylaw@gmail.com) or (406) 697-5419. Reasonable rates with flat fee.

**ENHANCE YOUR PRACTICE** with help from an AV-rated attorney with 33 years of broad-based experience. I can research, write and/or edit your trial or appellate briefs, analyze legal issues or otherwise assist with litigation. Please visit my website at [www.denevilegal.com](http://www.denevilegal.com) to learn more. [mdenevi@bresnan.net](mailto:mdenevi@bresnan.net), 406-210-1133..

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

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

## OFFICE SPACE/SHARE

**KALISPELL:** Existing 6-member general practice law firm in Kalispell seeking attorney(s) to share office space and staff or possible lateral merger. Contact [dwh@kvhlaw.com](mailto:dwh@kvhlaw.com).

## MEDIATION

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

**JOE ANDERSON, TRAINED MEDIATOR** -- "Conflict Free" -- Joseph B. Anderson Legal & Mediation Services, recently opened in Missoula, is new to Montana, although Shelby High graduate Joe is not. With over 25 years litigation and entertainment/tech transaction practice, keen insight, and competitive rates, Joe delivers a fresh neutral option. 406-880-5587. [www.joeandersonlaw.com](http://www.joeandersonlaw.com). [joe@joeandersonlaw.com](mailto:joe@joeandersonlaw.com).

## CONSULTANTS & EXPERTS

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

**ARCHITECTURAL EXPERT, FORENSIC INVESTIGATION & ANALYSIS:** 43 years architectural experience. Specializing in Contract Administration; Specifications; and Architect / Owner /Contractor relationships. Extensive knowledge of building systems, materials, construction methods; Accessibility Regulations and Standard of Care; and forensic architectural investigation. Provides consulting and expert witnessing services. Attorney references upon request. Frank John di Stefano, PO Box 1478, Marion, MT, 59925, Phone: 1-406-212-7943.

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

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

## EVICCTIONS

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

# MONTANA LAWYER

State Bar  
— of —  
Montana

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



BECAUSE BAD THINGS CAN  
HAPPEN TO GOOD LAWYERS.

You've worked hard to build your firm and you want to know your hard work is protected. ALPS has you covered. With ALPS, you're not buying a policy. You're buying a promise.

Ready to get a quote? Visit [www.alpsnet.com/get-a-quote](http://www.alpsnet.com/get-a-quote).



STATE BAR OF MONTANA  
Serving the people of Montana and their attorneys

(800) 367-2577 • [www.alpsnet.com](http://www.alpsnet.com) • [learnmore@alpsnet.com](mailto:learnmore@alpsnet.com)