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THE MONTANA LAWYER

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. Phone (406) 442-7660; Fax (406) 442-7763. E-mail: mailbox@montanabar.org

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SUBSCRIPTIONS are a benefit of State Bar membership; others purchase a year's subscription for \$25, pre-paid. Third Class postage paid at Helena MT 59601.

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.

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*Printed in Billings
at Artcraft Printers*

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PRESIDENT'S MESSAGE

Dinners with sustenance

Great discussions served up for dessert

Jock Schulte

One of the perks of being president is that I get an occasional meal while performing my duties. On Oct. 6, Patti and I were invited to attend the University of Montana Law School Scholarship Brunch at the Doubletree in Missoula.

The scholarship recipients were present, as well as the donors or their representatives, so the crowd was large. Associate Dean Peggy Tonan was the master of ceremonies, and – in spite of the fact that her beloved New York Yankees were having significant problems with the Cleveland Indians – she did a very good job of personalizing and conveying the importance of the occasion.

There can be no doubt that the scholarships make it possible for many law students to be honored for their achievements while helping to ease the financial burdens associated with obtaining a law degree. Certain law students persuasively described how their scholarships have helped them in material and substantial ways.

The State Bar of Montana is invited to the brunch (hence Patti and me) because the Board of Trustees contributes money to the scholarship program. The money is donated by individual trustees, not the State Bar of Montana as a whole. I have contributed to this scholarship fund in the past, and now that I have observed first-hand how much good these scholarships do, I will be certain to continue to contribute in the future.

A good friend of mine told me that his law firm was going to discontinue the firm's scholarship award so that their bottom line would be enhanced. After expressing his extreme disappointment to his partners over their decision, my friend made the contribution individually. This friend of mine was also at the scholarship brunch, and I could see that he was visibly moved by the sincere appreciation conveyed by the deserving law students.

We should all take a lesson from my philanthropic friend. If your firm does not contribute to the scholarship program, then create and fund a scholarship in the firm's name. Or, contribute in your own name or in the name of an admired person or entity. In appreciation of the contribution, you will be invited to the annual brunch. While the food will be good, the real nourishment will be bestowed in the form of the extremely satisfying feeling that comes

from being a benefactor to a program that helps ensure the continued excellence of Montana lawyers.

ANOTHER GOOD MEAL I had was on Sept. 27, at my own home. Patti prepared chicken cordon bleu and we hosted a special guest, University of Montana Regent's Professor of Philosophy Albert Borgmann. Billings attorneys Mark Parker and Don Harris, who really organized the event, were also present along with Past-President Peggy Probasco, Law School Professor Bari Burke, and Missoula attorneys Alex George and Gary Graham.

Professor Borgmann is world-renowned for his keen interest in studying ethics and technology, including technology's effect on people and society. We requested that Prof. Borgmann consider assisting us in understanding how technology helps or hinders the practice of law, including its ramifications on our professional and personal lives.

In order to do this, the professor inquired about the core values of the practice of law. And let me tell you, trying to describe the core values of the practice of law in a sentence or two is no easy task. In fact, the Professionalism Committee is holding a retreat in February 2008 to more fully analyze the legal profession's core values, so more on this will come later.

Nevertheless, Prof. Borgmann kindly consented to write an article for *The Montana Lawyer* within the next year dealing with ethics and technology. There was also some preliminary discussion about a conference or CLE at the Law School, with Prof. Borgmann as the keynote speaker, to further explore technology and ethics as it applies to the practice of law.

SO, TWO MEALS LATER, I am now an avid proponent of the UM Law School Scholarship program. I hope that Montana lawyers share this view and demonstrate their support by contributing. And, of course, the best meal was prepared with only a little help from technology, absolutely requiring Patti's human contribution for it to come out so delicious. Now, with Prof. Borgmann's assistance, Montana lawyers will have the opportunity to gain more insight into the ethical use of technology in a profession that requires so much of a human component. ○

Judge jumps on a burglar's Beatles gaffe

Before she left her position as State Bar president in September, Peggy Probasco used her June/July President's Message to recommend books that lawyers should read. She also suggested they read the following sentencing memorandum written in February by Billings District Judge Gregory Todd. Since then, Ms. Probasco has discovered that the memorandum has become a hit on the Internet. "I googled it and came up with about 25 direct hits and lots of indirects," she said. "It made a consumer law blog, some defense blogs, some law school blogs, etc." She said it also was mentioned on the Harper's magazine web site.

Judge Todd wrote in the burglary case of Andrew Scott McCormack:

Mr. McCormack, you pled guilty to the charge of Burglary. To aid me in sentencing, I review the pre-sentence investigation report. I read with interest the section containing Defendant's statement. To the question of "Give your recommendation as to what you think the Court should do in this case," you said "Like the Beatles say, 'Let It Be'."

While I will not explore the epistemological or ontological overtones of your response, or even the syntactic or symbolic keys of your allusion, I will say **Hey Jude, Do You Want to Know a Secret?** The greatest band in rock history spelled their name B-E-A-T-L-E-S.

I interpret the meaning of your response to suggest that there should be no consequences for your actions and I should just **Let It Be** so that you could live in **Strawberry Fields Forever**. Such reasoning is **Here, There and Everywhere**. It does not require a **Magical Mystery Tour** of interpretation to know **The Word** means leave it alone. I trust we can all **Come**

Together on that meaning.

If I were to overlook your actions and **Let It Be**, I would ignore that **Day in the Life** on April 21, 2006. Evidently, earlier that night you said to yourself **I Feel Fine** while drinking beer. Later, whether you wanted **Money** or were just trying to **Act Naturally**, you became the

Fool on the Hill on North 27th Street. As **Mr. Moonlight** at 1:30 a.m., you did not **Think for Yourself** but just focused on **I, Me, Mine**.

Because you didn't ask for **Help, Wait for Something** else, or listen to your conscience saying **Honey Don't**, the victim later that day was **Fixing a Hole** in the glass door you broke. After you stole the 18 pack of Old Milwaukee you decided it was time to **Run for Your Life and Carry That Weight**. But when the witness said **Baby It's You**, the police responded **I'll Get You** and you had to admit that **You Really Got a Hold on Me**. You were not able to **Get Back** home because of the **Chains** they put on you. Although you hoped the police would say **I Don't Want to Spoil the Party and We Can Work It Out** you were in **Misery** when they said you were a **Bad Boy**. When the police took you to jail you experienced **Something New** as they said **Hello Goodbye** and you became a **Nowhere Man**.

Later when you thought about what you did, you may have said **I'll Cry Instead**. Now you're saying **Let It Be** instead of **I'm a Loser**. As a result of your **Hard Day's Night** you are looking at a **Ticket to Ride** that **Long and Winding Road** to Deer Lodge. Hopefully you can say both now and **When I'm 64** that **I Should Have Known Better**.

DATED this 26th day of February, 2007

Hon. Gregory R. Todd, District Court Judge

Poor Tom Robinson, guilty again

Lawyers, I suppose, were children once.
— Charles Lamb
(Preface in *To Kill a Mockingbird*)

As part of "The Big Read Under the Big Sky," a Lewis & Clark County community and schools event based around the reading of "To Kill a Mockingbird," the 1st Judicial District Bar Association members re-enacted in October the trial from Harper Lee's novel.

The cast of lawyers participating in

the scene included the Helena District Judge Jeff Sherlock, Montana's Chief Public Defender Randi Hood as Atticus Finch, John Conner of the AG's Office as Prosecuting Attorney Gilmer, Pam Bucy as Mayella Ewell (the alleged rape victim), Charlie Adams as Bob Ewell (Mayella's hateful redneck father), and Bob Wood, new Helena city judge, as Heck Tate.

The event was directed by Chris Tweeten of the AG's Office and president-elect of the State Bar, and his wife,

Jeanne, who is on the Capital High School faculty. The trial was attended by a diverse audience, which packed the Old Supreme Court Chambers in the Capitol to capacity.

Although Atticus did not obtain an acquittal for the wrongly accused black man Tom Robinson (played by Wilmont Collins) — the same outcome as the book and movie — the cast did a fine job depicting this famous scene from a Great Depression-era southern courtroom.

Lewis & Clark County is one of about 200 communities nationwide engaged in the National Endowment for the Arts' initiative aimed at revitalizing reading.

How lawyers and courts should choose

forensic mental-health examiners

By **Patrick Davis**, Ph.D.
Great Falls forensic psychologist

An attorney, or a court, may request the involvement of a forensic mental-health professional in a legal matter in a variety of contexts and for a variety of reasons.

The context may be civil, criminal, domestic or administrative, and mental-health expertise may be relevant at any of various stages, including case formulation, pre-trial proceedings, trial and post-trial proceedings.

The mental-health professional most commonly will serve in the role of consultant, examiner and/or testifying expert. This article will focus primarily on the utilization of forensic mental-health professionals in the role of *forensic examiner*, but many of the issues discussed will have obvious implications for their use as consultants or testifying experts as well.

During the past 20 years or so, there have been significant developments in forensic mental-health practice. As such, attorneys and courts that retain forensic mental-health professionals need to have some degree of familiarity with the state of the art and science of forensic mental-health practice. In this article I will discuss:

- The differences between mental-health professionals with, and without, specialized forensic preparation.
- The differences between the different types of mental-health professionals who may be called upon to provide forensic mental-health services.
- The issue of specialty board certification for forensic mental-health professionals.
- Recent developments in the science upon which the services provided by forensic mental-health professionals are based.
- The nature and procedures of the forensic mental-health examination process.
- How forensic examinations differ from treatment-oriented mental-health evaluations.

Differences between mental-health professionals with and without specialized forensic preparation

Mental-health professionals have been involved in providing assistance to attorneys and courts in legal matters for as long as mental-health professionals have existed in an independent and clearly defined professional capacity. However, it is only in the last 20 years or so that forensic mental-health practice has developed into a full-fledged specialty area of practice

within the broader mental health field.¹

Prior to about 20 years ago, mental-health professionals who became involved in legal matters had little in the way of professional guidance or scientific literature, theory or research, upon which to base their work. There was very little awareness or appreciation among mental-

health professionals of how the application of mental-health concepts might differ between treatment-oriented settings and legal settings.

As a result, it was commonly the case that mental-health professionals would become involved in legal matters as consultants, examiners or testifying experts, but were not able to transport mental-health concepts and findings into legal settings in an effective manner. The result was often frustration on the part of attorneys and courts because, despite the sometimes impressively erudite psychological or psychiatric findings that were communicated in examination reports and in the courtroom, the relevance of those findings or testimony to the case at bar was often far from clear. Even if it were clear, the basis for such findings or testimony often consisted of nothing more than professional *ipsi dixit*. Unfortunately, this state of affairs persists to a significant degree despite significant advances in forensic mental-health practice.

Attorneys and courts frequently continue to rely on examinations and testimony provided by mental-health professionals who do not have specialized forensic preparation. Perhaps the primary reason is that attorneys and judges may not be aware that a highly specialized field of forensic mental-health practice now exists, and may mistakenly think that all licensed mental-health professionals are equally capable of providing competent and relevant forensic services.

A primary goal of this article is to clarify that mental-health professionals, merely by virtue of their basic clinical training, are not adequately prepared to function effectively in the legal arena, and that the legal system can benefit immensely by ensuring that the mental-health professionals who are called upon to provide consultative, examination and expert-testimony services have, as a result of specialized preparation, the necessary skills to provide truly useful and relevant services.

While information regarding the mental-health functioning of an individual involved in a legal matter, whether civil or criminal, is, at times, clearly relevant to the proceedings in which the individual is involved, the ultimate issues in question are legal in nature and do not translate easily from the ultimate "clinical" issues which mental-health professionals

are traditionally trained to address (e.g., diagnosis, prognosis, clinical treatment planning).

For example, a “clinical” finding that an individual suffers from a psychotic disorder does not translate directly into a finding that the individual is not fit to proceed or that he was not able to act with knowledge and purpose at the time of an alleged offense. Similarly, a finding that a plaintiff suffers from Posttraumatic Stress Disorder, or from some other form of diagnosable mental disorder, does not translate directly into a finding that the plaintiff has suffered psychological injury related to another party’s breach of duty. A competent forensic mental-health professional will recognize that it is not the presence or absence of a mental-health diagnosis per se that justifies a conclusion regarding a legal issue such as fitness to proceed or the presence of psychological injury, but rather that such conclusions require coherent articulation of the presence of specific clinical characteristics and whether or not such characteristics can be logically linked to the legal concept at issue in a manner consistent with extant scientific theory and data.

A couple of expanded illustrations of this point may be helpful. The fact that a criminal defendant suffers from Schizophrenia does not, in and of itself, justify an opinion that the defendant does not have the capacity to assist in his defense – although all too frequently a mental-health clinician without specialized forensic preparation may say that it does. While a mental-health professional without forensic preparation is likely to simply make a mental-health diagnosis and then conclude that the presence of that diagnosis justifies a certain legal determination, a mental-health professional with adequate forensic preparation will take a more sophisticated, and legally defensible, approach. He will identify the relevant clinical characteristics which, again, may or may not meet treatment-oriented criteria for a specific mental health diagnosis, and will be able to demonstrate how those clinical characteristics relate directly to the legal question at issue.

In a fitness-to-proceed case, for example, the adequately prepared forensic mental-health professional may diagnose the defendant as suffering from Schizophrenia. Next, he may go on to explain that the defendant’s illness manifests with delusions of persecution (e.g., a false belief that other individuals or organized groups are plotting against the person) into which the defendant’s attorney has become incorporated, with the result that the defendant is not able to trust his attorney and thus is not able or willing to provide the attorney with important information. In such a case, an opinion that the defendant does not have the capacity to assist in his defense is truly helpful to the court because the forensic mental-health professional has linked the relevant clinical characteristic associated with the defendant’s mental illness (delusions of persecution leading to mistrust of the attorney) to the relevant legal issue (the capacity of the defendant to assist in his own defense).



In the civil arena, the fact that a plaintiff suffers from symptoms consistent with Posttraumatic Stress Disorder, depression or some other type of mental defect, does not, in and of itself, justify an opinion that the plaintiff has suffered impaired functioning related to a defendant’s acts or omissions – although again a mental health professional without adequate forensic preparation may say that it does. In contrast, an adequately prepared forensic mental-health professional, prior to offering such an opinion, would conduct the necessary investigation to determine whether the plaintiff’s symptoms can be adequately explained by pre-injury, contemporaneous or post-injury

events unrelated to the alleged injury. In addition, the well prepared forensic examiner will also conduct a sophisticated assessment of malingering or exaggeration as possible alternative explanations for the symptoms. Ruling out such competing explanations for the plaintiff’s symptoms is an essential task for the mental-health forensic examiner in tort claims. Having ruled out such competing explanations, the forensic examiner would then be in a position to articulate: 1) the link between any clinical characteristics of psychological disturbance and any impaired functioning or other adverse effects experienced by the plaintiff, and 2) the absence of any alternative explanation for the apparent causal link between the actions or omissions of the defendant and the psychological disturbance and impairment suffered by the plaintiff.

For example, a forensic mental-health professional may conclude that a plaintiff suffers from the post-trauma symptoms of sleep disturbance and trauma-related nightmares, that as a result of these symptoms the plaintiff experiences sleep disturbance which causes impairment of the plaintiff’s capacity to accomplish work-related tasks, that it is clear that there are no persuasive alternative explanations for the plaintiff’s symptoms, and that the plaintiff is not exaggerating or fabricating his symptoms. Having carefully examined all of these issues, the forensic mental-health professional will be in a position to make a persuasive argument that the plaintiff is in fact suffering from specific impairments or other adverse effects that result in a negative change in his functioning, and that there does not appear to be any persuasive explanation for the plaintiff’s injuries other than the defendant’s acts or omissions.

Making the link between the relevant clinical characteristic and the legal concept at issue is a fundamental task of the forensic mental-health professional. The failure of a forensically unprepared mental-health professional to appreciate the need to make this link explicitly and coherently in a written report or in testimony and to base such conclusions on scientifically sound methods is perhaps the most salient difference between mental-health professionals with and without specialized forensic preparation. In addition, however, there are more differences worthy of brief comment.

Greenberg & Schuman² discuss a number of differences between the roles of forensic and non-forensic mental-health professionals. These include:

- The recognition by the forensic mental-health professional that his client is the attorney or the court, and not the party.

- Recognition that attorney-client privilege and not mental health professional-client privilege regulates disclosures of information.

- The cognitive set and evaluative attitude of the mental-health professional, with the forensic mental-health professional adopting a neutral, objective and detached attitude while the non-forensic mental health professional in a treatment-oriented context is more likely to adopt a supportive, accepting and empathic attitude.

- Differing areas of competency, as will be discussed below.

- The nature of the hypotheses tested (i.e., the mental-health professional without specialized forensic training will be likely to limit hypothesis testing to hypotheses consistent with *clinical diagnosis* and *treatment planning*, while the forensic professional will also reach beyond to relevant psycholegal issues).

- The amount of critical scrutiny applied to the information obtained during the examination, with such scrutiny being much more stringent in the forensic context and the weight afforded to the history as self-reported by the examinee being considerably less in the forensic context than in the non-forensic context.

- The amount of control and structure imposed by the examiner or evaluator during the examination process, with the forensic professional providing a higher level of control and structure.

- The nature and degree of “adversarialness” during the examination, with the forensic relationship being more adversarial when appropriate because of the need to clarify vague, inconsistent or discrepant information.

It behooves the prudent attorney or judge to retain or appoint mental health-professionals who have such specialized preparation when the need for forensic mental-health consultation, examination or testimony arises. While forensic clinicians typically charge higher fees than do their non-forensic colleagues, they do so for good reasons (e.g., additional training, higher overhead, higher levels of accountability, higher stress, etc.), and the added expense is easily justified by the superior quality, relevance and usefulness of the work-product obtained.

Differences between types of mental-health professionals

I have chosen to use the term “forensic mental-health professional” because, depending on the legal context, different types of mental-health professionals may be called upon to provide forensic mental-health services. Although the type of mental-health professional that may be licensed varies somewhat by jurisdiction, most mental-health professionals can be classified as either a psychiatrist, psychologist, psychiatric or mental-health nurse, social worker, counselor, marriage and

family therapist, or substance-abuse counselor. Montana licenses all of these types of professionals except for marriage and family therapists. Some other states license marriage and family therapists, while others do not license counselors.

A *psychiatrist* can be identified by the M.D. or D.O. credential following his name. Psychiatrists attend medical school where, as a general rule, they receive a limited amount of instruction in mental-health topics because the focus of their training is on biology, anatomy, physiology, biochemistry and so on. The majority of a psychiatrist’s training in mental-health issues occurs following the completion of his classroom instruction. During his postgraduate and residency years, he obtains hands-on experience working in a variety of mental health settings, including the psychiatric unit of a hospital.

A *psychologist* can be identified by the Ph.D. or Psy.D. credential following his name. While the Ph.D. or Psy.D., like the M.D. or D.O. degree, is a doctoral degree and is considered to be a “terminal” degree, a psychologist does not attend medical school, but rather attends what is typically a four-year program of doctoral-level classroom instruction focused primarily on mental-health topics. Typically, psychologists receive “hands-on” training throughout their doctoral study, often in a variety of settings, and then participate in a full-time internship. All states require substantial supervised training following the psychologist’s graduation from his doctoral program in order for the psychologist to be eligible for state licensure. In order to be eligible for licensure in Montana a psychologist must obtain two years of supervised experience, at least one of which must be obtained following the completion of the doctoral degree.

Psychiatrists and psychologists differ from one another in a number of ways. Most notably, psychiatrists, as medical doctors, can prescribe medication for the treatment of mental disorders. Psychologists, as a general rule, are not allowed by law to prescribe. There does appear, however, to be a trend in the direction of providing prescriptive authority to psychologists who demonstrate adequate preparation for that purpose, much like the prescriptive authority granted in Montana to advanced-practice nurses, dentists and podiatrists.

Psychologists differ from psychiatrists with regard to the extensive training that psychologists receive in the development, construction, administration and interpretation of psychological tests. Psychologists with a Ph.D. degree typically have attended a program that has provided a more intensive focus on science-related issues, while the instruction which psychologists with a Psy.D. degree receive tends to be somewhat more clinically focused.

There is substantial controversy with regard to when, or if, psychologists should be allowed to prescribe medication, and whether psychiatrists should be allowed to administer and interpret psychological tests. Of course, guild interests interface with genuine issues of competence in these debates. The typical training program for psychologists does not prepare them to prescribe medication, and the typical training program for psychiatrists does not prepare them to administer and interpret psychological tests. Of course, any professional, as a result of postgraduate training and experience, supervision, consultation and self-study, can develop competencies in areas beyond those achieved in their formal training program. As

such, there are psychologists who possess the necessary skills to prescribe and there are psychiatrists who possess the necessary skills to administer and interpret psychological tests.

However, since the administration and interpretation of psychological tests is not within the basic scope of expertise of psychiatrists, if a retained psychiatrist does his own psychological testing, it will be important for the retaining attorney to ensure that the psychiatrist is able to demonstrate evidence of adequate post-graduate preparation and experience in the administration and interpretation of psychological tests. When this is the case, the attorney should be able to successfully defend against objections which may be raised with regard to the admissibility of the psychiatrist's testimony based on the argument that the psychiatrist is planning to testify to an issue in which he does not have expertise. The Society for Personality Assessment has published a document entitled "Standards for Education & Training in Psychological Testing,"³ which provides guidance what constitutes adequate preparation for the practice of psychological testing.

Advanced-practice registered nurses have an R.N. degree in nursing plus additional training in a specialty area that qualifies them for certification at an advanced level of practice by a national certifying body and by the state. An advanced-practice nurse can be identified by the credential APRN following her name. Typically, to be certified at the advanced practice level, nurses have to obtain at least a master's degree from a nurse-practitioner program focused in the area of specialty as well as 500 supervised hours of clinical hands-on training in the specialty area above and beyond the clinical training required for the R.N. degree.

Advanced-practice nurses have prescriptive authority in Montana. One area of advanced practice in which a nurse may pursue, and become certified in, is psychiatric and mental-health nursing.

Licensure as a **clinical social worker** (LCSW) or **clinical professional counselor** (LCPC) in Montana, as in most, if not all, other states that license these types of professionals, requires a master's degree. Licensure as an **addiction counselor** in Montana can be achieved with an associate's degree. There is substantial variety in the primary focus of the educational programs which counselors and social workers attend. Some licensed clinical professional counselors will have graduated from a program focused primarily on school counseling. Some licensed clinical social workers will have graduated from a program focused primarily on community, rather than mental-health, social work. In order to be licensed by the state, however, counselors and social workers must obtain the equivalent of two years of full-time supervised mental-health experience. **Licensed addiction counselors** (LAC) are required to complete a "supervised work experience" in an internship program prior to licensure. No specific number of hours of supervised experience is noted in the licensing statute.

While any type of mental-health professional may be called

upon to provide consultative services to an attorney or a court, jurisdictions vary with regard to restrictions placed upon the admissibility of testimony from different types of mental-health professionals. Such restrictions also vary within jurisdictions as a function of the area of law in which the mental health professional may be called upon to conduct an examination or to provide testimony.

In Montana:

■ Only psychiatrists, psychologists and advanced practice psychiatric nurses may testify in fitness-to-proceed cases.⁴ Although Montana law is vague on this issue, this restriction seems to generally apply in criminal matters with regard to testimony relevant to determinations at trial regarding *mens rea* and with regard to sentencing determinations.

■ Psychiatrists – or, for that matter, any physician,⁵ psychologists,⁶ advanced practice nurses,⁷ social workers and counselors – can testify in involuntary commitment proceedings. To testify in such proceedings, additional certification by the state as a "Certified Mental Health Professional Person" is required for counselors and social workers.⁸

■ In hearings in which the state is seeking termination of an individual's parental rights without first implementing a child protective services treatment plan for the parent, testimony regarding the capacity of the parent to assume the role of a parent within a reasonable time must come from a physician or a psychologist.⁹

■ In guardianship proceedings for an incapacitated person, the testimony of a physician is required.¹⁰

■ The Montana Rules of Civil Procedure do not limit admissible testimony by type of profession, but rather only require that the examination be conducted by a "suitably licensed or certified examiner,"¹¹ which could theoretically include any type of mental-health professional licensable in Montana.

Board certification

The topic of board certification in forensic mental-health practice is important because of the recent proliferation of organizations providing board certification, and, in particular, because of the advent of so-called "vanity boards,"¹² which do not carefully vet the qualifications and capabilities of the professionals they certify. Attorneys and courts that retain forensic mental-health professionals who report being board-certified need to be aware that the requirements for obtaining certification vary substantially between certifying organizations.

The most reputable board certification credentials in forensic mental-health practice are provided by the American Board of Forensic Psychology (ABFP) for psychologists, and the American Board of Psychiatry & Neurology (ABPN), which provides subspecialty certification in Forensic Psychiatry, for

There has been a proliferation of organizations providing board certification – so-called 'vanity boards' – which do not carefully vet the qualifications and capabilities of the professionals they certify.

Deputy county attorney earns community's praise and thanks

Excerpted from the **Ravalli Republic**

Bill Fulbright prosecutes many of the cases that other attorneys call disturbing and sometimes horrific – domestic brutality, child sexual and physical abuse, rape and sexual assaults. And he has won convictions.

In October, the Ravalli County deputy attorney also won the 2007 Montana Outstanding Prosecutor of the Year Award. The Montana Attorney General's office, the State Bar of Montana and the Montana Coalition Against Domestic & Sexual Violence awarded the honor to Fulbright at the Ravalli County Coalition Against Domestic & Sexual Violence's annual Report to the Community gathering.

Bill's professionalism, his compassion working with the victims, his expertise in these cases, all helped him win this award, Ravalli County Attorney George Corn said.

Fulbright was low-key about the award and spoke only briefly at the ceremony at St. Francis Pastoral life Center in Hamilton, where he was recognized for receiving the award.

He thanked "the team we have here" at the Ravalli County Attorney's Office, law enforcement, the courts and the nongovernmental groups, like Supporters of Abuse Free Environments and Emma's House, that constitute the Ravalli County Coalition Against Domestic & Sexual Violence.

"I remember one 10-year-old girl who was a victim of sexual abuse, how she said that in school she would always wonder, is this going to be a good day or a bad day," Fulbright recalled. "Her focus was on what would happen when she got back home. Now she is with another family, and the perpetrator is in Deer Lodge.

"Nobody should spend the day wondering, is this going to be a good day or



William Fulbright

a bad day. Somebody has to stand up for those who cannot protect themselves. The whole team here is about helping those who can't help themselves."

During his five years with the county attorney's office, Fulbright has handled 22 cases of domestic violence, sexual abuse and related crimes.

In October, Fulbright fought for the conviction of Robert Stearns, a 45-year-old man from Missoula charged with exposing himself to three women in Hamilton parks. A jury agreed and convicted the registered sex offender on all three counts.

In March he won the conviction of Richard Crosley on seven counts of incest and three of assault on minors. Crosley received six concurrent life sentences plus another 50 years in prison for rape and other sexual crimes over the course of many years, as well as for what amounted to torturing children.

In late 2003, Fulbright won a conviction of James Hendershot III of Stevensville, even though the victim

refused to testify against him. The beating of the victim in that case was "methodical," Fulbright told the jury, which found Hendershot guilty of aggravated assault, assault with a weapon and misdemeanor partner or family-member assault.

In May 2003, Fulbright obtained guilty verdicts in a case of sexual assault and sexual intercourse without consent against Hamilton resident Luke Lloyd.

Fulbright also prosecuted Joel St. Germain. In 2003, a jury found him guilty on eight charges of felony rape and other sex crimes. In that case, Fulbright had the aid of the victim.

"I have the deepest respect for the victim to come forward and break the cycle and the silence," Fulbright said after that trial.

In his nomination of Fulbright, Corn wrote that Fulbright is not only an excellent trial attorney but had extensive civil practice before becoming a prosecutor. That, Corn wrote, familiarized Fulbright with "evidence-based prosecution," which can be critical when the victim, as sometimes happens in domestic violence cases – whether due to intimidation, financial need, lack of options or continuing emotional ties – recants and says nothing bad happened. In such cases, to secure a conviction, other evidence – forensic, medical and analytical – becomes all the more important.

Fulbright's concern for the vulnerable and victimized extends to before and after prosecution. He works closely with Emma's House, which serves child abuse victims, providing them a secure place for medical and psychological interviews. Fulbright follows the victims' progress after he is done as a prosecutor, said Corn. "He asks social workers to inform him of the progress of victims' well-being, particularly of child victims."

He also often works with the foster parents with whom the Department of Health & Human Service has placed children after they are removed from homes where sexual violence has occurred.

We are fortunate to have such a dedicated professional on our staff," said Corn. ○

New document privacy rules begin Dec 31

Beginning Dec. 31, access to state and local court records will be governed by rules adopted in February by the Montana Supreme Court.

These rules affect court personnel, attorneys, citizens representing themselves pro se, journalists and members of the public who wish to examine court records. They do not apply to federal courts.

The rules were created by an Access & Privacy Task Force appointed in November 2005 by the Montana Supreme Court and its Commission on Technology.

The task force began work on the rules in December 2005, using model rules created by the national Conference of State Court Administrators and the national Conference of Chief Justices. The task force took special care to make sure the rules reflected two of Montana's most cherished constitutional rights: the public's right to know and the right to individual privacy.

The full text of the rules is on the Web at:

www.courts.mt.gov/newrules.asp

(Look for order #AF 06-0377)

The new rules affirm the public's right of access to court records (Montana 1927 Constitution, Article II, which recognizes that some information should be kept confidential). The new rules allow courts to prohibit public access to information contained in court records if that information is protected by either state or federal law.

In addition, the task force decided to make the following information confidential in all court records to ensure individual privacy and prevent identity theft or identification of minors:

- Complete social security numbers.
- Complete financial-account numbers.
- Full birth dates of any person.
- Full names of minor children. (NOTE: in some cases, state law requires a child's name to be accessible to the public.)

The presence of confidential information must be reflected in the court file, even if the information itself is unavailable to the public. In addition, information may be sealed by a judge, either unilaterally or in response to a motion from:

- A party in the case.
- A person named in a record.
- A clerk of court.

Conversely, a judge may open a closed record, either unilaterally or in response to a motion by any member of the public. (Section 4.60)

Attorneys responsible for keeping confidential info off public records

If you submit court documents

Attorneys and pro se (self-represented) parties bear the responsibility for segregating confidential information from the public portion of the record.

The task force is developing a "confidential information" form that will be available at clerk of court offices across Montana.

Remember that even if information in a filing is confidential, its presence must be acknowledged in the file.

If you plan to ask a judge to make certain information in a filing confidential, the information should be contained in a sealed envelope that will be lodged (not filed) with the court until a judge rules on your request or motion.

The task force that developed these rules did not want to place additional and undue burdens on clerks of court. Therefore, the burden of protecting confidential information is placed on those people who submit documents to the court. However, clerks are allowed to ask a judge to place potentially confidential information under seal. Clerks will be provided with educational materials and forms that should be distributed to attorneys and pro se parties.

If you ask for records

As guaranteed by the Montana Constitution and by these rules, any member of the public may inspect court records during the court's normal business hours. Requests for large quantities of records ("bulk information") must be made to the court. If the bulk information includes confidential items, the judge may require requestors to disclose how they will protect that information from disclosure.

Requests for specific information compiled from large quantities of records ("compiled information") must be made to the court. Requestors seeking compiled information must meet specific conditions imposed by a judge.

Upon receiving a request for access to information, the court will respond within a reasonable time regarding the availability of the information and, if the request is granted, will provide the information within a reasonable time.

If the court is allowed by statute to charge fees for copying or printing records, those fees may be charged to the requestor.

Court records on the Internet

Eventually, Montana courts will begin placing records on the Internet for public view. In that case, records made available on the Internet will be subject to these same rules.

○

Bar's medical plan has new features

Now's the time for participants to renew, new members to join

The State Bar of Montana Group Benefits Trust medical-plan renewal is complete for 2008, the Trust announced in a letter to participating lawyers and law firms.

In a packet mailed to participating members in late October, the Trust asked groups to complete the enclosed, tan Employer Election Form and return it by Dec. 15, 2007, to HealthServe at the address at the bottom of the form. The form must be mailed in regardless of whether or not you plan to keep your same benefit option. Non-participants who wish to join the plan, can contact Mountain West Benefit Solutions, at (877) 343-1060.

"As in 2003, 2004, 2007 and 2008, the [cost] increase is in single digits: 9.9 per cent," the Trust said in an October report. "Our increases over the last five years, including premium holidays, have averaged less than half of the national average."

To keep health-care cost trends down, the Trust decided that all members currently on a traditional benefit (those other than Blue Choice) will now have access to a hospital Preferred Provider Organization (PPO). The Blue Cross & Blue Shield PPO network for professional services is identical to what is in place today on the traditional plan, the Trust said. The change is in the hospital and surgery centers. Currently, 56 out of 58 hospitals throughout the state participate in this network, as well as 15 out of 16 free-standing surgery centers. "Therefore, you don't have to give up provider choice and the upside is you and the Trust will have access to greater discounts," the Trust report said. If services are obtained from facilities outside the PPO hospital network a 25-percent penalty on the allowed amount will be applied. This includes services outside of Montana. "However, through the Blue Cross & Blue Shield Blue Card Network, you actually have access to a larger network than is available on the traditional plans," the Trust said. Prior to accessing any services (especially hospital services) you should call Customer Service at (800) 447-7828 or look on-line at www.bluecrossmontana.com for participating provider status.

Other State Bar medical-plan changes for 2008 include:

- **The pharmacy benefit manager (PBM)** will change on Jan. 1 from Express Scripts to RegenceRx. Unlike a typical PBM, RegenceRx is paid a flat amount for processing claims, and savings are passed on to your firm, your employees and the Trust. The process of purchasing and submitting of pharmacy claims does not change for you or your employees.

The State Bar of Montana Group Benefits Trust was established in 2000 for the purpose of providing cost-effective medical options to members, employees and their beneficiaries at group rates. Since inception, the Trust has experienced significant growth in participant numbers and premiums.

A seven-member Board of Trustees oversees the Trust. Board members' terms expire on a rotating basis at the end of each calendar year. Accordingly, elections are held each fall for trustee positions with expiring terms. This year, three Trustees will be elected for a three-year term. If you are interested in being a candidate, contact Chris Manos, executive director of the State Bar of Montana.

Benefits trustee candidates sought

There will continue to be access to the mail-order program, which continues through Ridgeway Pharmacy in Stevensville. The primary difference is there will be two ID cards – one for medical services and the other for pharmacy.

- **High-deductible health plans** have been improved to allow for only one individual on two-party, employee-children or family coverage to satisfy the deductible instead of the total family deductible being satisfied before any claims pay. Also, a \$500 preventive benefit for High Deductible Health Plan options has been added with no copayments or deductibles.

- **The mammogram benefit** has been increased from \$70 to \$125.

- **A Worksite Wellness Program** is now available to every firm. Each employee who completes the on-line Mayo Clinic Health Risk Assessment (HRA) will be given a \$25 gift card. If, through the HRA an employee is identified with four or more risk characteristics, he will have the opportunity to work directly with a Mayo Clinic health coach at no cost.

The State Bar Trust has partnered with Two Medicine, a Bozeman health management to help participating groups educate their employees and implement the worksite wellness programs. Two Medicine will work directly with your firm or through your agent to schedule employee meetings and help coordinate the HRA rollout.

All employees on the health plan will now have access to a 24 hour Nurseline through Aicare. At any time day or night they can contact a registered nurse to answer questions regarding health issues.

The "Open Enrollment" period is Dec. 1 to Dec. 31, 2007. (The pink sheet in the mailed packet should be copied and

More MEDICAL PLAN, Page 31

NOTICE: Your 2007 Lawyers' Deskbook & Directory is out-of-date!

There have been more than 1,000 attorney address changes in the past year, plus changes to judges, rules, committees and commissions and more. The *2008 Lawyer's Deskbook & Directory* has all this information in a format that makes it easy to find what you are looking for. Included are state and federal courts, law-related organizations, local District Court rules, Rules of Professional Conduct, sample fee agreements, the most current and comprehensive listing of State Bar of Montana attorneys, a useful legal resource guide, firm section and more! And now, you can get a Mid-Year update of the book on CD. Use the order form below to order your copy(ies) today!

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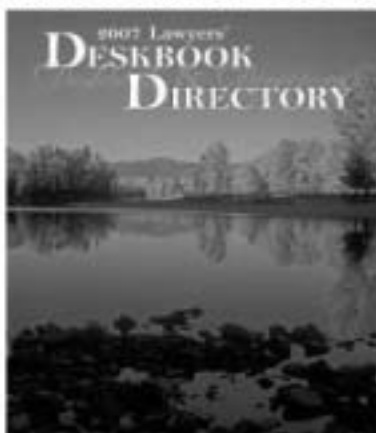
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November 28 Missoula – Holiday Inn Express
Privacy & the Right to Know 6.50 CLE credits. Presented by the Professional Development Center, (406) 444-3985

November 29 Billings – Crowne Plaza Hotel
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November 29 Helena – Park Plaza Hotel
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November 30 Helena – Metcalf Building, Capitol Complex
State Ethics Law 3.0 CLE credits, including 3.0 Ethics credits. Presented by Professional Development Center, (406) 444-3985

December 3-4 Billings – MSU-Billings Downtown
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Working with Trusts 1.50 CLE credits. Presented by Cannon, (800) 775-7654

Other web & phone CLEs for Montana credit are:

■ MTLA's SeminarWeb Live! Seminars at www.seminarweblive.com/mt/index.cfm?showfullpage=1&event=showAppPage&pg=semwebCatalog&panel=browseLive

■ Lorman Education Services' teleconferences at www.lorman.com/teleconferences/

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January 18-20 Big Sky – Huntley Lodge
CLE & Ski Presented by the [State Bar of Montana](http://www.montanabar.org). Details will be mailed to Bar members and posted at www.montanabar.org

STATE BAR CALENDAR

November 22-23
Thanksgiving and day after, State Bar offices closed

November 25
Content and advertising deadline for December/January edition of *The Montana Lawyer* magazine

December 5
Lawyers' Fund for Client Protection meeting, 10 a.m., State Bar offices, Helena

December 6
State Bar Executive Committee dinner meeting, 7 pm, Helena

December 7
State Bar Board of Trustees meeting, 9 a.m., State Bar

offices, Helena

January 4
State Bar Executive Committee meeting, 10 a.m., State Bar Offices, Helena

January 7
Board of Bar Examiners meeting, 10 a.m., State Bar offices, Helena

January 18-20
2008 CLE & Ski, Huntley Lodge, Big Sky

January 25
Small/Solo Firm Practice Tips CLE, 8 a.m.-5 p.m., Hilton Garden Inn, Kalispell

Justice Foundation unveils new web site

The Montana Justice Foundation (MJF) has announced that its new web site is now up and ready for use. The site can be found at:

www.mtjustice.org

The Foundation also has been registered with GuideStar, an online database of non-profit organizations. GuideStar enables potential donors and grant makers to view the Foundation's organization's mission, programs, accomplishments and objectives. "This will both build MJF's visibility and demonstrate our transparency as a worthy and healthy non-profit," said MJF Development Director Amy Sings In The Timber. You can view the MJF posting at www.guidestar.org.

Ms. Sings In The Timber said she welcomes questions and feedback from the users of the new web site. A link to the web site also can be found on the home page at www.montanabar.org.

Earl Hanson wins construction-law award

The State Bar of Montana's Construction Law Section gave its annual Career Achievement Award to Billings attorney Earl J. Hanson.

The award was presented at the Annual Construction Law Institute held at Montana State University by Attorney Dick Andriola, who was the recipient of the award at last year's Institute.

Mr. Hanson retired this year from JTL Group Inc., where he was executive vice president and counsel since 1999. He was honored for his trial work, counsel, legislative efforts and general work in the area of construction law. Mr. Hanson has practiced law in Montana since 1968.

Bronson elected to city commission

Great Falls attorney William O. Bronson was elected to the Great Falls city commission on Nov. 6.

Mr. Bronson, 45, a former Cascade County Republican Party chairman, had said one of his main goals on the city commission was to foster economic development.

Meanwhile, the law firm with which Mr. Bronson practices – Alexander, Baucus, Paul & Young – has changed its name to Bronson, Luinstra, Rothwell & Young. Principals in the firm are Mr. Bronson, Gregory A. Luinstra, J. Michael Young and

Denise L. Rothwell. The firm's address and other contact information remains the same: 615 Second Ave. North, Suite 300, PO Box 3169, Great Falls MT 50403; phone (406) 761-4800; fax (406) 761-4804; website: www.lawgreatfalls.com.

Stahl announces run for district judgeship

K. Paul Stahl, deputy county attorney for Lewis & Clark County and a member of the State Bar Board of Trustees, has announced that he will file for the office of district judge of the 1st Judicial District in the 2008 election. The position is presently held by Judge Thomas C. Honzel.

"Some may think this premature as Judge Honzel has not yet indicated whether he will again seek another term," Mr. Stahl said in a letter to Montana lawyers. But, he explained, he has chosen to announce now because he will be out of the state "for the next month or two."

Mr. Stahl said his appearance in a district-court courtroom nearly every day for 15 years – on both civil and criminal matters – makes him qualified to be a district judge.

Right-to-die lawsuit filed by two Montanans

Two terminally ill Montanans filed suit in October against the State of Montana for the right to die on their own terms. They are joined by four Montana physicians and a nonprofit patients' rights organization.

The case contends that competent terminally ill Montanans are guaranteed privacy and dignity by the Montana Constitution. These guarantees protect the right of such patients to control their own death by obtaining medications from their physician to enable the patient to achieve a peaceful death, if they so choose, the lawsuit contends.

Robert Baxter, 75, a retired truck driver from Billings, and Steven Stoelb, 53, a former logger and forest technician from Livingston, are represented by Mark S. Connell, a Missoula attorney, and Kathryn Tucker, legal affairs director for Compassion & Choices, a group dedicated to protecting and expanding the rights of terminally ill persons. Mr. Baxter suffers from lymphocytic leukemia and Mr. Stoelb has Ehlers-Danlos Syndrome.

The suit challenges Montana's homicide statutes on several grounds under the Montana Constitution.

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1999 w/2003 Update, 400 pages
Book plus CD \$200

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1999 w/2003 Update, 400 pages
Book plus CD \$105

Handbook for Guardians & Conservators

2005, 60 pages incl. 5 forms
Book plus CD \$150

2008 Lawyers' Deskbook & Directory

Available in January
Book \$35

MT Family Law Form Book

2005, 93 pages incl. 26 forms
Book and CD \$150

Public Discipline Under MT Rules of Professional Conduct

2007, 104 pages annotated
Book \$35

Public Information Flyers

tri-fold brochures, \$10/bundle of 100
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Author: Klaus Sitte, director of Montana Legal Services

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Prof. Greg Munro – Mini CLE

Wrongful Discharge Update

Prof. William Corbett – Mini CLE

The Legal Writer

Judge Mark Painter

Five short steps to better writing



We have railed against using three words when one would do. This month, we discuss five short rules that will vastly improve your writing.

Hyphenate phrasal adjectives

The reader is confused by nouns acting as adjectives, or by two adjectives together modifying one noun. Often, the reader will have to back up and read again.

Sentences like these fool the reader:

The public policy exception is rooted...
The law abiding citizen...

The reader may be fooled into thinking that the public or the law is the subject of the sentence, rather than a modifier of the actual subject. Just add the hyphen, and the reader knows that the hyphenated words are modifiers.

Words that end in -ly are not hyphenated, because they are adverbs – or because the -ly tells the reader that the word is a modifier, not a noun.

Always hyphenate phrases like “wrongful-discharge suit,” or “public-policy exception.” Just take my word for it, the hyphens increase readability.

Always question 'of'

Write “Ohio Supreme Court,” not “Supreme Court of Ohio.” There is nothing wrong with the possessive. Write “the court’s docket,” not “the docket of the court.” Somewhere, someone told lawyers not to use possessives, maybe because “docket of the court” sounds more formal than “the court’s docket.” It is not. It is just clutter. And much harder to read. Use the “find” feature on your word processor to hunt down these awkward constructions. Some uses of “of” are fine, but usually, if the word is possessive, just make it so with an apostrophe.

A possessive is fine, as long as the idea is possessive. But a possessive is different than a plural. Lately, everyone but lawyers seems to have fallen into the “creeping apostrophe.” This phenomenon does not do away with an “of,” it just adds an apostrophe for no reason, making all plurals into possessives.

- Hot Dog’s for Sale
- Smith & Co., Surveyor’s

Alas, I can no longer exempt lawyers. One Ohio firm has a sign on its historic building: “Samuel Hannaford & Sons, Architect’s, 1890.”

Use the serial comma

In a list of three or more, always insert the serial comma. Some writers insist on omitting the last comma, before the “and.” Do not omit the last comma – doing so can cause misinterpretation.

“Chickens, ducks, and geese” is clear “Chickens, ducks and geese,” allows someone to assert that “ducks and geese” are a distinct category. Using the serial comma never creates ambiguity; leaving it out sometimes does.

Avoid unnecessary preambles

Unnecessary preambles can weaken or hide the point they introduce. And they add nothing except distraction. Here are some unnecessary preambles:

- Let it be emphasized...
- It is important to add that...
- It may be recalled that...
- It is of significance that...
- It is interesting to note that...
- In this regard...

These phrases add nothing but clutter. In speaking, this type of transition is sometimes necessary to give the listener a break. But it never is in writing.

Purge 'lawspeak'

Eschew legalese. “Hereinafter,” “aforesaid,” and the like do not add anything but wordiness and detract from readability. Many studies show that legalese is the number one complaint of appellate judges and law clerks “Hereinbeforementioned” is as unreadable as it is silly. Let’s stop writing like we were using quill pens, slumped over a Dickensian desk.

The ancient “now comes plaintiff, by and through [is there a difference?] his undersigned attorney. . .” is junk. No one reads it anyway. The more clutter and cobwebs you can get out of your document, the more room you have to make your argument.

Use Latin phrases sparingly. A few — *res ipsa loquitur*, *respondet superior* — are acceptable, but do not litter your brief or memo with what Daniel Webster called “mangled pieces of murdered Latin.” I saw a case in which the appellate judge, describing what happened in the trial court, wrote that the trial judge had an “ore tenus” hearing. I had to resort to Black’s Law Dictionary; it means “oral” (as opposed to a written or cyberspace hearing?)

Cut out “such,” such as in “such motion.” “The” or “that” almost always works. “Pursuant to” usually may be translated as “under.” That is, write “under R.C. 2923.12...” not “pursuant to R.C. 2923.12...” Sometimes, when I’m bored with a brief, I count the number of times “pursuant to” appears.

JUDGE MARK P. PAINTER has served on Ohio’s 1st District Court of Appeals since 1995, after 13 years on Hamilton County Municipal Court in Cincinnati. He is the author of “Ohio DUI Law, Ohio Appellate Practice,” and “The Legal Writer, 2nd Edition: 40 Rules for the Art of Legal Writing.” Judge Painter is an adjunct professor at the University of Cincinnati College of Law, and has given more than 100 seminars to judges and lawyers.



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NEWS ABOUT MEMBERS

Burt Hurwitz has joined the Great Falls law firm of Church, Harris, Johnson & Williams as a member of its litigation team. Mr. Hurwitz was raised on his family's ranch in Meagher County. He attended Rocky Mountain College in Billings and completed a National Outdoor Leadership School Semester in the Rockies, and an internship in the Montana Senate. He graduated in 2004 with a BA in History and Political Science. He attended the University of Montana School of Law, graduating in 2007. While in law school, Mr. Hurwitz was president and ABA representative of the Student Bar Association and a member of the International Law Society. He studied law in Norway for a summer and represented the UM School of Law in the American Trial Lawyers Association's student advocacy competition. Mr. Hurwitz co-founded the Rural Advocacy League, a student group dedicated to raising awareness of legal issues affecting rural Montanans and is chairman of the group's board. Also at UM, he was named Outstanding Law Student for 2007, won the Dean's Award for Outstanding Student Leadership, the Carol Mitchell Award for commitment to mediation and alternative-dispute resolution, and the International Academy of Trial Lawyers Student Advocacy Award. Mr. Hurwitz's practice at Church, Harris will focus on agricultural law, trust and estate litigation, real property, energy law and employment law.

The **Youde Law Firm** has moved to the Wells Fargo Center at 175 N. 27th St., Suite 902, Billings MT 59101-2027; phone (406) 252-5400. Ronald E. Youde also announced his additional licensing to practice in Wyoming.

John M. Wagner has moved the Wagner Law Firm into the same building as Viscomi & Gersh at 121 Wisconsin Ave. in

Whitefish. Mr. Wagner is a Whitefish native. He earned his BA in Business Administration from the University of Washington and his juris doctorate from the University of Montana. Areas of practice include real estate, auto accidents, personal injury, business law, criminal defense, and wills and probate. The new Wagner Law Firm telephone number is (406) 862-4884.

James E. Brown, a Dillon native, has become associated with Doney Crowley Bloomquist Payne Uda in the law firm's Helena office. Mr. Brown received his juris doctorate in 2004 from Seattle University, graduating summa cum laude, and a master of laws degree in taxation from the University of Washington in 2005. Mr. Brown served for two years as a judicial clerk for Chief Justice Gerry Alexander at the Washington State Supreme Court and also worked at the Seattle firm of Perkins Coie as a summer associate. Prior to pursuing his legal career, Mr. Brown worked in Washington, D.C., for six years as a congressional aide under U.S. Senators Conrad Burns of Montana and Chuck Hagel of Nebraska, and then for U.S. Rep. Judy Biggert of Illinois. He is admitted to practice in state and federal courts in Montana, and in the state of Washington. His practice will focus in the areas of energy, estate planning, environmental, water law, governmental relations, tax and land use.

Two attorneys have joined the Helena law firm of Luxan & Murfitt:

■ **Pamela D. Bucy** graduated with honors from Rocky Mountain College in 1991. She attended the UM School of Law where she was a member of the National Moot Court Team and the *Public Land & Resources Law Review* and graduated with honors. Ms. Bucy began her legal career as a deputy county attorney for Lewis & Clark County. Since 2001, she has served as the state's executive assistant attorney general, representing Montana in both civil and criminal litigation. She also has spearheaded the legislative efforts for the Department of Justice and served as the chief legal counsel for the department's Office of Consumer Protection. She received a Distinguished Service Award from the State Bar of Montana for her work as co-chair of the Montana Supreme Court's Equal Justice Task Force. At Luxan & Murfitt, Ms. Bucy's practice will include general civil litigation and appeals, government relations, employment law and administrative law.

■ **Erin F. MacLean** was raised in Cody, Wyo., and graduated Phi Beta Kappa and with honors from the University of Wyoming in 1999. Prior to attending law school at the University of Wyoming, she was a business consultant and a licensed financial advisor. While in law school, Ms. MacLean initiated and supervised a mediation program at the University of Wyoming and is a trained legal mediator. She also studied international law in Bangkok, Thailand, through Golden Gate University's College of Law. She is licensed to practice law in Montana, Colorado and Wyoming. Before moving to Helena,

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Ms. MacLean was in private practice in Cheyenne, Wyo. At Luxan & Murfitt, her practice will include general civil litigation and appeals, business planning, health-care law, administrative law, labor law, Indian law, land and water law, and alternative dispute resolution.

Sheryl (Sheri) Taylor, a paralegal for Montana Legal Services Association in Missoula, has completed the CLAICP examination and is now entitled to use of the "CP" (Certified Paralegal) professional credential. At MLSA, she assists low-income Montanans with civil law issues.

Edward L. Meyers III of Phoenix, Ariz., has been promoted from litigation director of the Arizona Center for Disability Law to deputy executive director.

John Heenan has formed the Heenan Law Firm in Billings, which will focus on plaintiff's trial work, consumer law and criminal defense. Mr. Heenan is a graduate of the University of Montana, with honors, and UM School of Law, with high honors. He was a law clerk for U.S. District Court Judge Richard Cebull, then worked in private practice at the Edwards Law Firm, handling both civil and criminal cases, including the case of *Ammondson et al v. North Western Corporation et al*, which resulted in one of the largest jury awards in Montana history (\$21.4 million.) In 2003, he won the national American Association for Justice essay contest for his article exploring W. R. Grace's corporate maneuvers in the aftermath of the Libby fallout. Mr. Heenan is a member of the American Association for Justice, the National Association of Consumer

Advocates, and the Montana Trial Lawyers Association. His address is Downtown Post Office Bldg., 2602 1st Ave. N., Suite 305, Billings MT 59101. He can be reached at (406) 839-9091 and you can visit www.heenanlawfirm.com.

Eric E. Holm is a new associate in the Billings law firm of Matovich & Keller. Mr. Holm was born in Lovell, Wyo. He received his undergraduate degree in Environmental Science from Georgetown College in 2004 and his law degree from the University of Montana in 2007. Mr. Holm will concentrate on litigation in the areas of insurance law, personal injury defense, workers' compensation and commercial law.

Donald Ford Jones and **Philip A. Hohenlohe**, former staff attorneys at the Montana Advocacy Program, have formed Hohenlohe, Jones, a plaintiffs' law firm practicing in the areas of employment discrimination, disability rights and personal injury. The firm is located on the third floor of the Lions Building, 314 N. Last Chance Gulch in Helena. Contact the firm at PO Box 1959, Helena MT 59624; (406) 443-4601; fax (406) 443-4601. The firm's web site is at www.hohenlohe-jones.com. Mr. Hohenlohe and Mr. Jones have represented many clients in a variety of discrimination cases during their five years at the Montana Advocacy Program. Mr. Hohenlohe graduated first in his class in 1994 from George Washington University Law School. His background is in appellate advocacy. Mr. Jones is a 1995 graduate of the University of Oregon School of Law. He has broad litigation experience in both private practice and as a former assistant attorney general for Montana.

DEATHS

Chad Smith, Helena attorney

Retired Helena attorney Chadwick H. Smith, 82, died at his home in Florida on Oct. 14 after a long illness.

Mr. Smith was born in Irvington, N.J. He moved to Helena with his parents as a young boy. He attended the University of Montana until entering the Army in 1944, where he served for three years during World War II as an infantry lieutenant in Europe. After the war, he returned to Missoula, earning a bachelor's degree in business in 1949. He entered law school at UM, earning his LLB in 1951 and his JD in 1970.

Mr. Smith entered the practice of law part-time with his father, J. Miller Smith, and uncles, Paul W. Smith and David R. Smith, while working part-time as chief deputy county attorney for Lewis & Clark County. He then served as attorney for the Montana Unemployment Compensation Commission (now known as the state Department of Labor) from 1952 to 1955, and served as director of the UCC from 1955 to 1960. He then served as executive secretary to Montana Gov. J. Hugo Aronson from 1960 to 1961.

Mr. Smith joined the Smith Law Firm in Helena as a full-time partner in 1961. During his years in private practice, he also served as an assistant attorney general with the Highway Commission. He served as an attorney for the Montana Fish & Game Commission and the Montana Real Estate Commission.

He later served as attorney and lobbyist for the Montana School Board Association and for the Montana Hospital Association for more than 20 years, while serving a large clientele of individuals. Mr. Smith retired in 1993.

Mr. Smith belonged to a large number of community organizations. He was a president of Helena Rotary and district Rotary governor. He rose to the highest offices in the local and state lodges of the Fraternal Order of Eagles. He served on the advisory board of the Salvation Army, the board of directors of Shodair Hospital, the Metropolitan Dinner Club, Helena Community Chest (now United Way, where he served as a legal counsel for 10 years) and the Boy Scouts. As legal counsel for the Eagles, Mr. Smith helped establish the Penkay Eagles Manor senior-citizen apartment complex in Helena.

Mr. Smith served as chief attorney for the Montana Republican Party from 1964 to 1970 and was chairman of the party's Rules Committee. In 1972, he was selected as a first delegate for Montana to the Republican National Convention.

Mr. Smith married Dolores Johnson in Helena in 1949. She preceded him in death in 1993. They had two daughters, Deborah and Rebecca. Deborah preceded him in death in 1996. In July 1995, he married Rena Harrison in Helena. They began spending winters in Florida in 2000, and in 2005 moved to central Florida to make their home full-time. ○

psychiatrists. The ABFP is a member board of the American Board of Professional Psychology (ABPP). The ABPN is a member board of the American Board of Medical Specialties (ABMS). Of all the organizations providing board certification in forensic mental-health practice, only the ABFP requires oral examination of certification candidates. The ABPN requires demonstration of clinical skills or knowledge in general psychiatry, but subspecialty certification in forensic psychiatry does not require oral examination or forensic-specific skill demonstration.

Psychologists who are board-certified by the ABFP may list that credential following the Ph.D., or Psy.D. credential and/or they may list the ABPP credential since, as noted, the ABPP is the umbrella organization which oversees the ABFP. Since the ABPP oversees 13 specialty boards in psychology, however, if a psychologist lists only ABPP as his board-certification credential, the retaining attorney or judge should ask what specialty the psychologist is certified in, since the ABPP may signify certification in areas other than Forensic Psychology (e.g., School Psychology, Industrial Organizational Psychology, Clinical Psychology, Health Psychology, Neuropsychology, etc.) that may or may not be relevant to the needs of the retaining judge or attorney.

Psychiatrists who are board certified in the subspecialty area of forensic psychiatry by the ABPN do not typically include a credential indicating board certification following the M.D. or D.O. credential. Rather, a psychiatrist who is board certified will typically note his board certification status on his vita, resume, or other marketing materials with a statement along the lines of "Diplomate of the American Board of Psychiatry & Neurology with subspecialty in Forensic Psychiatry."

Most mental-health professionals who function in forensic roles are not board-certified. But the relaxed requirements used by some of the more recently established board certification organizations has resulted in an increase in the number of mental-health professionals reporting that they hold board certification in forensic practice. While Montana attorneys or courts most frequently retain professionals who are *not* board certified in forensic mental-health practice, it may be helpful to keep in mind that only the ABPP/ABPF requires oral examination of applicants and only the ABMS/ABPN includes interactive observation and assessment of applicant's general clinical, although not forensic, skills.

The current state of mental-health forensic science

During the past 20 years, there has been a virtual explosion of scientific research and scholarly thought in the field of forensic mental-health practice.

Until a few years ago, there were essentially no specialized assessment tools for the mental-health professional to use as a part of the forensic examination process. This state of affairs has changed dramatically. There are now specialized instruments that examine:

- A defendant's fitness to proceed.¹³
- Risk for violence¹⁴ and the degree to which an individual

possesses psychopathic personality traits.¹⁵

- A defendant's understanding of the Miranda warning.¹⁶
- Response bias (i.e., symptom exaggeration or malingering).¹⁷

In addition, some of the standardized assessment instruments traditionally used in the treatment context, such as the Minnesota Multiphasic Personality Inventory-2 and the Rorschach Ink Blot Test, now have forensically relevant norms and a growing body of scientific literature¹⁸ on their application in the forensic context.

There also has been significant research into, and scholarly commentary upon, other psycholegal issues, including jury selection, trial strategy, reliability of eyewitness testimony, recovered memories and false confessions. Forensic mental-health professionals also have at their fingertips a substantial literature focused on the principles and procedures of forensic practice. Finally, as the field has developed into a full-fledged specialty-practice area, annual national and international scientific conferences on forensic mental-health issues have become a fixture of the landscape.

It nonetheless remains true that "psychiatry [as well as the other mental-health disciplines] is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness."¹⁹ However, much progress has been made since Justice Thurgood Marshall penned those words. At this point in history, attorneys and judges can expect forensic mental-health professionals to use techniques and instruments, and to offer opinions, that have a solid basis in scientific theory and research, and when this is not possible, to provide frank testimony about the limitations of their methods and findings.

The nature and procedures of the forensic mental-health examination process

Forensic mental-health examinations are similar to mental-health evaluations conducted for treatment purposes, but differ from treatment-oriented examinations in several important ways.

A preliminary consideration in any mental-health evaluation or examination is that of informed consent or notification. The ethics codes of all of the mental-health professions require that they obtain informed consent from the individuals they evaluate, examine or treat unless, such consent is not practical or required. When informed consent is not necessary or practical, the mental-health professional still has an ethical duty to provide the examinee or evaluatee with notification of the nature, purposes and uses of the examination or evaluation.

The informed-consent or notification information that the forensic mental-health professional will provide to the forensic examinee will differ in significant ways from that provided in a treatment-oriented context. This is because the nature of confidentiality and privilege, the types and sources of information obtained and relied upon, and the potential consequences of participation in the examination all differ markedly between the forensic and treatment contexts. Adequately prepared forensic examiners will be aware of the limitations on confi-

dentiality and privilege inherent in Rule 35 examinations as well as of the limitations in criminal matters on admissibility of examination findings obtained with inadequate informed consent or notification.²⁰

A *treatment-oriented evaluation* that starts a mental-health or substance-abuse treatment relationship will include an interview of the client and perhaps the administration of one or more relatively simple assessment tools (e.g., questionnaires or structured interviews). A traditional psychiatric evaluation is typically limited to an interview of the client, although in some cases a psychiatrist may also administer simple assessment tools and/or speak with a family member. A treatment-oriented psychological evaluation typically will include an interview and relatively more in the way of sophisticated psychological testing. In all of these types of treatment-oriented evaluations, family members may be interviewed for the purpose of diagnostic clarification, and previous records of mental-health treatment may be requested and reviewed. In the case of outpatient mental-health services, the inclusion of interviews of family members and review of previous records is relatively uncommon. Inclusion of these sources of data is more common in the inpatient context, at least in facilities in which a client or patient may remain for more than a few days.

A *forensic mental-health examination* will typically include an interview of the individual involved, in most cases will include the use of assessment instruments (e.g., psychological testing, diagnostic interviews, forensically-relevant tests), and in most cases also will include review of records and interviews with collateral individuals not necessarily limited to family members. An essential aspect of the forensic examination is the careful assessment of response style (e.g., irrelevance, inconsistency, defensiveness, minimization, exaggeration or malingering), often utilizing assessment instruments designed specifically for that purpose.

The nature of the interview is somewhat different in the forensic examination as well. This is because the forensic interview needs to address those aspects of the individual's history and current functioning that are relevant to the legal issue being investigated. For example, in criminal matters there will be an increased focus on history relevant to offense behavior, malingering and so on, and in personal-injury examinations there will be a careful analysis of symptom history and functioning before and after the alleged injury.

The use of psychological testing and other assessment tools is also quite different in the forensic context. When traditional "clinical" tests are used in the forensic context, interpretation of the test results must take into account the fact that the test is being used in a context other than the context for which it was designed. In addition, traditional tests used in the forensic context ideally should include scales or procedures for assessing response style. Where appropriate, a mental-health profession-

al with specialized forensic preparation will use tests and tools which have been designed specifically for the forensic context.²¹ Mental-health professionals who do not have specialized forensic preparation generally will not be aware that such specialized tools and tests even exist since such tools and tests have little or no application in the treatment-oriented context. In addition, non-forensically prepared clinicians will not be likely to be aware of strategies for the forensic application of traditional psychological tests (i.e., use of forensic norms and consideration of relevant base rates).

It is axiomatic that a comprehensive forensic examination will incorporate a significant amount of third-party information from relevant medical, mental health, school and legal records, as well as interviews of collateral individuals. Because of the incentive for examinees in forensic contexts to provide inaccurate information about themselves, it is extremely important that the forensic mental-health professional obtain data about the examinee from multiple sources. In addition, the type of information sought from records and from collateral sources will differ somewhat from the type of

information sought from these sources in a treatment-oriented evaluation. In the treatment-oriented evaluation, the information sought from third party sources is generally limited to information that will confirm or disconfirm diagnostic or prognostic impressions, whereas in the forensic context, third-party information can help confirm or disconfirm hypotheses regarding the legal issue being investigated.

Finally, the nature of the written report differs markedly between the treatment-oriented and forensic contexts. The reports of treatment-oriented evaluations will focus on the issues of diagnosis, prognosis and treatment planning while the reports of forensic examinations will focus on providing relevant information about the examinee's functioning as it relates to the psycholegal issue in question.

Summary

The typical mental-health professional without specialized forensic preparation is ill-prepared to function effectively in the forensic context. While overlapping in nature and procedures to some degree with treatment-oriented mental-health evaluation, the forensic mental-health examination requires an enhanced and different set of skills, a different set of procedures, and a different body of professional knowledge.

When in need of mental-health expertise to inform legal questions or determinations, attorneys and judges will do well to ensure that the mental-health professionals they consider retaining have adequate preparation for the tasks they will be asked to perform.

Even a neophyte forensic mental-health professional should be able to describe familiarity with prominent texts on the topic of forensic mental-health practice.²² They should be able to describe a history of attending forensically-relevant educa-

While overlapping to some degree with treatment-oriented mental-health evaluation, the forensic mental-health examination requires an enhanced and different set of skills, a different set of procedures, and a different body of professional knowledge.

tional experiences, either as a part of a formal training program or in the form of continuing-education programs, and they should be able to describe having consultative relationships with one or more experienced forensic mental-health professionals.

Prospective forensic consultants, examiners or expert witnesses should be able to discuss the legal issues at hand and their potential roles in the cases without difficulty, and should be able to ask intelligent questions about aspects of a case that they might not understand or about which they might require clarification. They should demonstrate familiarity with relevant statutes, case law and procedural rules or show the willingness and foresight to ask the attorney or judge to provide such information.

For example:

■ A mental-health professional who is likely to give opinions in criminal matters should be able to discuss how the approach to negation of *mens rea* in Montana differs from the more traditional affirmative defense of insanity used in other states. He should be able to discuss how Montana's legal definitions of mental disease and defect,²³ and legal definitions of mental illness in general, differ from clinical definitions of mental illness.²⁴

■ In the civil context, attorneys and judges might want to inquire into the prospective expert's awareness of Montana's interpretation and implementation of the Daubert²⁵ test as well as into his familiarity with the procedural requirements of a Rule 35 examination.

■ In both criminal and civil contexts, the prospective expert should be familiar with the issue of whether or not ultimate issue testimony is not allowed.

Mental-health professionals who have forensic training or preparation should be able to provide satisfying responses to such questions.

During the past two decades, forensic mental-health practice has emerged as an independent and highly specialized professional discipline complete with a burgeoning theoretical and scientific literature, specialized assessment tools, board certification and clearly articulated guidelines. These developments make it possible for informed attorneys and courts to retain forensic mental-health professionals who are able to provide competent, coherent, relevant and useful consultation, examination and testimony services. Attorneys, courts, involved parties and the legal system as a whole will benefit from the careful selection and utilization of adequately prepared forensic mental-health professionals.

PATRICK J. DAVIS, Ph.D., is a forensic psychologist in private practice in Great Falls. He has been licensed to practice psychology in Montana since 1991. He is a member of Division 41 (The American Psychology-Law Society) of the American Psychological Association, and is an active member of the Montana Psychological Association. Dr. Davis has been providing forensic psychological consultation, examination and testimony services to the Montana legal community for many years. Additional information about Dr. Davis can be found at his web site: www.patrickdavisphd.com. Contact him at drdavis@patrickdavisphd.com.

ACKNOWLEDGEMENTS

I gratefully acknowledge the assistance of the following individuals for their help in the preparation of this article by reading preliminary drafts and providing helpful suggestions: Barton Evans, Ph.D., Vince van der Hagen, Cory Hessel, Ph.D., and Great Falls attorney Lee E. LeVeque.

NOTES

1. Recent developments illustrating the maturation of the field of forensic mental health practice include the publication of specialty guidelines for forensic psychologists in the journal *Law and Human Behavior* in 1991, Forensic Psychiatry being officially recognized as a subspecialty by the American Board of Medical Specialties in 1992, and Forensic Psychology being officially recognized by the American Psychological Association as a specialty area in 2001.
2. Greenberg, S. A. & Schuman, D. W. (1997). Irreconcilable differences between clinical and forensic roles. *Professional Psychology: Research and Practice*, 28(1), 50-57.
3. Society for Personality Assessment (2006). Standards for Education and Training in Psychological Assessment. Position of the Society for Personality Assessment – An official statement of the Board of Trustees of the Society for Personality Assessment. *Journal of Personality Assessment*, 87, 355-357. Also available online at www.personality.org.
4. § 46-14-202 M.C.A. (2007)
5. § 53-21-102 (16)(a) M.C.A. (2007)
6. § 53-21-102 (16)(c) M.C.A. (2007)
7. § 53-21-102 (16)(b) M.C.A. (2007)
8. § 53-21-106 M.C.A. (2007)
9. § 41-3-609 (4)(b) M.C.A. (2007)
10. § 72-5-315 M.C.A. (2007)
11. Rule 35(a) Mont. Rules Civ. Proc. (2007)
12. For a discussion of the issue of vanity

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UM Law negotiators are the tops

The University of Montana School of Law made history this month when all three of the school's negotiation teams advanced to the final round of regional competition.

Region 10 competition was hosted by the University of Saskatchewan College of Law in Saskatoon, Canada, on Nov. 3-4. Twenty teams, representing law schools across the northwestern U.S. and Canada, competed this year. In the history of UM's participation in the ABA Negotiation Competition, no other law school has advanced all three entrants into the final round.

Advancing to national competition were the second-place finishers and UM team partners Thad Seegmiller, of Washington City, Utah, and Nicole Baratta, of Las Vegas, Nev. Seegmiller and Baratta faced the only non-UM Team in the final round, Lewis & Clark Law School of Portland, Ore. The National Negotiation Competition will be held in Los Angeles in February.

Rounding out the championship round were UM team partners Charlie Cromwell of Missoula and Lindsay Hecht of Sioux City, Iowa. They faced fellow teammates Katie Mazurek of Charlevoix, Mich. and Ben Heiner of Missoula.

With three UM teams in the final round, Heiner and Mazurek were required to switch sides for the final round to compete against fellow teammates, Hecht and Cromwell, essentially eliminating each other from advancing. "This has never happened before either," said Klaus Sitte, coach of the UM Team and adjunct faculty member at the Law School. Sitte added, "When all three teams were announced as final round entrants, we were all simply speechless – no small feat for a negotiation team."

This is the third straight year that the UM Law School Negotiation Team has advanced to the final round of regional competition and the second straight year that UM will send one team to national competition. Sitte said that the entire team will spend many hours in January preparing for national competition.

boards see: The American Board of Forensic Psychology, Inc. Overview and introduction to ABFP. www.abfp.com/pdfs/certification/IntrotoABFP.pdf.

13. For example, the MacArthur Competence Assessment Tool – Criminal Adjudication (MacCat – CA) and the Evaluation of Competency to Stand Trial – Revised (ECST-R) both have documented psychometric properties. The Interdisciplinary Fitness Interview – Revised (IFI-R) and the Fitness Interview Test – Revised (FIT-R) both provide legally relevant structured interviews formats.

14. The HCL-20 and the Violence Risk Assessment Guide (VRAG). The Sex Offender Risk Assessment Guide (SORAG) is available for use in predicting risk of reoffense in sex offenders.

15. The Psychopathy Checklist – Revised (PCL-R)

16. The Instruments for Assessing Understanding and Appreciation of Miranda Rights

17. The Miller Forensic Assessment of Symptoms Test (M-FAST), the Structured Inventory of Malingered Symptomatology (SIMS), the Structured Interview of Reported Symptoms (SIRS), the Test of Memory Malingering (TOMM), and the Validity Indicator Profile (VIP).

18. See Pope, K.S., Butcher, J., & Seelen, J. (2006). The MMPI, MMPI-2, & MMPI-A in Court: A Practical Guide for Expert Witnesses and Attorneys. Washington, D.C., American Psychological Association; Gacono, C. B., & Evans, F. B. (Eds.) (2007). Handbook of Rorschach Assessment. New York: LEA

19. *Ake v. Oklahoma*, 470 U.S. 68 (1985)
20. *Estelle v. Smith*, 451 U.S. 454 (1981)
21. See Notes 13-17 Supra
22. A few of the more prominent and well-known texts include:

Grisso, T. (2003). Evaluating competencies: Forensic assessments and instruments (2nd Ed.). New York: Kluwer Academic/Plenum Publishers.

Heilbrun, K. (2001). Principles of forensic mental health assessment. New York: Kluwer Academic/Plenum Publishers.

Melton, G. B., Pettila, J., Poythress, N. G., & Solobogin, C. (2007). Psychological evaluations for the courts: A handbook for mental health professionals and lawyers (3rd Ed.). New York: Guilford.

Rogers, R. (2007). Clinical assessment of malingering and deception. (2nd Ed.). New York: Guilford Press.

23. § 46-14-101(2)(A) M.C.A. (2007); § 53-21-102(9)(a) M.C.A. (2007)

24. American Psychiatric Association. (2000). Diagnostic and Statistical Manual of Mental Disorders: Fourth Edition – Text Revision. Washington, DC: American Psychiatric Association. Pp xxx-xxxi

25. For an interesting and relatively recent discussion and criticism of Montana's application of Daubert see Justice Nelson's concurring opinion in *State v. Clifford*, 2005 MT 219 (No. 03-509)

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MEDICAL PLAN, from P. 12

given to each individual eligible for coverage.) Coverage should be offered to all eligible employees working 20 hours or more per week and their dependents. Those employees who have met the group probationary period and who work 20 hours per week are eligible to enroll for coverage. Medical enrollments must be received by Dec. 31, 2007, to ensure a Jan. 1, 2008 effective date. The funding level is at each firm's discretion.

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