

University of Montana

## ScholarWorks at University of Montana

---

Faculty Journal Articles & Other Writings

Faculty Publications

---

4-2017

### Clear, Convincing and Beyond a Reasonable Doubt: Montana Lawyers Are Amazing!

Cynthia Ford

Follow this and additional works at: [https://scholarworks.umt.edu/faculty\\_barjournals](https://scholarworks.umt.edu/faculty_barjournals)



Part of the [Legal Education Commons](#), and the [Legal Profession Commons](#)

Let us know how access to this document benefits you.

---

#### Recommended Citation

Ford, Cynthia, "Clear, Convincing and Beyond a Reasonable Doubt: Montana Lawyers Are Amazing!" (2017). *Faculty Journal Articles & Other Writings*. 128.  
[https://scholarworks.umt.edu/faculty\\_barjournals/128](https://scholarworks.umt.edu/faculty_barjournals/128)

This Article is brought to you for free and open access by the Faculty Publications at ScholarWorks at University of Montana. It has been accepted for inclusion in Faculty Journal Articles & Other Writings by an authorized administrator of ScholarWorks at University of Montana. For more information, please contact [scholarworks@mso.umt.edu](mailto:scholarworks@mso.umt.edu).

# Clear, convincing and beyond a reasonable doubt: Montana lawyers are amazing!

Volunteer participation from all corners of the bench and bar ensure success of Regional Trial Competition in Missoula

By Professor Cynthia Ford

The secret is out: Montana's bar is the reason our law students are so successful in national competitions. In February, 22 teams from 11 law schools<sup>1</sup> came to Missoula for the Regional Trial Competition. After a total of 39 trials, the verdict from the participating students and their coaches was unanimous: the quality of the competition in general and judging specifically was astounding. The coaches, in particular, were amazed that so many great lawyers and judges would volunteer so much of their time, in many cases driving long distances and spending the entire weekend hearing (over and over) the criminal case of U.S. v. Stevie Tyler. That's Montana, and that is why this is the best place, last or not, to study and practice law.

## Participation by Montana lawyers and judges

For each trial, the ideal is to have one presiding judge and three scoring judges. If the presiding judge does not have to score, s/he can concentrate on rulings, and the scoring judges can concentrate on assessing presentation skills rather than the merits of the case. In my two decades of coaching the trial team, I have participated in trial competitions across the country, observing first-hand the problems the organizers have in getting volunteers to serve as judges. It is exceedingly rare to find the full panel of four volunteers per trial, especially in the preliminary rounds. My guess is that the national average is two scorers, one of whom has to preside as well, and necessitating some fancy arithmetic to construct a mythical third ballot. I don't think the lawyers in all those other places are busier than we; I do think they are less committed to the advancement of the bar.

Of the 39 Missoula competition trials, 38 had the full complement of four "judges." The single exception occurred on the first day, Thursday, when one of the volunteers called to report that he was on his way to emergency surgery, but would try to get better in time to judge later in the weekend. That's the Big Sky spirit! In total, more than 80 Montana lawyers and judges served in the

mock trials. Obviously, to fill the 156 total spots, some served multiple times. Five stalwart supporters sat on all five rounds of the weekend: Max Davis (Great Falls), Randi Hood (Helena), Mike Lamb (Helena), Mike Meloy (Helena), and Justice James Shea (Helena by way of Butte).

In addition to sheer numbers, the quality of the attorneys and actual judges who shared their time and experience to help these nascent trial lawyers improve their skills was unbeatable. Again in contrast to many competitions where I have heard "judges" critiquing students with the preface "I have never tried a case, but I think you should have done this differently..." the competitors in Missoula got constructive criticism from folks with significant time in the trenches, who know what works and what does not. The roster reads like a "who's who" of the Montana trial bar, with many members both of the American College of Trial Lawyers and ABOTA appearing. Significantly in this criminal case, the [then] U.S. Attorney, Mike Cotter, and the Federal Public Defender, Tony Gallagher, as well as several from each of their offices, served. The judiciary also was exceedingly generous, with judges from the federal bench (Chief Judge Dana Christensen), the Montana Supreme Court (Justice Shea, Justice Beth Baker, former Justices Patricia Cotter and Terry Trieweiler), Montana District Courts (Judges Robert Deschamps, Leslie Halligan, John Kutzman<sup>2</sup>, and Brad Newman, with Master Amy Rubin as well) and Justice Court (Justice of the Peace Marie Andersen).

The Montana trial team, year in and year out, regularly benefits from the help of judges and lawyers across Montana. One out-of-state student who appeared in a round before Judge Christensen said: "I am so glad I didn't know who he was during the trial: I would have been too intimidated." Montana trial team members are not fazed, because they annually perform practice trials in both state and federal courtrooms before real judges. They also practice against real trial lawyers throughout the season, learning both skills and substance to prepare them for their trials at the regional competition. After the students graduate, they pay it forward, returning to do those practice trials and to give the current team the benefit of their competition experience as well as their real-world experience. Thus, this trial competition was just an expansion, albeit an intense one, of the tradition of Montana trial lawyers reaching down to help those on the lower rungs of trial practice climb the ladder, to the good of the profession and the public.

## Great volunteer witnesses too

Montana used to compete in the ATLA competition, where each team brings its own mock witnesses, but switched to the

<sup>1</sup> Arizona, Arizona State, BYU, Colorado, Denver, Montana, New Mexico, Oklahoma, Oklahoma City, Tulsa, and Utah.

<sup>2</sup> Judge Kutzman was the Trial Team Manager in his last year, and my first year, at the law school.

National Trial competition, jointly sponsored by the American College and the Texas Young Lawyers Association (TYLA), several years ago. This competition relies instead on locally recruited witnesses who do not meet the student advocates until 10 minutes before the trial begins. In the *U.S. v. Tyler* case, the four witnesses in each trial were a DEA agent, a confidential informant named (not-so-confidentially) “Crazy 8,” the defendant’s friend, and an expert psychologist who testified about the mental (dis)ability of the defendant. Law students (perhaps by compulsion in substantive trial-related courses) filled most of these roles. Rumor has it that a couple of real detectives were strongly encouraged to volunteer by Judge Karen Townsend, as a condition of obtaining search warrants. Dean Paul Kirgis contributed his support by hosting a reception at the law school for the volunteer judges, but he contributed his actual time also in the witness box as a very convincing expert. And you haven’t lived until you have seen Randy Cox in a mullet wig playing drug dealer Crazy 8....

### **The organizing committee**

The last time Montana hosted a regional trial competition was in 1989. A committee of Missoulians who had extensive experience coaching the Montana team, but not in putting an actual competition together, volunteered to do the work, and spent more than a year on the task. The organizers included Judge and former coach Karen Townsend, former team member and former coach Katie DeSoto, former team members and current coaches Tim Dailey and Briana Schwandt, and myself. I have left Randy Cox, another former coach, for last, because he contributed several times his body weight: countless bottles of great wine (no boxes there!) at our frequent meetings; the extraordinary mathematical skills of his better half, Theresa, who did all the calculations of points once the judges turned in their scoresheets; and his very detailed paralegal Karen Stephan who did all the work Randy so cavalierly assumed.

### **MT’s team was great, but we wish we had better news**

This year, unfortunately, neither the 3L nor the 2L team advanced into the elimination rounds. While this proves the efficacy of the many measures we took to eliminate hometown advantage, it was disappointing. Tim Dailey, who coached this year’s team with Briana Schwandt, summarized the results:

Our 3L Team, Brian Geer, Abby Rogers, and Vince Luparell, was very strong. After winning their first round 3-0 by the judges, they had a tough draw and were eliminated in heartbreaking fashion. In the second round, they split the first two judges but lost the swing judge by one point against New Mexico. In their third round, they lost the exact same way to BYU, again by one point. Had that one point gone the other way in either round, they would have advanced to the semifinals, where I am confident they would have made a run at winning it all.

Our 2L Team, Jenna Lyons and Jake Schwaller, got valuable experience that will help them next year. While they did not prevail, they lost in split decisions, which means at least one judge thought they were the better team. Next year, they will compete in Albuquerque, and we expect they will use

this experience to have a great competition as 3Ls.

There are two “winners” in each region, who qualify for the National Trial Competition, held in Texas. Arizona and BYU who emerged victorious from the final trials in Missoula.

Montana Law School, under both its former and current names, has a tradition of success in its many<sup>3</sup> competition teams. We have always packed a huge punch for a little place in what some view as “the sticks.” Our secret recipe is now public. It’s still not clear whether Stevie Tyler was a drug kingpin, offloading a kilo of heroin in that red cooler, or just a schmuck who did whatever his friend Crazy 8 told him. It is indisputable that the selflessness and quality of Montana’s lawyers made the competition in Missoula such a roaring success, and makes all of the law school’s competitors better both in their competitions and as lawyers.

### **Feedback**

The most gratifying result of the competition was the flow of emails from both competition teams and volunteers afterwards. The Denver University coach, a frequent winner wrote to Cox:

Simply, thank you. This was a great tournament. Having hosted an annual national high school tournament myself here in Denver these past 10 years, I know a well-run tourney when I see one. This one was more than that. With all hyperbole aside, the judging was consistently the best I think I have ever seen in a tournament. Kudos to the good folks of Montana.

While it was disappointing that our squad lost again in the Finals, I can find no ground for complaint (other than I did not get to see you in the famed wig! Lol).

Many of the volunteers took even more time from their schedules to write to the committee afterwards. Justice Baker emailed:

Thank you for the very nice letter and for the information about the winning teams. I was sorry to miss the announcement of the winners.

It was a privilege to participate with such an auspicious group of lawyers and judges, and I really enjoyed it.

Judge Kutzman wrote:

I was on the team the last time Missoula hosted this event. It was really gratifying to see the event back there, to see how much effort your county commissioners have poured into that courthouse, and to overhear the competitors and coaches in the hall talking about how well organized the event was.

A lawyer who drove halfway across the state thanked us for

**EVIDENCE**, page 36

<sup>3</sup> In addition to the Trial Advocacy competition, in the past twelve months, Montana entered teams in at least six competitions: Moot Court (regional winner); Environmental Moot Court; Native American Law Student Association Moot Court; National Cultural Heritage Law Moot Court Competition; ABA Negotiation Competition (2<sup>nd</sup> in the nation); and Jessup International Moot Court.

designated charitable organization may be in existence at one time and not in existence at another time, the phrase “on the date that a determination is being made” is critical to the understanding of Mont. Code Ann. § 72-38-110(4)(c). See Examples Three and Four below. The same charitable trust has an expressly-designated charitable organization in existence in Example Three, but not in Example Four.

The existence of a designated charitable organization to receive distributions can be flushed out with the following examples:

**Example One.** The governing instrument provides: “To A for life, remainder to Two Dot University (TDU), an IRC 501(c)(3) organization, of Two Dot, Montana.” Because TDU is expressly designated and would be a distributee of trust income and principal if the trust terminated, it is a qualified beneficiary under Mont. Code Ann. § 72-38-103(16). The Attorney General would not be treated as a qualified beneficiary under Mont. Code Ann. § 72-38-110(4)(c).

**Example Two.** The governing instrument provides: “To A for life, remainder to one or more non-profit colleges selected by the trustee.” A would be a qualified beneficiary under Mont. Code Ann. § 72-38-103(16). Because no expressly designated charitable organization is entitled to any of the remainder (the charitable portion of the trust), the Attorney General would have all the rights of a qualified beneficiary under Mont. Code Ann. § 72-38-110(4)(c).

**Example Three.** The governing instrument provides: “To A for life, remainder to Two Dot University (TDU), an IRC 501(c)(3) organization, of Two Dot, Montana. However, if TDU is not in existence at the time of A’s death, to one or more non-profit colleges selected by the trustee.” TDU would be treated as a qualified beneficiary under Mont. Code Ann. § 72-38-103(16). Although it is possible TDU might not be in existence at the time of A’s death, TDU is an expressly designated remainder beneficiary that would be a distributee of trust income or principal if the trust terminated on that date and therefore could enforce the trust and protect the charitable interest. The existence of a means to select a contingent charitable remainder beneficiary would not alter this result. Thus, the Attorney General would not have all of the rights of a qualified beneficiary under Mont. Code Ann. § 72-38-110(4)(c).

**Example Four.** The governing instrument includes the same language as Example Three. Ten years after the creation of the trust and during A’s lifetime, TDU is dissolved. Because no expressly designated charitable organization is entitled to any of the remainder (the charitable portion of

the trust), the Attorney General would have all of the rights of a qualified beneficiary under Mont. Code Ann. § 72-38-110(4)(c) as of the date TDU is dissolved and thereafter during A’s lifetime.

As illustrated by the preceding examples, the MT UTC gives the Attorney General “qualified beneficiary” status in fewer instances than the UTC, which may have a practical effect upon the Attorney General’s enforcement of charitable trusts. How can a Montana Attorney General enforce a charitable trust if the Attorney General does not know of its existence? How can a Montana Attorney General object to a proposed significant event such as the trustee’s resignation, the combination or division of a trust, the termination of an uneconomic trust, the transfer of a trust’s principal place of administration, or a change of trustee compensation, if the Attorney General is unaware of the charitable trust’s existence or unaware of the proposed significant event? Who will protect the public’s interest in the charitable assets if the Attorney General is not a qualified beneficiary?<sup>28</sup>

## E. Additional Rights and Powers if the Attorney General is a Qualified Beneficiary

If the Attorney General is classified as a “qualified beneficiary,” the Attorney General has additional rights and powers:

**Right to be reasonably informed.** If the Attorney General is a qualified beneficiary, the trustee must keep the Attorney General reasonably informed so that the Attorney General can protect the charitable interest.<sup>29</sup>

**Right to trustee’s name and contact information.** If the Attorney General is a qualified beneficiary, the trustee must provide the Attorney General with the trustee’s name, address, and telephone number within 60 days of accepting the trusteeship.<sup>30</sup>

**Right to request information and tax returns.** If the Attorney General is a qualified beneficiary, the trustee must provide the Attorney General with income, estate, or transfer tax returns relevant to the administration of the trust if requested by the Attorney General.<sup>31</sup>

**Power to fill a trustee vacancy.** If there is a vacancy in the trusteeship and no person designated in the trust instrument acts as successor trustee, the qualified beneficiaries may unanimously appoint a successor trustee.<sup>32</sup>

**See the May Montana Lawyer for part two of this article.**

***Former University of Montana School of Law Dean Ed Eck is professor emeritus at the law school.***

<sup>28</sup> Perhaps the Attorney General could become aware of some of these events from sources other than the trustee, such as a complaint filed with the Attorney General. But it is likely that many of the events will escape the Montana Attorney General’s notice.

<sup>29</sup> Mont. Code Ann. § 72-38-813(1).

<sup>30</sup> Mont. Code Ann. § 72-38-813(2)(b).

<sup>31</sup> Mont. Code Ann. § 72-38-813(3).

<sup>32</sup> Mont. Code Ann. § 72-38-704(3)(b).