Post-Courtal Separation Anxieties:
What can go wrong after the verdict is in

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Pity the lawyers who insist on calling themselves "trial lawyers" and on disparaging those who are merely "litigators," for they have not realized that no case has ever been won or lost at trial. Ever! A jury's verdict or a judge's findings and conclusions may have provided the basis for a settlement in cases, but just as often set the stage for further battles. In either event, though, the trial was not the end. It is never the end of the case.

Because trials produce the first decision on the merits in many cases, and because they are challenging, interesting, and fun, lawyers are apt to focus on the trial more than what might follow it. That can be a mistake. A wealth of traps await the lawyer who has not anticipated what may happen after the case goes to the jury.

The first time to think about post-trial issues is soon after you first meet with the client. As you draft the initial pleadings and first discovery requests, you should be anticipating the possible outcomes at trial, the issues that may have to be raised in post-trial motions or on appeal, and what you need to do as the case proceeds to maximize the opportunities that may be presented for your client.

If you do not have experience handling post-trial issues, or if the case is particularly complex or significant for your client, consider involving "appellate counsel" immediately not only to anticipate what could happen after trial and help protect the record, but also as a coach or mentor who can enhance your performance through the case.

Assuming you cannot justify hiring someone else to think about the post-trial issues, then here are a few of the risks you should keep in mind.

I. While The Jury Is Out

A. Responding to questions from the jury.

1. Be practical. The judge and jurors will appreciate it.

2. But be aware. Things do go wrong. For example, in *Henrichs v. Todd* (1990), 245 Mont. 286, 288, 800 P.2d 710, 712, the jury notified the bailiff that it wanted to ask a question about the effect of comparative negligence. The bailiff said he could not answer it and that all of the attorneys and court personnel would have to be called back into court to properly respond. When the foreperson asked how long all this would take, the bailiff responded that it would take about as long as it takes "for hell to freeze over." Other jurors overheard the remark and decided to resolve the issue on their own, ruling for the defendant. The plaintiff learned of the incident and moved for a new trial, which was granted and affirmed on appeal.

3. So preserve your objections. The failure to object waives any issue for purposes of post-trial motions and appeals. See *Sandman v. Farmers Ins. Exchange*, 1998 MT 286, ¶ 19, 291 Mont. 456, 462-463, 969 P.2d 277, 281, citing *Wisher v. Higgs* (1993), 257 Mont. 132, 143, 849 P.2d 152, 158, overruled on other grounds by *Blackburn v. Blue Mountain Women's Clinic* (1997), 286 Mont. 60, 951 P.2d 1, *Greytak v. RegO Co.* (1993), 257 Mont. 147, 152, 848 P.2d 483, 486, *State v. White Clay*, 1998 MT 244, ¶ 24, 291 Mont. 147, ¶ 24, 967 P.2d 370, ¶ 24, 55 St. Rep. 1014, ¶ 24; and *Seder v. Peter Kiewit Sons' Co.* (1971), 156 Mont. 322, 327-28, 332-33, 479 P.2d 448, 450-51, 453.

4. And don't get cute. In *Simonson v. White*, when the jury inquired why the verdict form failed to ask if one defendant's acts were

willful or wanton, the court amended the special verdict form and submitted it to the jury over that defendant's objection. The jury found willful and wanton conduct, which barred that defendant from recovering against another defendant. The losing defendant appealed, arguing that he had no opportunity to present arguments concerning the verdict form. The Supreme Court reversed.

B. Dealing with juror misconduct during trial.

1. Cases addressing juror misconduct during trial are hard to find, and not particularly susceptible to generalization. For example, in *State v. DuBray*, 2003 MT 255, 317 M 377, 77 P3d 247, two jurors came forward on the second day of deliberations with concerns that another juror with strong opinions in the case claimed to be a psychic. With counsel present, the trial court questioned the jury foreman and determined that no problem existed, and deliberations continued.

2. A new trial may be granted based on juror misconduct as defined by Section 25-11-102(2), MCA:

> Whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

II. The Jury Returns.

A. 25-7-501. Return of verdict -- polling the jury:

(1) When the jurors or two-thirds of them have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be in writing and signed by the foreman and must be read by the clerk to the jury, and the inquiry made whether it is their verdict.
(2) Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict. If upon such inquiry or

polling more than one-third of the jurors disagree thereto, the jury must be sent out again, but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case.

B. What can go wrong?

1. "Is that your verdict?" is an ambiguous question. *Pumphrey v. Empire Lath and Plaster*, 2006 MT 99, 332 Mont. 116, 135 P.3d 797 ($3.9 million verdict).

2. Once the jury is excused, you can't bring them back. Id.

3. And if you do, they may give inconsistent information. Id. (first poll of jury was unanimous; when 10 of 12 were re-polled that night after ambiguity in question was understood, 6 agreed with the verdict and 4 disagreed; the next day, the 2 missing jurors were polled after they had conversed with defense counsel in the elevator and divided their votes, creating a 7-5 split; so the court then reassembled the jury over the objection of both parties and re-polled them, resulting in a 9-3 split supporting the verdict).

4. But your other choices may not be great. *Crail Creek Associates, LLC, v. Olson,* 2008 MT 209, 344 Mont. 321, 187 P.3d 667 (on initial special verdict, jury awarded plaintiff $29,671.86 for breach of contract, and found plaintiff entitled to a construction lien for $47,738.17; after jury was polled, court granted plaintiff's request for a supplemental verdict form asking if the jury intended to award plaintiff the total of both amounts, and the jury said yes; the verdict was appealed and reversed on other grounds).

III. Going Back for More – Punitive Damages.

A. If punitive damages are on the verdict, you should have a trial plan for the punitive damage phase, including witnesses you will call, evidence you will introduce, objections you will make, and arguments you will present.

B. The judge will not give you much time to get your act together. Be ready.

C. In *Winslow v. Montana Rail Link,* 2005 MT 217, 328 Mont. 260, 121 P.3d 506, the trial judge excused a juror after the jury returned a verdict awarding punitive damages but before the punitive damage case was presented. The defendant refused to consent to the judge's action. The district court refused to award punitive damages on other grounds, but the Supreme Court affirmed because of the defendant's right to a jury of twelve.

D. If the jury has awarded punitive damages to your client, you need to have your evidence of the defendant's net worth and other factors defined by the statute, and arguments justifying the maximum award allowed by law.

E. If you have lost the punitive damage argument, accept the fact that the jury has rejected your client's case, and may have concluded that your client is not credible, but:

1. note that the burden of proof on a claim for punitive damages is higher clear and convincing evidence, i.e., evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. Section 27-1-221(5), MCA.
2. consider the possibility that some jurors may feel they already awarded enough in compensatory damages to punish the defendant for any wrongs.

F. Don't count on the judge to fix a disappointing punitive damage award. The district court's role with regard to punitive damages in a case tried to a jury is limited.

> [T]he District Court [is] bound by the jury's determination of facts on all issues which had been presented to the jury. Section 27-1-221(7)(c), MCA, only empowers the court to evaluate the amount of the award of punitive damages in light of the factors enumerated under subsection (7)(b), and to make findings of fact and

conclusions of law as to its reasons for increasing, decreasing, or letting stand the amount of the punitive damages award. *It does not open the door for reversal of jury findings on underlying issues of liability*.

DeBruycker v. Guaranty Nat. Ins. Co. (1994), 266 Mont. 294, 300, 880 P.2d 819, 822, quoted in *Sandman v. Farmers Ins. Exchange,* 1998 MT 286, ¶ 48, 291 Mont. 456, 472, 969 P.2d 277, 286 - 287.

IV. The Court of Public Opinion: Responding to the media.

A. Dealing with the media may seem to be an opportunity to market yourself, but your duty is still to your client (and representing your client well will augur to your benefit).

B. Make sure you know what your client wants you to do before you open your mouth.

C. "No comment" is not helpful, but sometimes the best you can do.

V. Attacking the Jury's Verdict.

A. Juror affidavits are addressed in Rule 606(b), M.R.Evid., different versions of which appear in West's Montana Rules of Court, and on Westlaw. Here is the Westlaw version:

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. However, as an exception to this subdivision, a juror may testify and an affidavit or evidence of any kind be received as to any matter or statement concerning only the following questions, whether occurring during the course of the jury's deliberations or not: (1) whether extraneous prejudicial information was improperly brought to the jury's attention; or (2) whether any outside influence was brought to bear upon any juror; or (3) whether any juror has been induced to assent to any

general or special verdict, or finding on any question submitted to them by the court, by a resort to the determination of chance.

B. The exceptions to Rule 606(b) are exclusive and narrowly construed because of the rationale underlying the rule:

> The rule is founded on public policy, and is for the purpose of preventing litigants or the public from *invading the privacy of the jury room, either during the deliberations of the jury or afterward. It is to prevent overzealous litigants and a curious public from prying into deliberations* which are intended to be, and should be, private, frank, and free discussions of the questions under consideration. *Further, if after being discharged and mingling with the public, jurors are permitted to impeach verdicts which they have rendered, it would open the door for tampering with jurors and would place it in the power of a dissatisfied or corrupt juror to destroy a verdict to which he had deliberately given his assent under sanction of an oath....*
>
> Testimony of the jurors to impeach their own verdict is excluded not because it is irrelevant to the matter in issue, but because *experience has shown that it is more likely to prevent than to promote the discovery of the truth. Hence, the affidavit of a juror cannot be admitted to show anything relating to what passed in the jury room* during the investigation of the cause, or the effect of a colloquy between the court and a juror, or the arguments made to a juror by a fellow juryman.

Sandman v. Farmers Ins. Exchange, supra at ¶ 29, quoting *Boyd v. State Medical Oxygen & Supply, Inc.* (1990), 246 Mont. 247, 252, 805 P.2d 1282, 1285-86.:

C. Whether jurors have been subjected to external influences is a question of law. External influences might include telephone calls, newspaper articles, or scene visits, but do not include confusion arising from answers to questions or unintended effects of the verdict. *Sandman*, at ¶ 32.

VI. Submitting the Proposed Judgment.

A. Rule 58 directs the clerk to enter judgment on a general verdict, but the clerk will not do anything until counsel presents a proposed judgment.

B. And because Rule 58 requires the court to approve the form of judgments

in many situations, the clerk may always defer to the judge.

C. Judgment is to be entered "forthwith" or "promptly," but when the parties disagree over the form of the judgment, difficulties and delays can ensue.

D. "The entry of judgment shall not be delayed for the taxing of costs." Rule 58, M.R.Civ.P.

E. However, a judgment is not final under the rules of appellate procedure until it settles all claims in controversy, "including any necessary determination of the amount of costs and attorney fees awarded or sanction imposed." Rule 4(1)a, M.R.App.P.

VII. Entry of Judgment and Notice of Entry.

A. Rule 77(d) requires the prevailing party to serve notice of entry of judgment or an order within 10 days, and authorizes any other party to do the same.

B. Until notice of entry is served, the deadlines for many post-trial motions and for filing the notice of appeal do not begin to run. See *In re T.H. & C.D.F.*, 2005 MT 237, 328 Mont. 428, 121 P.3d 541

C. The Rule does not specify the orders that must be noticed. By serving a notice of entry of an order on a discovery motion or on an award of sanctions, counsel can create complicated issues concerning appealability.

D. An unsuccessful intervenor is not entitled to service of notice of entry of judgment. *Clark Fork Coalition v. Dept. of Environmental Quality*, 2007 MT 176, 338 Mont. 205, 164 P.3d 902.

VIII. Seeking and Objecting to Costs.

A. 25-10-501. Bill of costs: The party in whose favor judgment is rendered and who claims his costs must deliver to the clerk and serve upon the adverse party, within 5 days after the verdict or notice of the decision of the court or referee or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum must be verified by the oath of the party, his attorney

or agent, or the clerk of his attorney, stating that to the best of his knowledge and belief the items are correct and that the disbursements have been necessarily incurred in the action or proceeding.

B. The five day period is triggered by a jury verdict and, because mailing is not necessary, the three-day mailing rule does not apply when the case was decided by a jury. *Karell v. American Cancer Society, Montana Division, Inc.* (1989), 239 Mont. 168, 799 P.2d 506. When the decision is issued in a written order, the period is triggered by the judge's mailing of the order. Id.

C. An untimely bill of costs will be stricken, and no costs awarded. *Rocky Mountain Enterprises, Inc., v. Pierce Flooring* (1997), 286 Mont. 282, 951 P.2d 1326.

D. A memorandum that is not properly verified is fatally defective. *McDermott v. Carie, LLC*, 2005 MT 293, 329 Mont. 295, 124 P.3d 168 (affidavit prepared for trial counsel's signature, but he was unavailable so his law partner signed it; costs refused).

E. The costs that are allowable are specified by statute (Section 25-10-201, MCA), and have been further defined in case law. Claiming costs in excess of what is allowed is common, but foolhardy.

F. The party opposing the award of costs has five days to object under Section 25-10-502, MCA, by filing and serving "a notice of motion to tax costs."

G. The Court may not deny the opportunity to object by awarding costs prematurely. *Sherner v. Nat'l Loss Control Serv. Corp*., 2005 MT 284, 329 Mont. 247, 124 P.3d 150.

IX. Seeking and Objecting to Attorney's Fees.

A. A motion seeking attorney fees is treated as a motion under Rule 59(g) to alter or amend the judgment and must be filed within 10 days after notice

of entry of judgment and decided within 60 days or it is deemed denied. *Estate of Pruyn ex rel. Meyer v. Axmen Properties, Inc.,*, 2008 MT , 346 Mont. 162, ___ P.3d ___. However, if such a motion is timely made and granted, the court has no set time within which it must determine the amount of attorney fees. Id.

B. The Montana Supreme Court has developed a legal framework for awarding attorney's fees. To determine the reasonable amount of attorney's fees, the district court is required to hold an evidentiary hearing. *Plath v. Schonrock*, 2003 MT 21, ¶ 39, 314 Mont. 101, ¶ 39, 64 P.3d 984, ¶ 39.

C. The party claiming fees may - but is not required to - present expert testimony to support the reasonableness of the claimed attorney's fees. *Ramsey v. Yellowstone Neurosurgical Associates, P.C.*, 2005 MT 317, ¶ 29, 329 Mont. 489, ¶ 29, 125 P.3d 1091, ¶ 29.

D. The party seeking fees bears the burden of proof, and is required to present evidence in support of the claim. *Rossi v. Pawiroredjo*, 2004 MT 39, 320 Mont. 63, 85 P.3d 776. An award of fees, like any other award, must be based on competent evidence.

1. Query when that burden must be met? Does the party seeking fees have an obligation to present evidence with the motion, or can she wait until the hearing?
2. Query what discovery is permitted, from which parties, and over what period of time? Moving parties regularly seek billing statements from parties opposing the request, but the basis for ordering such a disclosure is unclear.

E. The party opposing a claim for expenses and fees cannot simply object to every expense item claimed, thereby forcing the Plaintiff to incur additional cost in proving the amount of expenses and fees, but must have

a good faith basis for any objections. In extraordinary circumstances, the Court has discretion to require the objecting party to pay the costs incurred in making such proof. *State ex rel. Montana Dept. of Transp. v. Slack*, 2001 MT 137, ¶ 33, 305 Mont. 488, ¶ 33, 29 P.3d 503, ¶ 33; *State By and Through Dept. of Highways of State of Mont. v. McGuckin* (1990), 242 Mont. 81, 87, 788 P.2d 926, 930.

F. Determination of the amount of fees falls within the discretion of the district court. "A court abuses its discretion if it acts arbitrarily without employment of conscientious judgment or exceed[s] the bounds of reason resulting in substantial injustice." *Chase v. Bearpaw Ranch Ass'n*, 2006 MT 67, ¶ 15, 331 Mont. 421, ¶ 15, 133 P.3d 190, ¶ 15 (quoting *McDermott v. Carie*, 2005 MT 293, ¶ 10, 329 Mont. 295, ¶ 10, 124 P.3d 168, ¶ 10).

G. The Montana Supreme Court has outlined a number of factors the district court should consider as guidelines in determining the amount of attorney's fees: (1) the amount and character of services rendered; (2) the labor, time, and trouble involved; (3) the character and importance of the litigation in which the services were rendered; (4) the amount of money or the value of the property to be affected; (5) the professional skill and experience required; (6) the attorneys' character and standing in their profession; and (7) the result secured by the services of the attorneys. These factors are not exclusive, however, and district courts may consider other factors as well. Thus, the reasonableness of attorney's fees must be ascertained under the unique facts of each case. *Chamberlin v. Puckett Const.* (1996), 277 Mont. 198, 205, 921 P.2d 1237, 1241-42. See also, *Renville v. Farmers Insurance Exchange,* 2004 MT 366, 324 Mont. 509, 105 P.3d 280; *Kruer v. Three Creeks Ranch*, 2008 MT 315, 346 Mont. 66, ___ P.3d ___.

H. While the Court may consider such factors, there are other factors it may not consider. For example, the amount awarded in other cases is not relevant since "[t]he reasonableness of attorney's fees must be ascertained under the unique facts of each case." *Chase*, at ¶ 36 (quoting *Chamberlin*, 277 Mont. at 205, 921 P.2d at 1241-42). Similarly, comparison to the other parties' attorney's fees is not necessarily a proper measure of reasonableness. *Chase*, at ¶ 38.

I. The Supreme Court has approved awards of reasonable attorney fees and costs based on contingent fee agreements, specifically in workers compensation, and wage and hour cases. See, e.g., *Stimac v. State* (1991), 248 Mont. 412, 812 P.2d 1246. In *Stimac*, the Court affirmed a district court's award based on a one-third contingent fee. The parties had settled a wage claim after extensive discovery and multiple motions. Noting that the "purpose of awarding attorney fees [as well as all costs and expenses] to an employee who obtains a judgment in a wage claim is to make the employee whole," the Court identified eight factors the district court "must consider" when assessing whether to award "the full amount of a contingent-fee agreement as a reasonable attorney fee:"

1. The novelty and difficulty of the legal and factual issues involved;
2. The time and labor required to perform the legal service properly;
3. The character and importance of the litigation;
4. The result secured by the attorney;
5. The experience, skill, and reputation of the attorney;
6. The fees customarily charged for similar legal services at the time and place where the services were rendered;
7. The ability of the client to pay for the legal services rendered; and
8. The risk of no recovery.

Stimac, 248 Mont. at 417, 812 P.2d at 1249, quoted in *Kuhr v. City of*

Billings, 2007 MT 201, ¶ 41, 338 Mont. 402, 418, 168 P.3d 615, 626.

J. The district court has substantial discretion so long as its decision is well supported by the record and the court's analysis.

1. Six years ago, the Supreme Court found no abuse of discretion in the trial court's award of attorney fees at one-third contingency under the Little Davis-Bacon Act and Section 39-3-214(1), MCA, and because the fee agreement provided a 40% contingency on appeal, remanded the case to the district court to decide if a higher fee award was appropriate. *Cochran v. State*, 2003 MT 318, 318 Mont. 282, 80 P.3d 423.

2. Within the past year and a half, the Supreme Court has found no abuse of discretion and affirmed both a district court's refusal to award fees based on a contingent fee agreement in *Kuhr v. City of Billings*, 2007 MT 201, 338 Mont. 402, 168 P.3d 615, and a district court's award of fees based upon a 40% contingent fee agreement in a breach of employment contract case. *West v. The Club at Spanish Peaks, LLC,* 2008 MT 183, 343 Mont. 434, 186 P.3d 1228.

X. Post-Judgment Motions.

A. Rule 59 - Motion for new trial.

1. Must be served no later than 10 days after the service of notice of entry of judgment.

2. May be granted to all or any of the parties and on all or part of the issues for any reason provided by the statutes of Montana. The reasons provided in Section 25-11-102, MCA, are:

a. irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

b. misconduct of the jury. Whenever any one or more of the jurors have been induced to assent to any general or special verdict or to a finding on any question submitted to them by the court by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

c. accident or surprise which ordinary prudence could not have guarded against;

d. newly discovered evidence material for the party making the application which he could not, with reasonable diligence, have discovered and produced at the trial;

e. excessive damages appearing to have been given under the influence of passion or prejudice;

f. insufficiency of the evidence to justify the verdict or other decision or that it is against law;

g. error in law occurring at the trial and excepted to by the party making the application.

3. Must state with particularity the grounds for the motion. It is insufficient simply to set forth statutory grounds.

4. Affidavits may be served with the Motion, and opposing party has 10 days to file to serve opposing affidavits, which may be extended for an additional period not to exceed 20 days.

5. The Court must hear and rule on these motions within 60 days from the time the motion is filed. If not, the motion is deemed denied.

6. A decision to grant a new trial is committed to the sound discretion of the trial judge and will not be disturbed absent a showing of manifest abuse of that discretion. *Sandman v. Farmers Ins.*

Exchange, 1998 MT 286, ¶ 50, 291 Mont. 456, 473, 969 P.2d 277, 287, citing *Jim's Excavating Service v. HKM Assoc.* (1994), 265 Mont. 494, 512, 878 P.2d 248, 259.

7. See *Fish v. Harris*, 2008 MT , 345 Mont. 527, 192 P.3d 238 (juror's statements during deliberations that a plaintiff claiming injury to her arm had failed to react when a courtroom door slammed on her injured arm, and that plaintiff's lawyers had "bought a Toyota" for a medical expert were not "extraneous" to trial, so trial court did not abuse discretion in denying motion for new trial).

B. Rule 59(g) - Motion to alter or amend judgment.

1. No later than 10 days after the service of notice of entry of judgment.
2. May be combined with motion for new trial.
3. Must be heard within 60 days from the time the motion is filed. If not, the motion is deemed denied.
4. A motion to award attorney fees is treated as a motion to alter or amend.
5. Since a "motion for reconsideration" does not exist under the rules of civil procedure, a motion wrongly characterized as such that seeks to "amend" the judgment will be treated as a motion under Rule 59(g) and be subject to the time limits specified. *Horton v. Horton*, 2007 MT 181, 338 Mont. 236, 165 P.3d 1076.

C. Rule 60(a) - Motion for relief from clerical mistake.

1. "Clerical mistakes and errors are those errors which misrepresent the court's original intention. See generally 12 Moore's Federal Practice § 60.11(3) (3d ed.1997)." *Muri v. Frank*, 2001 MT 29, 304 Mont. 171, 174, 18 P.3d 1022, 1024.

2. The motion may be made "at any time." "So long as there is no currently-pending appeal, this may be taken quite literally." *Muri,* supra, quoting 12 Moore's Federal Practice § 60.12(1)(a).

D. Rule 60(b) - Motion for relief from judgment on the grounds of mistake, newly-discovered evidence, fraud, and other grounds.

1. The five usual reasons are:

   a. mistake, inadvertence, surprise, or excusable neglect;

   b. newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

   c. fraud, misrepresentation, or other misconduct of an adverse party;

   d. the judgment is void;

   e. the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

2. A party seeking to set aside a judgment under the residual "any other reason justifying relief" clause (Rule 60(b)(6)) must first establish that none of the reasons set forth in the other five subsections apply. Id. In fact, by submitting a motion that seeks relief under any of the other subsections, a party waives relief under subsection (6).

3. Under any subsection, the motion must be made to the Court within 60 days after the judgement when the defendant has been personal served, or if notice of entry of judgment is required by Rule 77(d), 60 days after service of notice of entry of judgment.

4. Movant must show extraordinary circumstances, that she acted

within a reasonable time, and that she was blameless. *Essex Insurance Co. v. Moose's Saloon, Inc.,* 2007 MT 202, 338 Mont. 423, 166 P.3d 451.

E. Rule 62 - Motion to stay proceedings to enforce judgment pending disposition of post-trial motions.

1. In Court's discretion

2. On such conditions for the security of the adverse party as are proper

XI. Staying Judgment Pending Post-Trial Motions and Appeal.

A. On motion, district court may stay execution pending disposition of motions for new trial or to alter or amend judgment (Rule 59), for relief from judgment (Rule 60), for judgment under Rule 50, or for amendment of findings (Rule 52(b)). No bond is required.

B. Motions for stay pending appeal are filed in the district court (Rule 22, M.R.App.P.) Sufficient bond required except upon good cause shown.

C. Upon grant or denial, a motion for relief from the district court order may be filed in the Supreme Court within 11 days from date of entry.

XII. Collecting the Judgment, or Not.

A. Collection of judgments is a specialty for another seminar. Here, a few random issues I have encountered recently.

B. Enforcement Measures

1. Discovery no Montana statute or rule specifically authorizes normal discovery procedures, including written discovery requests and subpoenas duces tecum, after entry of judgment, but nothing bars use of those procedures either. Rule 69 says that the procedure on execution and in aid of execution "shall be in accordance with the statutes of the state of Montana." Collection attorneys apparently conduct discovery under Rules 26 through 37

and 45 routinely.

2. Debtor's Examinations: Montana law provides two options:

(1) 25-14-101. Debtor to answer concerning debtor's property when execution unsatisfied: When an execution against property of the judgment debtor or of any one of several debtors in the same judgment, issued to a levying officer or the sheriff of the county where the judgment debtor resides or, if the judgment debtor does not reside in this state, to a levying officer or the sheriff of the county where the judgment is docketed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after the return is made, is entitled to an order from a judge of the court requiring the judgment debtor to appear and answer concerning the judgment debtor's property before the judge or a referee appointed by the judge at a time and place specified in the order. However, a judgment debtor who is a state resident may not be required to attend before a judge or referee outside the county in which the judgment debtor resides.

(2) 25-14-102. Procedure when debtor withholding property from execution. (1) After the issuing of an execution against property and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court that any judgment debtor **has property which he unjustly refuses to apply toward the satisfaction of the judgment**, such judge may, by an order, require the judgment debtor to appear at a specified time and place before such judge or a referee appointed by him to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution.

b. The statutes are intended to apply to different situations.

Belote v. Bakken (1961), 139 Mont. 43, 359 P.2d 372

(section 102 applies where the debtor is known to have property, but when the creditor is unsure whether the debtor has assets, the creditor can invoke the other debtor's examination procedure under section 101).

3. Receivers may be appointed to assist in executing judgments under two statutes:

a. **27-20-102 When and by whom receiver appointed.**

A receiver may be appointed by the court in which an action is pending or by the judge thereof: . . .
(3) after judgment, to carry the judgment into effect;
(4) after judgment, to dispose of the property according to the judgment or to preserve it during the pendency of an appeal; or in proceedings in aid of execution, when an execution has been returned unsatisfied or when the judgment debtor refuses to apply his property in satisfaction of the judgment; . . . .

b. Under Section 25-14-201, MCA, a judge may appoint a receiver over the property of the judgment debtor on 2 days notice or, in some cases, without notice. See *May v. First Nat'l Pawn Brokers, Ltd.* (1995), 240 Mont. 132, 890 P.2d 386.

XIII. Satisfaction of Judgment and Setting Aside Satisfaction of Judgment.

A. The procedure for entering satisfactions of judgment is statutory:

1. 25-9-311. Entry of satisfaction of judgment in docket:

Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property by the judgment creditor or by his endorsement on the face or on the margin of the record of the judgment or by his attorney unless a revocation of his authority is filed. Whenever a judgment is satisfied in fact otherwise than upon an execution, the party or attorney must give such acknowledgment or make such endorsement, and upon

motion, the court may compel it or may order the entry of satisfaction to be made without it.

B. If a party requests entry of a partial satisfaction of judgment, the court must order it. *Gullett v. Van Dyke Const. Co.*, 2005 MT 105, 327 Mont. 30, 111 P.3d 220.

C. An improperly filed satisfaction of judgment apparently may be set aside in the same case in which it was filed.

1. *Wallace v. Hayes*, 2007 MT 194N (non-cite opinion affirming because "settled Montana law clearly controls the legal issues and ... the District Court correctly interpreted the law."

2. In making that ruling, the Court disregarded a "holding" in *McGee v. Burlington Northern, Inc.*, 179 Mont. 1, 585 P.2d 1296 (1978), that Rule 60(b), M.R.Civ.P. could not be invoked to set aside a satisfaction of judgment and said "the appropriate proceeding is an independent action in equity."

XIV. And What If Your Judgment is Set Aside or Reversed?

A. You have to give the money back: "a party who takes property by force of a judgment not yet final is a trustee, subject to making restitution as a court of equity might order if the judgment is overturned. See *Aye v. Fix*, 192 Mont. 141, 147, 626 P.2d 1259, 1263 (1981). " 'The right to recover what one has lost by enforcement of a judgment subsequently reversed is well established.' " *Reil v. State Comp. Mut. Ins. Fund*, 254 Mont. 274, 278, 837 P.2d 1334, 1337 (1992)." *Crail Creek Associates, LLC v. Olson*, 2008 MT 209, 344 Mont. 321, 334, 187 P.3d 667, 675.

XV. Appeals

A. New MRAP: traps for the unwary:

1. Time Requirements (Rules 3 & 10)

a. No additional time for mailing.

b. Fax filing is not sufficient. *Reedal v. Reedal*, 2008 MT 151, 343 Mont. 235, 183 P.3d 122.

c. Weekends and holidays are counted.

d. Documents must be received by the clerk before 5:00 pm.

2. Commencing appeal (Rule 4)

a. Notice filed with Clerk of Supreme Court

(1) With filing fee

(2) Copy must be filed with District Court, but mistaken filing of original with District Court is no excuse. Late appeal was dismissed in *Mountain West Bank, N.A., v. Western Skys Ltd.,* 2008 MT 54, 341 Mont. 448, 177 P.3d 1052.

b. Notice must specify:

(1) Party taking appeal

(2) Judgment or order or part thereof from which appeal is taken

(3) That appeal is taken after Rule 54(b) Certification, and include copy of order

(a) Notice that makes certification incorrectly may corrected within 11 days after notice from Clerk; otherwise, appeal is subject to dismissal. *In the Matter of Appeals Improperly Certified as Final Judgments Entered Pursuant to M.R.Civ.P. 54(b),* 2007 MT 334, 340 Mont. 237, 178 P.3d 694.

(4) Whether appeal is subject to mediation process

(5) That notice was served on other parties

(6) That notice to the Attorney General of constitutional

challenges has been or will be given

(7) That all transcripts have been ordered

3. Confidential information (Rule 10(6) & (7))

a. Only initials may be used to identify parties, children, and parents in abuse and neglect, parentage, adoption, elder abuse, developmental disabilities, mental illness, and alcohol dependence cases.

b. The party that files a document must remove references to confidential personal information, such as complete social security numbers, financial account numbers, birthdates, etc.

4. Writ of Supervisory Control (Rule 14)

a. Standard specified by rule: "urgency or emergency factors exist making the normal appeal process inadequate, the case involves purely legal questions, and one or more of the following circumstances exist: a) the lower court is proceeding under a mistake of law and is causing gross injustice; b) constitutional issues of state-wide importance are involved; c) the other court has granted or denied a motion for substitution of a judge in a criminal case.

5. Petitions for Rehearing (Rule 20)

a. Rule spells out criteria, which are that Supreme Court overlooked some fact material to the decision; that it overlooked some question presented by counsel that would have proven decisive to the case; or that its decision conflicts with a statute or controlling decision not addressed by the supreme court.

B. An Old Trap: Cross-Appeal

1. Matters that are "separate and distinct" from the issues presented by the appeal must be raised in a cross-appeal. *Mydlarz v. Palmer/Duncan Construction Co.*, 209 Mont. 325, 682 P.2d 695 (1984).

2. A untimely cross-appeal deprives the court of jurisdiction to hear the issues raised. *Joseph Eve & Co. v. Allen,* 284 Mont. 511, 945 P.2d 897 (1997).

C. Mootness

1. Failure to appeal denial of injunction under former Rule 1(b)(2) (now Rule 6(3)(3), M.R.App.P.), or to seek a stay of execution under former Rule 7 (now Rule 22, M.R.App.P.), rendered moot an appeal from order granting summary judgment against plaintiff's claim to set aside a zoning change. By the time the appeal reached the Court, the zoning change had been approved, a building had been constructed, and the Court could not restore the parties to their original position. Appeal dismissed. *Povsha v. City of Billings,* 2007 MT 353, 340 Mont. 346, 147 P.3d 515.

2. But an appeal involving a division of marital property was not mooted by sale of some property to a third party because the Court could order payment from the sale proceeds or other adjustments. *In re Marriage of Gorton and Robbins*, 2008 MT 123, 342 Mont. 537, 182 P.3d 746.

XVI. When Does It All End?

A. Wallace v. Hayes IV, and counting!