

APPLICATION FOR

**DISTRICT COURT JUDGESHIP
Eighth Judicial District**

A. PERSONAL INFORMATION

1. Full Name: **Allen P. Lanning**
 - a. What name do you commonly go by? **Allen**
2. Birthdate: [REDACTED] Are you a U.S. citizen? **Yes**
3. Home Address: [REDACTED]
Phone: [REDACTED]
4. Office Address: **300 Central Avenue, Suite 500, P.O. Box 2049, Great Falls, MT 59403**
Phone: **406-727-9270**
5. Length of residence in Montana: **52 years**
6. Place of residence for the last five years:

<u>Dates</u>	<u>City</u>	<u>State</u>
2011 - present	Great Falls	MT

B. EDUCATIONAL BACKGROUND

7. List the names and location of schools attended beginning with high school:

<u>Name</u>	<u>Location</u>	<u>Date of Degree</u>	<u>Degree</u>
Helena High School	Helena, MT	May, 1982	H. S. Diploma
University of Miami	Coral Gables, FL	June 24, 1985	B. A. Politics & Public Affairs Magna cum Laude
University of Montana School of Law	Missoula, MT	June 11, 1988	J. D.

8. List any scholarships, awards, honors and citations that you have received:

At the University of Miami, I received academic scholarships each year: 1982-83 (25% tuition) 1983-1985 (50% tuition); I was designated the Honored Politics and Public Affairs student in 1985, I was inducted into Order of Omega (the interfraternity honor society) and Pi Sigma Alpha (the political science honor society) in 1984; was appointed to the minor disciplinary hearing board from 1983-1985; held the Honor Student designation from 1982-1985, and graduated magna cum laude.

I served on the Montana Law Review from 1986 to 1988.

I received the Big Brothers and Sisters of Helena Big Brother of the Year Award in 1989. I have spoken, by invitation, at Helena High School during their Notable Alumni day.

In 2015, I was awarded the Liberty Bell award by the Cascade County Bar Association for outstanding community service for my pro bono service as a standing master in the Eighth Judicial District in child abuse and neglect cases. In 2016, I was awarded the Judge Robert P. Goff Pro Bono Award by the Cascade County Bar Association for outstanding service to citizens who would otherwise have no access to civil justice.

9. Were you a member of the Law Review? If so, provide the title and citation of any article that was published and the subject area of the article.

Yes. I was a staff member during the 1986-1987 year and on the Board of Editors during the 1987-1988 year. I published the casenote *Settlement and Liability in Montana: State Ex Rel. Deere & Co. v. District Court*, 48 Montana Law Review 401 (No. 2 Summer, 1987), on contribution among joint tortfeasors; and the comment *The Occasional Sale Exemption of the Montana Subdivision and Platting Act*, 49 Montana Law Review 333 (No. 2 Summer, 1988) about occasional sales in Montana's subdivision law.

C. PROFESSIONAL BACKGROUND AND EXPERIENCE

10. List all courts (including state and federal bar admissions) and administrative bodies having special admission requirements in which you are presently admitted to practice, giving the dates of admission in each case.

<u>Court or Administrative Body</u>	<u>Date of Admission</u>
State of Montana	October 5, 1988
United States District Court, District of Montana	October 5, 1988
Ninth Circuit Court of Appeals	May 16, 1991
United States Supreme Court	April 19, 1993

11. Indicate your present employment. (List professional partners or associates, if any).

I am a shareholder with the Law Office of Allen P. Lanning, P.C.

12. State the name, dates and addresses of law firms with which you have been associated in practice, governmental agencies or private business organizations in which you have been employed, periods you have practiced as a sole practitioner, and other prior practice:

<u>Employer's Name</u>	<u>Position</u>	<u>Dates</u>
Law Office of Allen P. Lanning, P.C.	President	June 2016-present
Lanning, Harris & Conklin, P.C.	Associate attorney	1988-1992
fka Conklin, Nybo & Leveque, P.C.;	Shareholder	1992-2003
Conklin, Nybo, LeVeque & Lanning, P.C.; and	President	2003-June 2016
Conklin, Nybo & Lanning, P.C.,		

Part-time/contract positions:

Jefferson County Attorney Jefferson County Courthouse Boulder, MT 59632	Spec. Deputy County Atty.	1988-1992
Great Falls Municipal Court Civic Center Great Falls, MT 59401	Substitute Judge	2012-2014
Cascade County Justice Court Cascade County Courthouse Great Falls, MT 59401	Substitute Justice of the Peace	2011-present

Cascade County District Court
Cascade County Courthouse
Great Falls, MT 59401

Standing Master (YINC)
Judge Pro Tem
(*pro bono*)

2014-present
2016-present

Montana Supreme Court
Court Administrator's Office
301 S. Park, Suite 328
P.O. Box 203005
Helena, MT 59620-3002

Prehearing Conference Facilitator 2015-present

13. If you have not been employed continuously since completion of your formal education, describe what you were doing.

Not Applicable.

14. Describe the nature of your present law practice, listing the major types of law that you practice and the percentage each constitutes of your total practice.

I have a general civil practice, concentrating on civil litigation (both plaintiff and defense) and Youth in Need of Care cases (as OPD contract and conflict counsel). My civil litigation practice includes personal injury, insurance (coverage issues and bad faith claims), complex litigation (including class actions), professional malpractice, elder abuse, contract disputes, products liability, and farm and ranch litigation as well as other matters. The firm also serves as plan counsel for a group of corporate legal employee benefit plans, under which we provide a full range of legal services. My practice is allocated as follows:

35%	Civil litigation
35%	Child abuse and neglect cases
10%	Family law
10%	Wills, probate and trust matters
5%	Criminal
2%	Business formation, contract drafting and advice
2%	Real estate
1%	Miscellaneous matters
<hr/>	
100%	

15. List other areas of law in which you have practiced, including teaching, lobbying, etc.

In the past, I have also practiced in the areas of mediation, bankruptcy, landlord/tenant, and workers compensation.

I taught Insurance and Risk Management as an adjunct professor at the University of Great Falls for two years. I am currently coordinating the abuse and neglect case pre-hearing conference pilot program in the Eighth Judicial District Court. I have served as a Guardian ad Litem for children in divorce proceedings, abuse and neglect cases, and Youth Court proceedings. I participate in the training program for new CASA/CAN guardians ad litem.

16. If you specialize in any field of law, what is your specialty?

I have two areas of specialization: complex insurance litigation and child abuse and neglect actions.

17. Do you regularly appear in court?

Yes.

What percentage of your appearance in the last five years was in:

Federal court	9 %
State or local courts of record	90 %
Administrative bodies	1 %
Other	0 %

18. During the last five years, what percentage of your practice has been trial practice?

90 %

19. How frequently have you appeared in court?

15-20 times per month, as counsel for litigants.

As a Substitute Justice of the Peace, I sit on average once a month, hearing initial appearances for 10-20 defendants, and occasionally handling other matters, including trials. As a YINC Standing Master, I sit every other Friday, presiding over 5-10 hearings for 3-7 hours each day. As Judge Pro Tem, I sit once or twice a month, presiding over nondispositive criminal hearings such as changes of plea or answer, bail hearings and status hearings for 3 hours each day.

20. How frequently have you appeared at administrative hearings?

2-3 times per year on average.

21. What percentage of your practice involving litigation has been:

Civil	95% (including YINC cases)
Criminal	5%
Other	0%

22. Have you appeared before the Montana Supreme Court within the last five years? If so, state the number and types of matters handled. Include the case caption, case citation (if any), and names, addresses and phone numbers of all opposing counsel for the five most recent cases.

Yes, I have appeared and briefed appeals before the Montana Supreme Court three times in the last five years. As counsel for the youth in abuse and neglect cases, I appear in and monitor appeals of terminations of parental rights regularly, but I only file briefs when the child's interests diverge from other briefing parties.

My last five cases before the Montana Supreme Court are:

- 1. *In re B.R.*, 2016 MT 234N, ___ Mont. ___, 381 P.3d 548, an appeal by a parent of a termination of his parental rights. *Opposing Counsel*: Scott Albers, Strain Building Suite 613, 410 Central Avenue, Great Falls, MT 59401, 406-727-3226.**
- 2. *Van Orden v. USAA*, 2014 MT 45, 374 Mont. 62, 318 P.3d 1042, a certified question from the Montana Federal District Court on the "made whole" doctrine. *Opposing Counsel*: David McLean and Christy McCann of Browning, Kaleczyc, Berry & Hoven, P.C., 201 W. Railroad, Suite 300, Missoula, MT 59802 406-728-1694.**
- 3. *In re K.H.*, 2012 MT 175, 366 Mont. 18, 285 P.3d 474, a Youth In Need of Care appeal brought on behalf of the youth. *Opposing Counsel*: Wade Zolynski & Sarah Chase Rosario OPD Appellate Defenders, 555 Fuller, P.O. Box 200147, Helena MT 59620 406-444-9505.**
- 4. *Giacomelli v. Scottsdale Ins.*, 2009 MT 418, 354 Mont. 15, 221 P.3d 666, an appeal from an adverse insurance coverage determination. *Opposing Counsel*: Cal Stacey, Stacey & Funyak, 100 N. 27th St, Suite 700, Billings, MT 59103 406-259-4545.**
- 5. *Chief Dull Knife College v. McDonald*, 2009 MT 370N, 354 Mont. 391, 222 P.3d 644, defense of a summary judgment in favor of former college officers in a dispute relating to a tribal community college foundation. *Opposing Counsel*: Brian Chestnut, Ziontz, Chestnut, Varnell, Berley & Slonim, 2101 Fourth Avenue, Suite 1230, Seattle WA, 98121 206-448-1230 & James L. Vogel, P.O. Box 525, Hardin, MT 59034 406-546-9342.**

23. State the number of jury trials that you have tried to conclusion in the last ten years.

Two: A wrongful death case on behalf of a defendant; and a breach of contract action involving a resort purchase on behalf of a defendant. I obtained a favorable jury verdict in the first case and a split verdict in the second.

I presided over a two day jury trial in justice court.

24. State the number of non-jury trials that you have tried in the last ten years.

I have tried approximately 10-12 civil nonjury trials, primarily in district court, with a few in justice court. My last civil trial in state district court was in February, 2016, before Judge

Oldenburg of the 10th Judicial District in Lewistown. I have tried approximately 25-30 termination of parental rights hearings.

I presided over several nonjury misdemeanor criminal trials in Great Falls Municipal Court.

25. State the names, addresses and telephone numbers of adversary counsel against whom you have litigated your primary cases over the last two years. Include the caption, dates of trial, and the name and telephone number of the presiding judge. If your practice does not involve litigation, provide the same information regarding opposing counsel and the nature of the matter.

1. Abuse and neglect cases:

**Cascade Deputy County Attorneys Matt Robertson and Val Winfield
121 4th St. N. Suite 2A
Great Falls, MT 59401
454-6915**

**Public Defender Jane Berger
615 2nd Ave. n., 3rd Floor
Great Falls, MT 59401
770-3200**

**Chouteau County Attorney Stephen Gannon
P.O. Box 459
Fort Benton, MT 59442
622-3246**

The judges I appear in front of in YINC cases are 8th Judicial District judges Gregory Pinski 454-6894, John Kutzman 454-6897, Elizabeth Best 771-3950, and Dirk Sandefur 771-6566, 12th Judicial District judge Daniel Boucher 265-5481 x231, 9th Judicial District judge Robert G. Olson 406-424-8360, 17th Judicial District judge John C. McKeon, 406-654-1062, and 10th Judicial District judge Jon A. Oldenburg, 406-535-8028.

2. Civil litigation:

- a. **Joshua Campbell, Jardine, Stephenson, Blewett & Weaver, P.C., 300 Central Avenue, 7th Floor, P.O. Box 2269, Great Falls, MT 59403, 727-5000, *Davenport v. Starlit Motel, Inc.*, Eighth Judicial District Cause No. ADV-14-009, settled before trial, Judge Gregory G. Pinski, 454-6894.**
- b. **David McLean and Christie McCann, Browning, Kaleczyc, Berry & Hoven, P.C., 201 W. Railroad, Suite 300, Missoula, MT 59802, 728-1694 *Van Orden v. Benefis*, United States District Court Cause No. CDV-11-26-GF-SHE, settled before trial, and**

***Van Orden v. USAA*, United States District Court Cause No. CDV-11-0188-GF-SHE, resolved by certified question, Judge Samuel E, Haddon 457-4910.**

- c. **Jason Holden, Faure Holden, P.O. Box 2466, Great Falls, MT 59403, 452-6500, *LeComte v. Hagen*, Eighth Judicial District Cause No. ADV-10-702, settled before trial, Judge Gregory Pinski, 454-6894.**
- d. **Curtis Thompson, Thompson Law, P.C., P.O. Box 2799, Great Falls, MT 59403, 727-0500, *Richard v. Richard*, Montana Eighth Judicial District Court Cause No. ADV-13-994, settled before trial, Judge Gregory Pinski, 454-6894, and then Judge John Kutzman presiding, 454-6897.**
- e. **George F. Darragh, Jr. (now retired) and Victoria Francis, Assistant U.S. Attorneys, U.S. Attorney's Office, P.O. Box 3447, Great Falls, MT 59403, 771-2033, *Jordan v. United States of America*, filed in Montana Eighth Judicial District Court and removed to United States District Court, District of Montana, Great Falls Division, Cause No. CV 14-76-GF-BMM, settled in settlement conference with United States Magistrate John Johnston, Judge Brian Morris, 727-8877.**
- f. **Torger Oaas, 618 West Main, Suite 201, P.O. Box 76, Lewistown, MT 59457, 538-2338, *Peterson v. Central Montana Co-op*, filed in Montana Tenth Judicial District, Fergus County, Cause No. DV-2014-105, tried and decision issued by Judge Jon A. Oldenburg, 535-8028.**
- g. **Elizabeth W. Lund, Moore, O'Connell & Refling, P.O. Box 1288, Bozeman, MT 59771-1288, 587-5511, *Gales v. Flying J*, filed in Montana Eighth Judicial District Court, settled before trial, Judges Julie Macek and Elizabeth Best.**

26. Summarize your experience in adversary proceedings before administrative boards or commissions during the last five years.

I occasionally advocate for clients in contested administrative hearings relating to wage claims or child support determinations. I have filed one Federal Tort Claims Act claim in the last five years, relating to a medical malpractice claim. I have appeared on behalf of injured parties at hearings before the Montana Medical Legal panel.

27. If you have published any legal books or articles, other than Law Review articles, list them, giving citations, dates, and topics involved. If you lectured on legal issues at continuing legal education seminars or otherwise, state the topic, date, and group to which you spoke.

I presented a short CLE on judicial ethics to the local bar association in approximately 1997, and have presented a few lectures on Montana insurance coverage law and insurance bad faith law to local groups and at CLEs over the years. My last CLE presentation was for the NBI Insurance Coverage Litigation CLE held 12-4-09 in Helena, MT. I have written a Montana Automobile and Insurance Law Handbook for the claims handling staff of insurer clients.

D. PROFESSIONAL AND PUBLIC SERVICE

28. List all bar associations and legal professional societies of which you are a member. Provide the titles and dates of any office that you have held in such groups and committees to which you belong. These activities are limited to matters related to the legal profession. List the dates of your involvement.

Montana Bar Association Member since 1988. I have served on both the Judicial Relations Committee and as an officer of the Health Care Law Section.

Cascade County Bar Association Member since 1988

American Bar Association 1988 to 2008

Montana Defense Trial Lawyers Association 1988 to 2008, Board Member 2001-2003

29. List organizations and clubs, other than bar associations and professional societies, of which you have been a member during the last five years. State the title and date of any office that you have held in each organization. If you held any offices, describe briefly your activities in the organization.

Mansfield Center Advisory Board	Jan 2015 – present
CASA/CAN of Cascade County Board of Directors	2008-2014
Montana Pride Foundation grant award committee	2013
Open Definition Great Falls	2014 – present
LGBTQ Center of Great Falls Board of Directors	2016 - present

30. Have you ever run for or held public office? If so, provide the details.

No. I managed a friend's campaign for the state legislature in 2002.

31. Explain your philosophy of public involvement and practice of giving your time to community service.

I learned about the importance of public involvement and community service as a Boy Scout. I believe that it is my duty as a citizen to be informed and involved in government and public affairs. I believe that it is my duty as a member of society to engage in community service and that one of the best ways to lead is through serving others and helping those in need. I believe that involvement in nonprofit art and educational endeavors enriches the individual and the community. I believe attorneys have special duties to give their time to those who cannot afford it. I have worked hard to put these beliefs into practice in my life and my work.

My participation in community service has been focused on serving children and being involved in organizations that safeguard and advance the American ideals of liberty and equality for all citizens. Over the years, I have been a Scoutmaster, a Big Brother in the Big Brothers and Sisters Program (Receiving an award for Big Brother of the Year), and have been a member and officer of the Great Falls Children Receiving Home's nonprofit and foundation boards, and a member of the Cascade County CASA/CAN Board. I served on the Montana ACLU Board of Directors for several years in the late 1990s, holding the office of Treasurer. I have been involved

in the local performing arts, literary, and poetry communities, including serving on nonprofit and community boards to advance the performing arts. I have been involved in education, activism, and community building with the local LGBTQ community and organizations.

As an attorney, I have a special obligation to provide community service. Lack of access to legal services is a significant problem for low income individuals. I take my *pro bono* obligations seriously and have consistently met and exceeded the minimum recommended requirements through taking on representation of litigants *pro bono* through Montana Legal Services, the Cascade County Law Clinic, judicial appointments, and through assisting private clients who present for legal services but do not have the ability to pay. In late 2013, realizing that our local district court judges were struggling under a growing wave of child abuse and neglect cases that has increasingly strained judicial resources, I offered to assist and have been presiding over youth in need of care cases two days each month as a volunteer *pro bono* standing master. I have been recognized twice in the last eighteen months by the Cascade County Bar Association for my *pro bono* work, through receipt of the Liberty Bell Award and the Robert P. Goff Pro Bono Award.

E. PROFESSIONAL CONDUCT AND ETHICS

32. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No.

33. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No.

34. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No.

35. Have you ever been found guilty or liable in any civil or criminal proceedings with conduct alleged to have involved moral turpitude, dishonesty and/or unethical conduct? If so, provide the details.

No.

36. Is there any circumstance or event in your personal or professional life that would, if brought to the attention of the Commission, Governor or Montana Supreme Court, affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No.

F. BUSINESS AND FINANCIAL INFORMATION

37. Since being admitted to the Bar, have you ever engaged in any occupation, business or profession other than the practice of law? If so, provide the details, including dates.

I was an adjunct professor at the University of Great Falls for two years, teaching Insurance and Risk Management.

38. If you are an officer, director, or otherwise engaged in the management of any business, provide the name of the business, its nature, and the nature of your duties. If appointed as a district court judge, state whether you intend to resign such position immediately upon your appointment.

I am the President of my law firm, the Law Office of Allen P. Lanning, P.C. The firm provides legal services. I will resign immediately upon appointment.

39. State whether during the last five years you have received any fees or compensation of any kind, other than for legal services rendered, from any business enterprise or organization. If so, identify the source and the approximate percentage of your total income it constituted over the last five years.

In 2013-2014, I received nominal payments from Act Normal, a local dinner theater production company, for seven dinner theater performances in two productions. The payments represent approximately .1% of my income during those years.

40. Do you have any personal relationships, financial interests, investments or retainers that might conflict with the performance of your judicial duties or that in any manner or for any reason might embarrass you? If so, please explain.

No.

41. If appointed by the Governor, are you prepared to disclose the information required under 2-2-106, MCA (i.e., the name, address and type of your business; any present or past employer from which you currently receive benefits; any business or professional entity or trust in which you hold an interest; any entity in which you are an officer or director; and any real property, other than a personal residence, in which you hold an interest)?

Yes.

42. Have you filed appropriate tax returns as required by federal, state, local and other government authorities?

Yes.

43. Do you have any liens or claims outstanding against you by the Internal Revenue Service (IRS)?

No.

44. Have you ever been found by the IRS to have willfully failed to disclose properly your income during the last five years? If so, provide the details.

No.

G. WRITING SKILLS

45. In the last five years, explain the extent to which you have researched legal issues and drafted briefs. State if associates or others have generally performed your research and the writing of briefs.

Legal research and writing is a significant part of my practice. Most of my civil litigation cases require research and briefing on multiple issues throughout the litigation process, from motions to dismiss to summary judgment motions, discovery motions, and motions in limine. I brief placement and dispositional issues and termination of parental rights petitions in abuse and neglect cases. I research legal issues for appeal and draft appellate briefs.

I generally do all of my own research and writing. However, when my firm had an associate attorney in 2011-2012, I mentored him in research and legal writing, which included assigning him research and writing projects.

46. If you have engaged in any other types of legal writing in the last five years, such as drafting documents, etc., explain the type and extent of writing that you have done.

I write insurance coverage opinion letters and mediation brochures. I draft pleadings, pretrial orders, jury instructions and proposed findings of fact and conclusions of law. I write or revise proposed judicial orders on a weekly basis for my standing master and judge pro tem caseload. I write detailed status reports and analytical evaluations for clients.

I draft wills, trusts, powers of attorney, contracts, business formation documents, and family-law specific documents such as settlement agreements and parenting plans.

47. Attach a writing sample of no more than ten pages that you have written yourself. A portion of a brief or memorandum is acceptable.

Please see the attached writing sample.

48. What percentage of your practice for the last five years has involved research and legal writing?

Roughly 90% of my practice involves cases in which legal research and writing are required. Currently, about 15-20% of my time is spent in legal research and writing.

49. Are you competent in the use of Westlaw and/or Lexis?

My firm has Westlaw and I am competent in its use. It is my preferred first legal research tool. I have also used Fastcase.

H. MISCELLANEOUS

50. Briefly describe your hobbies and other interests and activities.

I love being a parent, and I spend most of my non-work time with my seven-year-old daughter. We play games, read and draw together, visit museums, car shows, and work on adventures for her youtube channel (though the filming and editing of her episodes is done mostly by her other dad). We spend a lot of time at the pool and the waterpark, and on the Missouri river with our canoe and paddleboards.

I write speculative fiction and write and perform slam poetry. I read historical fiction, contemporary literature, fantasy/science fiction, classical literature, and historical treatises. I play computer, console, table top, MtG and RPG games. I am a student of history, particularly military history and ancient Mediterranean civilizations. I love the Montana outdoors and I hike, kayak, paddle board, canoe, and snowshoe. I work out. I like to travel to places with unique cultures or well-preserved historical sites. I cook and bake, especially medieval and ancient dishes. I enjoy watching live theater and supporting local musicians and artists.

I love my community and spend time working to make it better. Great Falls has seen both a renaissance of arts and culture and an awakening of its LGBTQ community in the past few years. Though the main work has been done by many others, I have, through my own modest efforts, contributed to these two positive developments in our community, as a volunteer, an organizational leader, a participant, and a supporter.

51. Describe the jobs that you have held during your lifetime.

As a farm kid, my first jobs were irrigating for my father and our neighbors, both ditch/dam irrigating and moving irrigation pipe systems. I worked at Burger King in high school, doing food preparation, order taking at the front counter and in drive-thru, and routine cleaning and equipment maintenance. During breaks from college, I worked at First Montana Title Insurance Company in Helena as a deed poster and performing special projects reconstructing subdivision and mining claim title histories and mapping. In law school, I worked for a legal research service at the law school, and interned at Keller, Reynolds, Drake & Sternhagen and Johnson, P.C. in Helena, primarily doing legal research and writing, and at the Jefferson County Attorney's office, doing project work including reconstructing public road formation records.

I have worked for the same law firm and its successors in Great Falls since I graduated from law school and passed the bar in 1988, engaged in the general practice of law but focused primarily in complex civil litigation and more recently also in child abuse and neglect cases.

When I was under contract with the Jefferson County Attorney's office, I tried criminal misdemeanor cases and assisted with Jefferson County civil litigation. At the University of Great Falls, I taught Insurance and Risk Management to students both on campus and at distance learning centers.

As a substitute judge in Great Falls municipal court, I conducted initial appearances, changes of pleas, nonjury trials and sentencing. As a substitute justice of the peace for Cascade County, I conduct initial appearances, changes of plea, sentencing, and occasional civil matters. As a YINC standing master for Cascade County district court, I handle all aspects of abuse and neglect cases, including contested hearings, except proceedings related to termination of parental rights. As a Judge Pro Tem for Cascade County, I preside over nondispositive criminal matters, including bail hearings, change of pleas and answers, and status hearings. As a facilitator in the PHC program, I conduct pre-hearing conferences in abuse and neglect cases.

52. Identify the nature and extent of any pro bono work that you have personally performed during the last five years.

I have handled contested and uncontested divorce proceedings for the Cascade County Law Clinic and Montana Legal Services and at the request of the local district court judges. I have served as a court-appointed guardian ad litem for children in contested divorce proceedings. I have represented clients for no fee in cases where a private client approached me directly but was unable to pay, in probate, guardianship, orders of protection, mental health issues, debt collection matters, real estate contracts and other matters. I have handled some cases for clients, particularly family law matters and orders of protection, for substantially reduced fees. I serve as a standing master pro bono, which takes 10-15% of my professional time. I also serve as a Judge Pro Tem pro bono, for an average of 4-8 hours per month. I recently undertook representation of a disabled client pro bono at the request of Judge Best.

53. In the space provided, explain how and why any event or person has influenced the way that you view our system of justice.

When I was a new associate attorney, most of my day to day work was legal research and writing and litigation assistance to the partners on personal injury, products liability, and insurance bad faith litigation. Aside from my part-time prosecutorial work in Jefferson County, I was rarely in court, except to second-chair trials or observe arguments on motions, and I didn't really represent people with everyday legal problems.

One day, a young man came to the firm's offices looking for help. He had been served with a petition for termination of parental rights brought by his ex-wife, who wanted her new husband from the local military base to adopt the children from her previous relationship. The young man had no money and had been unable to obtain pro bono counsel through traditional channels. No one else would take his case. He had a significant health problem that his ex-wife claimed prevented him from safely parenting his own children. He was desperate and heartbroken. I agreed to take his case, pro bono. At the hearing before Judge McKittrick, I was able to establish that my client could safely parent his kids, and that his ex-wife's primary reason for wanting the new husband to adopt was to qualify for better military base housing, and the judge denied the petition to terminate and preserved my client's parental rights. I am proud of my work for that client because I was his last hope and I was able to make an amazing difference in his life.

But the case concerned me. I have believed since law school that our American legal system represents the best method mankind has come up with to apply law to resolve disputes between

people. But the system doesn't work for people who can't meaningfully access it. For a society to be truly just and ruled by law, there must be equal access to the justice system for all who need it. This case made me realize the extent of the need for access to justice and that attorneys and judges must bear the primary responsibility for assuring that access. It is never enough to say we have a great system and leave it at that; rather attorneys and judges should constantly seek to safeguard the integrity of the judiciary, to do pro bono work for people who otherwise would be shut out of the justice system, and to develop new programs, like the drug and veterans courts, to better serve people and strive for a more just society.

My view of the law, the judicial system, and judicial ethics in particular has been influenced by the writings of Ninth Circuit Judge, legal scholar and historian John Noonan. I first read his book, *The Responsible Judge: Readings in Judicial Ethics*, over twenty years ago, and has continued to shape how I view the administration of justice as an attorney and when I am serving as a substitute judge or standing master.

I would be remiss in this application if I did not address the impact that Judge Dirk Sandefur, the judge who I am asking to succeed, has had on how I view our system of justice in general, and on being a judge in particular. I have admired his open-mindedness and fairness to each litigant before him, his ability to blend practicality and common sense with sophisticated legal analysis, and his thoughtful decisiveness since he became a judge. In the past three years, in my work in his division as a Standing Master and Judge Pro Tem, he has served as a mentor and guide. We have had the opportunity to discuss in depth the nature of judging and justice, which has given me an increased appreciation for and understanding of the duties of a district court judge and the qualities necessary to do the job well, maintain judicial independence while not undermining the efforts and responsibilities of the attorney participants in the legal system, and make difficult decisions in close cases. I have had hands-on training in how to be an effective district court judge, and I have learned from the best. Dirk Sandefur is an impressive judge and working with him has been a pleasure.

54. In the space provided, explain the qualities that you believe to be most important in a good district court judge.

I recently introduced my seven year old daughter to one of the CASA/CAN volunteers who do such good work on behalf of abused and neglected children in our community. The volunteer said to my daughter "Your dad is a great judge. He listens carefully to everyone. Then he thinks about it. Then he makes a good decision. We love to be in his courtroom." I believe that this simple, brief explanation encapsulates the most important qualities of a good district court judge, and illustrates that quality judging enhances public confidence in the judicial system. And I am honored to have my work on the bench described that way.

A good district court judge must be knowledgeable in the substantive and procedural law governing the matters before him or her, and have the analytical ability to identify critical issues, determine and analyze the facts of the case and the applicable law to arrive at a just result. The judge must be thoughtful, capable of reasoned decision-making, and committed to the rule of law.

As the public face of the judicial system, the judge must have an appropriate judicial demeanor. A good judge must be patient, dignified, and courteous. Rule 2.8 Mont. Code of Jud. Con. The judge should be attentive, temperate, restrained, and firm but without rancor. The judge's demeanor should set the tone for proceeding. The judge must maintain order. The judge must respect the judicial system and show compassion to all litigants, counsel and others in his presence. Every case is important to those involved, and each person wants and deserves to know that the judge has truly listened.

To maintain the integrity of the judiciary, a judge must be impartial. A good district court judge will avoid any conduct which might cause others to question his or her impartiality, recuse himself or herself from cases in which he or she has an interest or bias, treat litigants with equal respect and courtesy, and maintain his or her independence. Cf. Hamilton, *Federalist Paper #78*. The judge will demonstrate personal integrity.

A good judge will be decisive. The judge's primary job is to decide conflicts of fact and law. Not mediate. Not split the baby. Decide. A judge must be conscientious and analytical, but an effective judge must also have a proper degree of decisiveness.

A good judge will have a broad range of experience in legal practice, life, and society, and will have the fortitude to preside over the difficult and often disturbing criminal proceedings, child abuse and neglect cases, and juvenile proceedings which make up a substantial part of the day-to-day work of the district court judge.

A good judge will also be consistent, efficient, energetic, diligent, and pleasant.

55. In the space provided, explain how a court should reach the appropriate balance between establishment of a body of precedent and necessary flexibility in the law.

A district court judge must follow clearly applicable precedent from a higher court. Where such precedent is absent, the district court should establish its own body of precedent, striving for clarity and consistency in the annunciation and application of general principles of law which provide guidance but also allow flexibility in the decision of a particular case. For example, in criminal cases, sentencing guidelines should have a uniform sentence for each offense, from which the judge may deviate higher or lower, within the statutory range of penalties, based upon the particular circumstances of the case and the party. The judge's balancing of precedent and flexibility should be consistent enough to provide attorneys and litigants a framework for understanding a predictable range of outcomes. Arbitrary decisions unanchored by such a framework can lead to substantially different rulings in similar cases, denying justice and causing an erosion of confidence in the judiciary.

A judge must also strive to be aware of legislative changes in the law and regional and national trends in the development and adjudication of particular areas of law.

56. In the space provided, state the reasons why you are seeking office as a district court judge.

Simply put, I love the job. I look forward to the days I am serving as standing master or judge pro tem. I like challenges, and I like the challenge of being prepared, of taking evidence and listening to the argument of skilled advocates, of making difficult decisions, and communicating those decisions, both orally and in writing, in a way that is clear, well-reasoned, and is respectful of the parties, their counsel, and the process. I have always been passionate about achieving justice, and the work of a district court judge is the administration of justice, every day. I am committed to improving the administration of justice within the judicial system.

I know the duties of a district court judge. Because of my experience on the bench and the wide scope of my practice, I understand the nature of the job and am enthusiastic about the opportunity to do this work full-time.

I am uniquely qualified. My experiences as a substitute judge and standing master have taught me that I have the knowledge and temperament to be a good judge. I have been encouraged to apply by many people, including judges, court personnel, and others within the courthouse familiar with my work, who have expressed the belief that I would make a good district court judge. I bring a solid set of skills and experience to the position which would both fit in with and enhance the existing pool of judges in the Eighth Judicial District. I possess the necessary analytical skills, legal knowledge, and judicial demeanor to make an effective judge. I am thorough, able to separate emotion from logical thinking, and skilled at legal research and analysis. I maintain my temper well and conduct myself appropriately and with integrity, working hard to maintain the dignity and seriousness of judicial proceedings while showing respect to all and giving every litigant a chance to be heard. I have lived in Great Falls my entire professional career and I understand the community and its people. I am experienced in district court work: civil, criminal, family law, abuse and neglect, and probate matters. I do not shy away from making difficult decisions. I am thoughtful, considerate, and diplomatic by nature, but firm when necessary.

I am committed to serving my community here in Cascade County, and this is a position that will provide me the opportunity to do so, subject to the periodic approval of the voters. This position would not be a stepping stone for me.

57. What items or events in your career have distinguished you or of which you are most proud?

I am most proud of those cases where I have achieved a just result under difficult circumstances for clients who faced substantial barriers to justice, such as in the case detailed above about the young man facing termination of parental rights.

One of my insurance company clients retained me to defend a wrongful death action in Missoula involving a tragic accident near the law school where a University of Montana professor died crossing the street on a dark evening. The pretrial publicity had been sensational, with extensive press coverage of allegations that my client, a logger returning home from work, had been drinking and had fled the scene deliberately. Law school teaching personnel had agreed to take the plaintiff's case pro bono and no one thought the case could be defended successfully, even though I was convinced my client had not been negligent. At trial, with the able assistance of attorney Paul Haffeman who had agreed to serve as trial co-counsel, and facing the formidable

trial team of UM Law School professor Greg Munro and attorney Monte Beck, I was able to present a case which resulted in a defense verdict on the sixth day. The difference this verdict made in my client's life was immense. This tough, taciturn logger cried in relief when the verdict came in. I did too. I consider that trial, including the extensive pretrial preparation, to be among the best work I have done, in a case where my efforts made the difference in achieving a just result.

Recently, I have become known for my representation of abused children in abuse and neglect cases, work which I had done earlier in my career and agreed to resume as OPD contract and conflict counsel several years ago during a serious crisis of increased child abuse and neglect cases in Cascade County. I am passionate in pursuit of my young clients' wishes and best interests in these cases, trying to keep families together where possible and to keep my clients safe and find permanency for them. This work is so important. I am proud that I was able, in the K.H. case, to help set the legal standard for representation of children in abuse and neglect cases, and that when there is a particularly difficult case pending, the local judges request that I be the attorney assigned to represent the children.

58. Provide any pertinent information reflecting positively or adversely on you that you believe should be disclosed to the Judicial Nomination Commission.

I have done my best to disclose all pertinent information elsewhere in this application. I am happy to answer any addition questions the commission may have.

59. Is there any comment that you would like to make that might differentiate you from other applicants or that is unique to you that would make you the best district court judge applicant?

I would bring to the position both the maturity commensurate with my years of experience and the energy and enthusiasm inherent in my personality.

I already have an existing, positive working relationship with Judge Sandefur's staff and court personnel. I am familiar with Eighth Judicial district court scheduling and how Judge Sandefur's calendar fits in. My selection would ensure a smooth transition and continuity, with a much reduced adjustment period.

I have had a broad scope of experience in my twenty-eight years of practicing law which has encompassed almost all of the types of matters routinely and not-so-routinely placed before a Montana District Court judge. I would not have to learn new areas of law or procedure. I have handled many complex cases from class action suits and insurer bad faith and coverage actions to expert-intensive medical malpractice and product liability actions, and my work has been for both plaintiffs and defendants, and both as a prosecutor and defending those charged with crimes.

Although my judicial experience has been part-time, I am comfortable on the bench. I am well-liked and respected within the courthouse and I have received positive feedback on my handling of cases, including that I have a good judicial demeanor that keeps the courtroom calm and the proceedings dignified. I am analytical, thoughtful and decisive. I am also a positive, happy person who handles stress well and is unflappable.

I understand the administrative aspects of the position and am aware of current developments in court administration. I am committed to carrying forward, through shepherding the involvement of other attorneys and facilitators, the abuse and neglect pre-hearing conference pilot program that I implemented if I am chosen for Judge Sandefur's position.

CERTIFICATE OF APPLICANT

I understand that the submission of this application expresses my willingness to accept appointment as District Court Judge for the 8th Judicial District, if tendered by the Governor, and further, my willingness to abide by the rules of the Judicial Nomination Commission with respect to my application and the Montana Code of Judicial Conduct, if appointed.

December 4, 2016

(Date)

s/ Allen P. Lanning

(Signature of Applicant)

A signed original **and** an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Thursday, December 22, 2016.

Mail the signed original to:

**Office of Court Administrator
c/o Lois Menzies
P.O. Box 203005
Helena, MT 59620-3005**

Send the electronic copy to: mtsupremecourt@mt.gov

SUMMARY OF ARGUMENT

1. The College's cause of action for breach of fiduciary duty against College officers McDonald and Pond accrued when the assets at issue were transferred in 1993. The College's claim on appeal that it was not damaged until 2000 must be disregarded in light of its judicial admissions before the District Court that it began to be damaged as early as 1994.

2. Neither the nature of the Foundation nor the asset transfer were concealed. Dr. Spang admitted that he learned of both no later than 1995 and had concerns at that time that the asset transfer resolution did not contain any safeguards for the College. The College had sufficient information to file a suit for breach of fiduciary duty against McDonald and Pond as College officers by 1995, or could have had the knowledge if it acted diligently. The cause of action is barred by the statute of limitations.

3. McDonald and Pond's actions satisfied their duties as officers under § 35-2-441, M.C.A. as a matter of law. They acted at the express direction of the College Board and their actions were justified by reliance on the careful decision-making process of the College board and the advice of the College's attorney, James Torske.

ARGUMENT

Standard of Adjudication

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), M.R.Civ.P. The party may move for summary judgment as to all or any part of a claim, counterclaim or cross claim. Rule 56(b), M.R.Civ.P. The party moving for summary judgment has the initial burden of establishing an absence of genuine issue as to material fact. *Spadaro v. Midland Claims Service, Inc.*, 227 Mont. 445, 450, 740 P.2d 1105, 1108 (1987). Once that absence of material fact is established, the burden then shifts to the party opposing the motion to present facts raising a material issue. *Id.* Speculative or conclusory statements are not sufficient evidence to defeat a motion for summary judgment. *Nelson v. Montana Power Company*, 256 Mont. 409, 412, 847 P.2d 284, 286 (1993).

1. **The nature and requisites of the Cause of Action for Breach of Fiduciary Duty in Montana.**

In its Ninth Cause of Action, the College alleged that McDonald and Pond, as officers of the College, owed fiduciary duties to the College. As this Court has recognized, the nature and extent of those duties are defined by statute. § 35-2-

441, M.C.A.; *Knutson v. Bitterroot Intern. Systems, Inc.*, 2000 MT 203, 5 P.3d 554, 300 Mont. 511 (construing identical duties of § 35-1-443, M.C.A. relating to for profit corporations).

Section 35-2-441 provides, in pertinent part:

(1) An officer with discretionary authority shall discharge his duties under that authority:

- (a) in good faith;
- (b) with the care an ordinarily prudent person in a similar position would exercise under similar circumstances; and
- (c) in a manner the officer reasonably believes to be in the best interests of the corporation and its members, if any.

(2) In discharging his duties, an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

- ...
- (b) attorneys . . . as to matters the officer reasonably believes are within the person's professional or expert competence

(3) An officer is not liable to the corporation . . . for an action taken or not taken as an officer if the officer acted in compliance with this section.

2. The College's Cause of Action for Breach of Fiduciary Duty is

Barred by the Statute of Limitations.

A statute of limitations serves justice by providing a time limit within which parties can litigate a case. The fundamental purpose of statutes of limitations is to preclude claims in which a party's ability to mount an effective defense has been lessened or defeated due to the passage of time. The policy underlying the bar imposed by statutes of limitations is one of basic fairness. *Ereth v. Cascade*

County, 2003 MT 328, 318 Mont. 355, 81 P.3d 463.

A statute of limitations is meant to provide a reasonable period of time in which wronged parties can initiate suit and obtain redress. Such time frame also allows defendants to rest easy after the passage of a requisite period of time so as not to keep causes of action forever lurking in the distance. The time period specified by a statute of limitations seeks to balance the interests of both parties.

Montana Petroleum Tank Rel. Comp. Board v. Federated Service Ins. Co., 2008 MT 194, 344 Mont. 45, 185 P.3d 998, *quoting Linder v. Missoula County*, 251 Mont. 292, 298, 824 P.2d 1004, 1007 (1992).

The claim for breach of fiduciary duty is based on the transfer of College assets to the Foundation without adequate safeguards that the assets would be maintained and used for College purposes. Specifically, the College alleges that McDonald and Pond breached fiduciary duties by "failing to assure that the transfers of the College assets to the Foundation were effected in a manner which protected the continuing interests of the College in the assets, by failing to preserve and protect the College assets in a reasonable, prudent, and productive manner, by purporting to give College assets to the Foundation without authority to do so." Second Amended Complaint, Ninth Cause of Action, Paragraph 5.21.

The statute of limitations for breach of fiduciary duty is three years. § 27-2-204(1), M.C.A.; *Walstad v. Norwest Bank*, 240 Mont 322, 783 P.2d 1325 (1989); *Shupak v. New York Life*, 780 F.Supp.1328 (D.Mont.1991).

McDonald and Pond ceased employment as College officers and began

working for the Foundation in September, 1995. The assets at issue were primarily transferred from the College to the Foundation in 1993. The initial complaint was not filed until May 17, 2002, almost six years after the statute of limitations had expired and four years after McDonald and Pond had ceased to work for the College. This claim is untimely and the District Court correctly granted summary judgment to McDonald and Pond.

The College bases its appeal on two grounds: first, that it wasn't damaged - and so the cause of action didn't accrue - until June 2000, at which time the statute of imitations began to run; and second, that the statute of limitations was tolled until the College discovered its claims in 1999. As set forth below, neither the facts nor the law support the College's effort to avoid the consequences of its failure to timely bring this claim.

a. The Cause of Action Accrued when the Property was Transferred.

The period of limitation for bringing a claim begins to run when the claim accrues. § 27-2-102(2). M.C.A. A claim accrues when all elements of the claim exist or have occurred, the right to maintain an action on the claim is complete, and a court is authorized to accept jurisdiction of the action. §27-2-102(1), M.C.A.

The College's claim for breach of fiduciary duty is based on the transfer of

College assets to the Foundation without adequate safeguards. Even though the transfers were complete by August, 1995, the College asserts that the claim did not accrue until 2000, because an element of the claim - that the College was damaged by McDonald and Pond's breach of fiduciary duty - did not occur until then. Specifically, the College claims without reference to the record that it was not damaged by the asset transfer until June, 2000, when the Foundation allegedly refused to return the assets and stopped providing money to the College. College's Brief on Appeal, page 41. The College is incorrect.

The correct standard of measuring injury in a breach of fiduciary duty case is to evaluate when the injury occurred. When the wrong alleged is deprivation of or impairment of a legal right, the injury occurs at the time of the deprivation. *Joyce v. Garnass*, 295 Mont. 198, 983 P.2d 369 (1999) (legal malpractice cause of action accrued and statute of limitations began to run on last date of period to timely serve summons, where attorneys failure to serve summonses resulted in dismissal of action). The injury occurs when the fiduciary duty is breached. If one assumes that the College has stated a valid claim, then it is the deprivation of property that must constitute the College's injury in this case; the loss of legal control and authority over that property without sufficient safeguards is what led to the dissipation and depletion of those assets. This claim is analogous to the tort of conversion (indeed, the College pleaded such a claim and abandoned

it after losing at the summary judgment stage) in that the harm is complete and the cause has accrued when unauthorized dominion is exercised over the property at issue. *Yarbro, Ltd. v. Missoula Federal Credit Union*, 2002 MT 152, 310 Mont. 346, 50 P.3d 158; *Yore v. Murphy*, 18 Mont. 342, 45 P. 217 (1896).

The Montana federal district court addressed this issue in *Shupak v. New York Life*, 780 F.Supp.1328 (D.Mont.1991). Shupaks brought an action asserting various claims out of their purchase of several life insurance and annuity policies from Harold Schwan, an agent of New York Life. Shupaks met with Schwan in 1983 and he sold them the policies in question at that time. Another New York Life agent advised them in the fall of 1983 that Schwan had misrepresented one of the policies' provisions. By 1985, Shupaks had developed doubts about their insurance policies and the truth of the information presented by Schwan, with Thomas Shupak even believing that Schwan had "went south" with a premium payment. They made inquiries with a banker which increased their concern; inquiries to Schwan and other New York Life agents were not responded to. In 1986, Schwan wrote Shupaks a check from his personal account. Shupaks filed an action in May, 1989, against New York Life, asserting a number of claims, including breach of fiduciary duty for failing to supervise its agent. Analyzing the same provisions of Montana law that are at issue in the instant case, Judge Battin determined that the cause of action for breach of fiduciary duties accrued in 1983

when the Shupaks purchased the policies.

With respect to the first three grounds for plaintiffs' claims of negligence and breach of fiduciary duty, the Court finds that the supervisory and managerial duties asserted by plaintiffs necessarily existed at the inception of the relationship between the parties [footnote omitted] Any breaches of those duties also occurred at the inception of the relationship. Simply put, if defendant's company policies governing the qualification, supervision and monitoring of its agents were so deficient that they constituted a breach of a legal duty owed to plaintiffs, then they were so at all times relevant to this case. However, a cause of action did not accrue, and the statute of limitations did not begin to run, until the plaintiffs sustained injury as a result of the alleged deficiencies. Mont. Code Ann. § 27-2-102(1)(a),(2)

The record shows that plaintiffs were injured as a result of New York Life's alleged policy and supervisory failures in 1983, when plaintiffs purchased the policies in question in reliance upon Schwan's misrepresentations. Construing the facts in favor of plaintiffs, Schwan's misrepresentations resulted from his incompetence or dishonesty

None of this conduct would have occurred if New York Life met the duties which plaintiffs seek to impose upon it. Plaintiffs were therefore injured by defendant's alleged lack of sound management practices in 1983. Plaintiffs cause of action for negligence and breach of fiduciary duty were complete at that time and the three-year limitation period began to run in 1983.

Id. at 1339-40. Accord: *Conopco Inc. v. Minster Bank*, 2008 WL 4443117(S.D.Ind)(*constuing New York law*)(*"a cause of action for breach of fiduciary duty accrues upon the occurrence of the alleged wrongful conduct"*).

As Judge Battin was careful to point out with reference to existing Montana precedent, the fact that other consequential damages occurred later did not toll the

statute of limitation period. *Id.* at 1340, citing *Engine Rebuilders, Inc. v. Seven Seas Import-Export & Merc.*, 189 Mont. 236, 615 P.2d 871, 873 (1980).

Taking the College's allegations as true, the alleged wrong to the College occurred when the assets were transferred without sufficient protections to guarantee that they would be used by the Foundation as intended. The College was thus injured at the time of transfer, and its right to bring a cause of action was complete.

However, the College asserts that it did not suffer damages until June, 2000, when the Foundation refused to return the assets and stopped providing funds to the College¹, relying on the unique holding of another case, *Watkins Trust v. Lacosta*, 2004 MT 144, 321 Mont. 432, 92 P.3d 620, and its companion case, *Estate of Watkins v. Hedman, Hile & Lacosta*, 2004 MT 143, 321 Mont. 419, 91 P.3d 1264. These cases involved claims of professional attorney malpractice arising out of the creation of a trust for a couple which was intended to be revocable but actually became irrevocable upon the death of one of the couple. In *Lacosta*, the attorney who had created the trust continued to advise the wife/trustee that the trust was revocable for three years after it became irrevocable, during which time the wife continued to transfer assets out of the trust as though it were indeed revocable. In *Watkins Trust* and *Estate of Watkins*, the Montana Supreme

¹ In the Amended Complaint, the College alleged that it has received no money or assets whatsoever from the Foundation since 1998, which is another factual representation at odds with its claim on appeal. Dkt:73, page 11, Paragraph 4.23.

Court held that the cause of action did not accrue until 1996, even though the trust became irrevocable in 1992, because she suffered no actual damages until the beneficiaries filed suit to remove her in 1996. Before that time, she remained in control of the assets, continued to transfer them as though the trust were revocable, and therefore suffered no impairment on her right to control the assets as a result of the attorney's breach of fiduciary duty.

The Watkins cases do not apply to help the College for two reasons. First, unlike Carolyn Watkins, the College's right to control its assets was immediately impaired by the transfer of those assets in 1993 and cemented by the Foundation's assumption of control over them during the transitional period from 1993 to 1995. Once the assets were transferred without restriction and the Foundation became fully staffed and completely separate in its operations, the College's injury was complete.

Second, assuming *arguendo* that mere loss of control and the placing of assets at risk was not an actual injury, then actual injury occurred when the transferred assets were depleted, misused, misapplied, or dissipated, not when the Foundation refused to respond to a demand to return the assets. The College has asserted consistently that it was damaged much earlier than June, 2000, in its filings against the Foundation in the underlying suit and even its Statement of Facts in its