

# MONTANA

# LAWYER

State Bar  
— of —  
Montana

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## Also inside:

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# You have a choice

*“The theme you choose may change or simply elude you, but being your own story means you can always choose the tone.”*

~ Toni Morrison

As part of our effort to raise money for our senior sneak trip, my class of 11 contracted to maintain the Bainville Community Cemetery. Walking through the dry and dusty cemetery in the heat of a summer day with a trimmer can be quite educational. You can't help reading the various headstones while clearing away the long prairie grass and debris.

A repeated phrase on many of the headstones was “Gone But Not Forgotten.” I often shook my head because the graves themselves seemed like they were forgotten, let alone the people buried there.

Likewise, I wonder if this message, my last, will be both gone and forgotten. Have the 9 previous messages had much impact?

I've tried to speak about things that truly mattered to me – treating ourselves and others with kindness, serving our community, apologizing when we do wrong. Some messages were aspirational – examining how we measure our success, discussing our attitudes, and addressing the value of including others. Other messages were more practical – taking a lawyer to lunch or planning for retirement. All spoke to real issues facing our Bar.

What I hope I conveyed above all through these messages is that our legal practice in Montana is a product of our individual choices. Whether our negative public perception is deserved or not, we are each responsible for that perception. When we play fast and loose with the law, or use our training and skill to bully a layperson, we do harm to more than our individual reputation.

I've attended many national meetings of bar leaders this past year. I've walked away from each conference with a clearer understanding of how unique and special the practice of law is in Montana. Unlike larger bar associations, we can't abuse an opposing lawyer thinking that we won't see that attorney again. Montana's legal community is really just a very long main street – we all know one another, or at least know of each other.

But, our bar is growing. Relative anonymity is becoming

increasingly possible. Email and other technologies separate us physically, even while “communication” becomes easier. Our personal lives have become increasingly busy and our socializing with one another has suffered.

How we face these challenges is, again, a matter of choice, and we make these choices each and every day. We choose how we interact with clients, colleagues, judges and opponents. We set the tone for how we practice law. We decide if we are going to make the extra effort to avoid miscommunication, to be proactive in proposing a workable solution, or to reach out when previous attempts have resulted in a slapped hand. These are all personal choices – solve the problem, or become part of the problem. In this we are judged individually and as a profession.

As we practice, we all need to be more mindful of our conduct, and the conduct of other attorneys. When we see bad behavior, we should be honest and report it. When we see good behavior or positive practice, we need to laud it. When was the last time you thanked an opposing attorney for their assistance in resolving a case, even if the case went to trial or resolved after a particularly difficult negotiation?

Each year the State Bar seeks nominations for the George L. Bousliman Professionalism Award. This award recognizes lawyers or law firms who have established a reputation for and a tradition of professionalism as defined by Dean Roscoe Pound: “Pursuit of a learned art as a common calling in the spirit of public service.” This year the State Bar had NO nominations! What an extraordinarily sad commentary on how we attorneys view ourselves – we couldn't even identify (or perhaps take the time to identify) one amongst us who deserved recognition for their professionalism.

I implore you all to take personal responsibility for how you practice law. Cultivate the habits necessary to be a good and competent lawyer; prune the bad habits that prevent you from realizing your potential and serving your clients well. Individually and as a profession, we must drive ourselves to be our best. It is, after all, a choice.

# Annual CLE Seminar

## ■ TRIALS: Tips, Tactics & Practical Tales

Michael P. Cash, Esq.

- ◆ Pre-trial tips to shut down your opponent at trial
- ◆ High impact openings and closing arguments that move the jury to action
- ◆ Tips and tactics illustrated with tales from real-life trials
- ◆ Demonstration-rich program that will take you to the next level of success in the courtroom

## ■ View from the Bench

District Judge (Federal) Dana L. Christensen  
U.S. District Court

### November 16, 2012

7 CLE hours

Doubletree by Hilton Missoula - Edgewater

Missoula, Montana

A limited block of rooms have been reserved for MDTL program participants. Call 406.728.3100 and ask for the MDTL room block.

## Montana Defense Trial Lawyers



Michael P. Cash, Esq.

- Partner in Houston office of Gardere Wynne Sewell, LLP
- Over 20 years experience in commercial litigation
- Tried dozens of cases to jury verdict in state and federal courts
- Argued before appellate courts, including the Texas Supreme Court
- Nationally recognized for trial skills



District Judge (Federal) Dana L. Christensen  
U.S. District Court

## Seminar Schedule

7:30-8:00 am	<b>Registration</b>
8:00 am - 12:30 pm	<b>TRIALS: Tips, Tactics &amp; Practical Tales</b> Michael P. Cash, Esq.
12:30-2:00 pm	<b>MDTL Luncheon Meeting</b> Lunch on own if not attending
2:00-3:45 pm	<b>TRIALS: Tips, Tactics &amp; Practical Tales</b> Michael P. Cash, Esq.
4:00-5:00 pm	<b>View from the Bench</b> District Judge (Federal) Dana L. Christensen U.S. District Court

## Fees

	On or Before Oct. 29	After Oct. 29
<input type="checkbox"/> MDTL Member	\$250	\$315
<input type="checkbox"/> Nonmember	\$335	\$400
<input type="checkbox"/> Paralegal	\$165	\$205
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**Registration Policies:** The registration fee includes all sessions and course material. Payment must accompany registration form to receive early registration discount. **Cancellations received in writing by October 29 will be subject to a \$25 service charge. No refunds will be made after October 29.** Course materials will be mailed to pre-paid registrants who were not able to attend the conference. Registration substitutions may be made at any time without incurring a service charge.

## Registration

Name \_\_\_\_\_

Nickname for badge \_\_\_\_\_

Firm \_\_\_\_\_

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## Register online at [www.mdtl.net](http://www.mdtl.net)

Or send registration to:

MONTANA DEFENSE TRIAL LAWYERS  
36 South Last Chance Gulch, Suite A • Helena, MT 59601  
Phone 406.443.1160 • Fax 406.443.4614  
Email [sweingartner@rmsmanagement.com](mailto:sweingartner@rmsmanagement.com)  
Website [www.mdtl.net](http://www.mdtl.net)

### Peers recognize Matovich, Murphy as "Best Lawyers"



Matovich

Carey Matovich and Brooke Murphy, both of Matovich, Keller & Murphy, P.C., have been selected by their peers for inclusion in the 2013 edition of The Best Lawyers in America. Matovich has been selected in the specialties of Bet-the-Company Litigation, Commercial Litigation and Litigation – Labor & Employment, and Murphy has been selected in the specialties of Commercial

Litigation and Product Liability Litigation - Defendants. They both can be reached at 252-5500.



Murphy

### Garab starts at Missoula firm



Garab

The Law Firm of Sullivan, Tabaracci & Rhoades, PC is pleased to announce that Alison Garab has become associated with the firm.

Garab completed her undergraduate studies in psychology at the University of Georgia in three years and graduated Cum Laude with honors in 2005. Originally from Columbus, Georgia, she moved to Missoula to attend the University of Montana School of Law where she obtained her J.D. in 2008. During her third year in law school, Garab began working for Montana Legal Services Association. She then spent three years as the Civil Attorney in the Tribal Defenders Office representing clients in the Confederated Salish and Kootenai Tribal Court. In her free time, she spends a lot of time running with her dog, Dozer, on the streets of Missoula, hiking, cross-country skiing, watching movies, and taking in the beautiful scenery Montana has to offer. She will focus her practice on commercial and civil litigation. [www.montanalawyer.com](http://www.montanalawyer.com).

### Putzier joins Bozeman firm

Matt Putzier has merged his practice, the Putzier Law Office, P.C., with the Guza & Nesbitt, PLLC law firm to form Guza, Nesbitt & Putzier, PLLC (GNP). Matt, a Wisconsin native, graduated summa cum

laude from Colorado State University in 1994 with dual degrees in Political Science and Sociology. Matt received his law degree from the University of Montana



Putzier

School of Law in Missoula, graduating in 1997. From 1997 to 1999 Matt worked as a Deputy Gallatin County Attorney. From 1999 to 2001 Matt had the honor of serving as District Court Judge Mike Salvagni's law clerk. From 2001 to 2006 Matt worked as an associate at the Landoe, Brown law firm in Bozeman, where his practice consisted primarily of personal injury insurance defense work. In 2006 Matt launched the Putzier Law Office, P.C., where Matt's practice consisted almost exclusively of plaintiff's personal injury claims. Matt's practice at GNP consists primarily of general civil litigation, with an emphasis on personal injury and other insurance-related issues. Matt is a member of the Gallatin County Bar and State Bar of Montana, and licensed to practice in the Federal District Court of Montana. Matt can be reached at (406) 586-2228, or [mputzier@gnplaw.com](mailto:mputzier@gnplaw.com).

### Braukmann starts new firm

Billings attorney Matthew Braukmann recently formed Braukmann Law Firm, PLLC, after 5 years of practice at Moulton Bellingham PC, followed by 2 years of practice as corporate counsel for a mid-size corporation in Billings. Mr. Braukmann's practice focuses on representing claimants in employment, personal injury, and workers' compensation matters. He may be reached at (406) 294-0294, [matthew@braukmannlawfirm.com](mailto:matthew@braukmannlawfirm.com), or [www.braukmannlawfirm.com](http://www.braukmannlawfirm.com).

### Honorable James R. Browning Symposium set for Sept. 27-28

#### "The State of the Republican Form of Government in the States"

This biennial symposium will focus on the distinct place of state law and politics in the changing landscape of election law.

Montana is a focal point of debate over these issues this year as it hosts its independent redistricting commission, supreme court justice elections, a closely fought U.S. Senate race, and litigation of its campaign contribution and disclosure

laws, all in the aftermath of the Supreme Court's invalidation of Montana's century-old Corrupt Practices Act.

Harvard Law School Professor Lawrence Lessig will provide the keynote address on Thursday evening. There will be four panels on Friday. Each panel corresponds to general issues of legislation (what state campaign laws are preferable or permissible), enforcement (how states should administer campaign laws), and adjudication (in particular, what special issues arise in judicial campaigns), as well as an additional panel focused on the Montana experience.

The symposium takes place Thursday, Sept. 27, 6 – 7 p.m.; Friday, Sept. 28, 8:45 a.m. – 5:45 p.m. at the University Center Ballroom in Missoula. This course provides CLE credits. The program is free and no registration is required.

Contact the Montana Law Review staff at [montanalawreview@gmail.com](mailto:montanalawreview@gmail.com).

### Big Sky Association of Legal Administrators to host 2012 salary and benefits survey

The Big Sky Chapter Association of Legal Administrators will host the 2012 Salary and Benefits Survey for firms with four or more practicing attorneys. The survey is coordinated with the help of Anderson ZurMuehlen & Co., P.C. and gives valuable information on the previous year's salaries, benefits, and technology used within firms. In addition, the survey addresses hot topics faced by Montana firms. The last survey administered by the ALA was in 2008. Since then, fluctuations within the job market have prevented the ALA from completing a current survey. At the request of several firms, the survey has been revised and will go out via email to interested firms. The survey does not cost anything to complete. If you are interested in purchasing the survey results, the cost is \$85, made payable to the Big Sky Chapter Association of Legal Administrators. The survey is given confidentially, and all questions are based on prior year's figures.

If you are interested in completing a survey for your firm, or if you are interested in becoming a member of the Big Sky Chapter, please email Kandy Jenkins, chapter president,

MEMBER NEWS, Cont. next page

# State Bar of Georgia honors Robert Lee Aston for support of Military Legal Assistance Program

State Bar of Montana member Robert Lee Aston of Elberton, Ga., was honored by the State Bar of Georgia June 1 during its Annual Meeting for his meritorious support of the Bar's Military Legal Assistance Program. The program makes available legal services to active duty military personnel, National Guard members, Reservists and veterans on a pro bono or reduced fee-basis.

Dr. Aston was cited for his meritorious service for assisting veterans obtain many long overdue military medals, 104 of them thus far, for their military service principally during World War II. Dr. Aston's accomplishments were brought to the attention of the State Bar of Georgia and its Military Legal Assistance Program by General Richard B. Myers, former Chairman of the Joint Chiefs of Staff (2001-2005). In a recent letter to the Bar, General Myers reported that Dr. Aston "... continues his work on behalf of retired military personnel with dedication, persistence and success."

As a lawyer, Dr. Aston specializes in mining and environmental law, having published two books on the subject, and was an adjunct professor at the University of Missouri-Rolla on mining and environment law. He holds Bachelor of Science degrees from the College of William & Mary (1948) and the University of Missouri School of Mines (1950), is a graduate of the Woodrow Wilson College of Law (1984), and also holds a Ph.D. from the University of Aston in Birmingham, England (1996), and a Doctorate of Engineering from the University of Missouri-Rolla (2000).

Dr. Aston was born in Henrico County, Va., which was later incorporated into Richmond, Va. During World War II, Dr. Aston served in the Army as a navigator and was discharged as a captain. His military decorations include the Silver Star for gallantry, two Distinguished Flying Crosses, even Air Medals, and France's highest combat award, the Legion of Honour.

Charles Ruffin, chair of the Military Legal Assistance Program Committee, said "Lee Aston has devoted substantial time and energy in helping veterans obtain long-overdue military recognitions for their service principally during the



Photo courtesy of State Bar of Georgia

**Dr. Robert Lee Aston**, left, receives an award from outgoing President Ken Shigley honoring his work and commitment to veterans at the State Bar of Georgia's Annual Meeting.

Second World War. He has been an exemplar of how Georgia lawyers can aid not only citizens in their local communities with legal problems but also help our service men and women and veterans from Georgia and indeed from throughout the country as Dr. Aston has done. The State Bar of Georgia is grateful for his dedication and his commitment."

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## MEMBER NEWS, from previous page

at [kjenkins@boonekarlberg.com](mailto:kjenkins@boonekarlberg.com). The ALA offers HR managers, accounting managers and legal administrators a variety of networking tools and activities to help with the growth of their firms. In addition, the ALA provides valuable information and opportunities to people holding law firm management positions by holding seminars, providing continuing education, hosting an online site, and mailing a quarterly magazine and newsletter at the regional and national levels.

## Drug Treatment court awarded federal grant

District Court Judge Jim Reynolds recently announced the drug treatment court operating in the First Judicial District Court received \$343,000 in federal funding to fully expand and implement the treatment court. The federal Department of

Justice grant, awarded to the Montana Supreme Court on behalf of the local court, will allow the court to expand to serve 25 clients at a time. The grant should last for three years.

Drug treatment courts allow criminal offenders to remain out of jail or prison by focusing on chemical dependency treatment and direct accountability with the court system through routine appearances before the judge.

The 1st Judicial District currently has a small treatment court supported by funding from Lewis and Clark County. The federal grant will allow expansion of the docket with the addition of more staff time and treatment and drug testing dollars.

The remaining \$80,000 will provide funding for a statewide conference for professionals involved in drug courts throughout Montana. There are approximately 30 drug courts throughout the state. Judge Reynolds' treatment court is the first of its kind in Helena.

# The Big Sky Rendezvous runs Sept. 19-21

This year's State Bar of Montana annual meeting, "Big Sky Rendezvous," is in Billings, Sept. 20-21, at the Crowne Plaza. Opening activities starting on Sept. 19.

Events kick off Thursday with the local bar reception at Zoo Montana, which features live music by South Bound and zoo visits starting at 4 p.m.

Official meeting activities begin Thursday morning with the Board of Trustees meeting (bar members are encouraged to attend). A half day's worth of CLE begins at 1 p.m. Tours of the new federal courthouse will be available before the president's reception. Afterward, Justice Sandra Day O'Connor gives the keynote address at the annual banquet. J. Martin Burke, winner of the Jameson award, will be

honored along with the bar's 50-year members.

Friday carries a full day of CLE and begins with a UM School of Law breakfast and Supreme Court candidates forum. An appellate practice panel will round out the early morning activities. Following a brief introduction, the Montana Supreme Court will hear two oral arguments: *Kluver, et al. v. PPL, Montana, et al.*, and *State v. Fitzpatrick*.

The awards luncheon begins at noon on Friday, where the winners will be announced for award winners. After the luncheon, hot topics CLE begins. Attend the whole event and earn 11 CLE (2 ethics/1 SAMI).

Register at online at [www.montanabar.org](http://www.montanabar.org). Slots are filling quickly, call 406-447-2206 for more info.

## State Bar Award Winners

### William J. Jameson Award

*J. Martin Burke*

### Neil Haight Pro Bono Award

*Sunday Rossberg*

### Karla Gray Equal Justice Award

*Hon. Joe Hegel*

### Haswell Writing Award

*Gordon Bennett, Virginia A. Bryan, P. Mars Scott*

## Distinguished Service Awards

*Bernadette Franks-Ongoy, Rep. Shannon Augare, Richard P. Bartos, Debra L. DuMontier, Ann K. Gilkey, Mary Jane McCalla Knisely, Judy Meadows, Tammy Plubell, Klaus D. Sitte, Cynthia K. Smith, Nancy Sweeney*

# New Lawyers Section membership meeting set for Sept. 20

## Attention all lawyers under the age of 36 or in your first 5 years of practice

The New Lawyers Section invites you to join us for our annual membership meeting on Sept. 20 at noon at the Crowne Plaza where lunch will be provided. This meeting is held in conjunction with the State Bar Annual Meeting. At this meeting the following will be accomplished:

- Vote on amended NLS Bylaws. The current Executive Board spent a large part of the 2011-2012 year updating the bylaws to better serve the Section. At the Membership Meeting, the Board will discuss the amendments

and the full membership in attendance will have a chance to vote on the amendments.

- Election of Executive Board Officers including President-Elect, Secretary/Treasurer, and two Trustees. If you are interested in running for a position, please attend the meeting prepared to give a brief (1-2 min.) introduction of yourself and the reasons you'd like to be a part of the NLS Executive Board. If you cannot attend the meeting, please email the same to [erica@bkbh.com](mailto:erica@bkbh.com).)

- Discussion of 2012-2013 goals & projects. We will discuss opportunities for members to be involved throughout the 2012-2013 bar year including CLEs, networking events, and public service projects.

We look forward to seeing all eligible members in Billings on September 20! If you would like additional information regarding this meeting, please contact current NLS President Kris Goss at [kgoss@mtsba.org](mailto:kgoss@mtsba.org) or current NLS President-Elect Erica Grinde at [erica@bkbh.com](mailto:erica@bkbh.com).

## Judicial Conference of the United States Advisory Committees on Appellate, Bankruptcy, Criminal, and Evidence Rules proposes rules, forms amendments

The Judicial Conference of the United States Advisory Committees on Appellate, Bankruptcy, Criminal, and Evidence Rules have proposed amendments to their respective rules and forms, and requested that the proposals be circulated to the bench, bar, and public for comment. The proposed amendments, Rules Committee reports explaining the proposed changes, and other information are posted on the Judiciary's website at [www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx](http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx). The Rules Committees

appreciate the comments received from your respective schools, bar associations, and law firms on past proposed amendments, and we hope to receive your comments on the new proposed amendments. Please note that the public comment period ends February 15, 2013. If you have questions about the rulemaking process or pending rules amendments please visit <http://www.uscourts.gov/rulesandpolicies/rules.aspx> or contact the Rules Committee Support Office at (202) 502-1820 or via e-mail at [Rules\\_Support@ao.uscourts.gov](mailto:Rules_Support@ao.uscourts.gov).

# School of Law sets busy fall agenda

The University of Montana School of Law kicks off a new academic year this month with a busy autumn. "It's always a bit of a rush at the start, but this year our plate seems to be particularly full," said John Mudd, director of development and alumni relations at the School.

On Thursday, Sept. 13, the School's Reunion and Alumni Weekend begins with a welcome reception and continues through Saturday, Sept. 15.

There'll be a little bit of everything, from reunions and CLE, to rock 'n' roll and the scholarship and awards brunch. And, of course, it's a football weekend.

The Alumni and Reunion CLE on Friday, Sept. 14, brings together the School's faculty and nearly 20 panelists who are in their reunion class years.

"We have an outstanding group of practitioners who are talking on a range of topics," said Mudd. "We are really excited to share this CLE with the bar."

This year's reunion classes include, 2007, 2002, 1997, 1992, 1987, 1982, 1977, 1972, 1967, 1962 and 1952. However, all are invited to participate in the weekend's activities.

The School will also host a breakfast and Montana Supreme Court candidate forum at the State Bar of Montana's Big Sky Rendezvous — annual meeting — the following Friday, Sept. 21, in Billings. The annual meeting will feature presentation of the Jameson Award to UM Regents Professor J. Martin Burke during the Thursday evening banquet.

"Martin is the embodiment of this Law School," Dean Irma S. Russell said. "He personifies the philosophy of teaching and modeling theory, practice and professionalism. We are all delighted that he will be recognized with this award from the Bar."

**BUSY, Page 10**



Photo courtesy of University of Montana School of Law

**Class of 1977.** John Farmer is highlighted in the back row. Farmer is returning to Montana for his 35th class reunion, and as a member of Thunder Road, a Springsteen tribute band.

## '77 graduate "thundering" back to Missoula, Bozeman

When State Bar member John Farmer isn't busy in the courtroom representing his clients, the San Diego defense lawyer is practicing his guitar licks with — among other bands — "Thunder Road," a Bruce Springsteen tribute band in which he plays lead electric guitar as the band's "Little Steven."

"Music is a great break from the day-to-day practice of law," says Farmer.

The 1977 graduate of The University of Montana School of Law clerked for the late Hon. John C. Harrison, then practiced in Bozeman with the Gallatin County Attorney's office, before relocating to San Diego, where

**THUNDERING, Page 10**

# Thundering

from page 9



© Dana Gambill Photo.com

he has practiced law for more than 30 years. Farmer is the immediate past-president of the Board of Directors of the San Diego Defense Lawyers Association.

On Sept. 14 and 15, Farmer returns to Montana with Thunder Road for his 35th law class reunion and concerts in Missoula and Bozeman – his old stomping grounds.

“Bruce released ‘Born to Run’ back when I was in law school and it shot to the top of the charts, so coming back to Missoula and Bozeman to play that music, including in front of some of my old classmates, is a real thrill,” Farmer said.

The eight-piece band includes two other attorneys, Gerry Schneeweis, Esq. on bass, and the Hon. Andy Shoreinstein, on keys. This is the first Montana show for the group, which also features New Jersey-born Josh Tanner as “The Boss.” Tanner has performed as Springsteen throughout the country and overseas.

Thunder Road will play live in Missoula on Friday, Sept. 14, in connection with the School of Law’s Alumni and Reunion Weekend. General public tickets for the concert at the George and Jane Dennison Theatre on campus (formerly the University Theatre) are available through GrizTix at <http://www.griztix.com>, the Adams Center Box Office, MSO Hub, The Source in the UC, Southgate Mall, Worden’s Market, or by calling 406-243-4051. Tickets for the group’s Bozeman show on Saturday, Sept. 15, at the Filling Station may be purchased at Cactus Records or online at <http://www.ticketriver.com>.

**LEFT:** John Farmer performs as a member of Thunder Road.

# Busy

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Burke retired at the end of the last academic year. He will now teach on a post-retirement contract beginning in the spring.

Also on Friday, Sept. 21, back on campus in Missoula, Hon. Donald W. Molloy will receive a Distinguished Alumni Award from The University of Montana Alumni Association. Molloy, who received his undergraduate degree, as well as his J.D. ('76) in Missoula has long collaborated with the School as an adjunct member of the faculty and on the Board of Visitors.

“Judge Molloy has been a strong partner to the School and the University and a real inspiration and mentor for so many of our students,” said Russell. “We are honored that he is our graduate and partner and delighted that his commitment will be recognized with this award.”

The School will host a reception in Molloy’s honor on Friday, Sept. 21, at 3:30 p.m. in the ALPS Commons on the main floor of the building.

September concludes with the Montana Law Review hosting the 2012 James R. Browning Symposium on Sept. 27 and 28. The topic this year is timely: “The State of the Republican Form of Government in the States.” Harvard Law School Professor Lawrence Lessig will make the keynote address with other prominent national and practitioners participating.

More information on all of the September events is available on the School of Law’s website at <http://www.umt.edu/law>.

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### Correction to Rule 45 of MT Rules of Civil Procedure

Summarized from a July 31 order (No. AF 07-0157)

An error has been brought to the Court's attention in M. R. Civ. P. 45(a)(2), as adopted effective October 1, 2011.

IT IS ORDERED that M. R. Civ. P. 45(a)(2) is modified as shown below.

Highlighted language is added to the rule; language stricken through is deleted from the rule:

(2) Except as provided in Rule 28(c)(2), a subpoena must issue from the court in which the action is pending. ~~Issued~~

~~from which Court. A subpoena must issue as follows:~~

~~(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;~~

~~(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and~~

~~(C) for the production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.~~

The above changes to M. R. Civ. P. 45(a)(2), which reflect the longstanding practice in cases filed in Montana district

courts, shall take effect immediately.

### District Judge sitting in place of Chief Justice

Summarized from an Aug. 16 order (DA 11-0559)

STATE OF MONTANA, Plaintiff and Appellant,

v.

DELAINE MINNIE FITZPATRICK and, MALISA LYNN FITZPATRICK, Defendants and Appellees.

IT IS ORDERED that the Honorable Ingrid G. Gustafson, District Judge, will sit in the above-entitled matter in the place of Chief Justice Mike McGrath.

### Discipline

Summarized from an Aug. 14 order (PR 11-0623)

On October 21, 2011, a formal disciplinary complaint was filed against Montana attorney Darrel L. Moss.

Moss filed a written response to the complaint, admitting some of the complaint's allegations and denying others. Then, in April 2012, Moss filed written notice that he relinquished and surrendered his license to practice law in Montana. Under Rule 7 of the Montana Rules for Lawyer Disciplinary Enforcement, the Commission on Practice retained jurisdiction to proceed with these formal disciplinary proceedings in spite of that relinquishment.

The Commission held a hearing on the complaint on April 20, 2012. Moss did not attend. On June 28, 2012, the Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. Moss did not file any objections within the time allowed.

Based on the allegations of the complaint and the evidence produced at the hearing, the Commission found that Moss filed a complaint, hired an expert, and conducted discovery for clients who wished to sue the Montana Department of Natural Resources and Conservation for negligent fire suppression activities. Then, for a 6-year period, Moss did

nothing to advance his clients' case and did not truthfully communicate with them regarding the reasons for the delay. The case was eventually handled by other counsel. The Commission concluded Moss violated provisions of the Montana Rules of Professional Conduct dealing with competence (Rule 1.1), diligence (Rule 1.3), communication (Rule 1.4), and expediting litigation (Rule 3.2).

The Commission recommends that, as a result of these violations of the Montana Rules of Professional Conduct, Moss be disciplined by suspension from the practice of law in Montana for an indefinite period of not less than seven months. The Commission also recommends that Moss be ordered to pay the costs of these proceedings.

The Court accepted and adopted the Commission's Findings of Fact, Conclusions of Law, and Recommendation.

Suspension for an indefinite period of not less than seven months was effective as of the date of this order.

Summarized from an Aug. 21 order (PR 11-0603)

On October 14, 2011, a formal disciplinary complaint was filed against Montana attorney Richard R. Buley.

The Commission on Practice held a hearing on the complaint on April 19, 2012, at which Buley was present and testified. On July 10, 2012, the

Commission submitted to this Court its Findings of Fact, Conclusions of Law, and Recommendation for discipline. Buley did not file any objections within the time allowed.

Based on the allegations of the complaint and the evidence produced at the hearing, the Commission concluded Buley violated Rule 1.1 of the Montana Rules of Professional Conduct (MRPC) by failing to provide competent representation to clients.

The Commission found that Buley failed to object to an opposing party's patently objectionable \$4,942.85 bill of costs that was ultimately charged to Buley's clients, or to discuss the bill of costs with his clients. The Commission concluded clear and convincing evidence also established that Buley violated Rule 1.4, MRPC, by failing to keep his clients reasonably informed about the status of their case.

The Commission recommends that, as a result of his violations of the Montana Rules of Professional Conduct, Buley should be admonished by the Commission, ordered to pay the costs of these proceedings, and placed on probation subject to the condition that he satisfy and discharge the \$4,942.85 judgment against his clients.

The Court accepted and adopted the Commission's Findings of Fact, Conclusions of Law, and Recommendation.



# Campaign branding



*The IP hoops and hurdles of marketing a candidate*

By Trent Hooper<sup>1</sup> and Marley Clark<sup>2</sup>

Has watching presidential politics ever reminded you of the reality TV show “Wipeout?” One spectacular spill after another, with an occasional I-can’t-believe-he-actually-pulled-that-off moment.

Upon closer look, a surprising number of the headline-making thrills and spills have been intellectual property related—and most have been avoidable. From the Obama Hope poster that spawned a hotly contested copyright suit, to Gingrich being sued for using Survivor’s “Eye of the Tiger” without permission, intellectual property missteps seem to abound. So why do our supposedly bright and savvy candidates

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<sup>2</sup> Marley Clark is a high school senior with the American School. She has particular interest in government, politics, and the law, and plans to enter a pre-law college program in the Fall of 2013. Marley provided research support and contributed initial outlines and drafts for portions of all three sections of the article.

continue to stumble into headline-making IP blunders? Perhaps the IP hurdles in campaigning aren't as obvious as one might think? Our curiosity about these questions sent us researching.

After reviewing a few lessons from the '08 campaign, we'll grade the class of 2012. You would think the candidates would learn. Well... not necessarily. The 2012 campaign has been rife with bloopers. Still, there have also been some unlikely successes (or mini-successes), think "9-9-9" or "the sweater vest." Along the way we'll sum up some of the take-aways for advising clients who aspire to be candidates. While not a large client base, the lessons provided have broad application to any individual or business involved in marketing or branding. So without further ado, let us introduce you to a short primer on campaign marketing and why IP law is such a challenging gauntlet for political candidates.

## I. "The Good, The Bad, and The Ugly" — Five Lessons from the '08 Campaign

Beyond being a historic election, the 2008 campaign provided at least five more or less well-defined marketing and branding lessons. Marketing schools and analysts (regardless of political leaning) seem to agree that President Obama essentially put on a clinic on how to powerfully and effectively brand a campaign.<sup>3</sup> Obama won the campaign branding and marketing battle so decidedly in '08 that other candidates were mimicking him before the election season concluded.<sup>4</sup> The effectiveness of Obama's branding and marketing campaign, and in particular its ability to capture new segments of society, left an echoing message for all candidates that branding and marketing are critical for a successful campaign. The first three lessons come from the Obama campaign and the final two came from '08 bloopers involving unauthorized use of music and photography. Then the fun part. We'll see how if the candidates of 2012 have learned the lessons of '08.

### Lesson One: The Power of a Logo

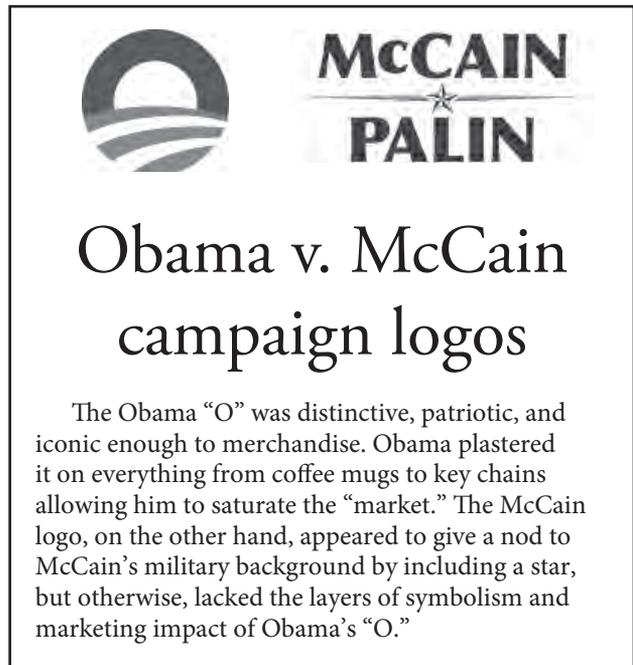
President Obama's rising sun logo (the Obama "O") became the focal point of his visual branding. The logo was intended to be meaningful, memorable and unique. It proved to be a stark contrast to the more corporate looking logos commonly used during political campaigns. The 'rising sun' represented a new beginning, change and hope; all slogans that Barack Obama used during his campaign. It seemed the American public wanted something new and fresh and the symbol of a rising sun into a

<sup>3</sup> David Meerman Scott, *Ten Marketing Lessons from the Barack Obama Presidential Campaign*, November 6, 2008. Available at: <http://www.webinknow.com/2008/11/ten-marketing-lessons-from-the-barack-obama-presidential-campaign.html>.

<sup>4</sup> Sam Stein, *McCain Rips Off Obama's Slogan*, June 12, 2008. Available at: [http://www.huffingtonpost.com/2008/06/04/mccain-rips-off-obamas-sl\\_n\\_105266.html](http://www.huffingtonpost.com/2008/06/04/mccain-rips-off-obamas-sl_n_105266.html).

blue sky over what appears to be crop rows seems to have captured that.

Even though voters wouldn't see the Obama "O" on the



ballot, by making a logo out of the first letter of his last name, the "O" at the front of his name on the ballot had the potential of subliminally conjuring up all of the goodwill that the rising sun mark had developed over the course of the campaign. This presumably translated into votes. Interestingly, Romney appears to have taken note, also making the first letter of his last name into a logo.

### Lesson Two: An Effective, Chantable, and Repeatable Slogan

Years have passed since the '08 election, but most seem to recall: 'Change we can believe in,' 'Hope,' and 'Yes we can.' All of these became key phrases used by the Obama Campaign. Does anyone recall what McCain's slogans were? Most we queried, McCain supporters included, couldn't.

Obama's slogans have been considered effective because they were easily chanted and easily incorporated into speeches.<sup>5</sup> They packaged a product that the country was craving into a catchy deliverable slogan. Following housing and stock market crashes, two no-end-in-sight wars, and a Bush administration that had lost public support, U.S. morale was low. The message of 'Hope'

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<sup>5</sup> Nancy Duarte, *6 Tips for Communicating in a Way That Resonates*, October 19, 2010. Available at: <http://www.fundraisingsuccessmag.com/article/6-tips-communicating-way-that-truly-resonates/1>.

and ‘Change’ was welcomed by the American public, allowing the Obama Campaign to feed off of the frustration expressed by the average American. This all seems logical in hindsight, but Obama was the only candidate to effectively harness the national sentiment.

President Obama relentlessly repeated the phrase “Yes we can” during campaign rallies and speaking engagements. His supporters took to “Yes we can”, and would chant it during rallies, amplifying its effect. The Obama Campaign also used the message of change, making it a main speaking point that coincided with the slogan “Change we can believe in.” Change became an easy phrase to sprinkle into speeches. By choosing slogans that were repeatable and chantable, Obama was able to present a congruent message between speeches, slogans, chants, posters, etc. The technique was so effective, in fact, that it may haunt Obama as many remember the promise of change and are now asking him where the change is.<sup>6</sup>

### Lesson Three: Flood the Market

Possibly the most important lesson from the Obama Campaign was persistence in communicating the brand to the public. Some have called it omnipresence.<sup>7</sup> The Obama Campaign was constantly referencing their logo and repeating their slogans. A common shortcoming of campaigns is their inability to flood the market with a consistent message and brand. One recent example is the ‘08 McCain Campaign. His slogan ‘Country First’ had potential. It seemed to represent John McCain’s tendency to cross party lines to do what he believed best for the country rather than a particular political party. “Country First,” however, is not that chantable, and we can’t recall it being repeated in speeches or rallies. (Though this could be a result of all the attention Sarah Palin commanded.) So while the McCain brand had promise, the McCain campaign may have adopted it without a plan of how to deploy it to its fullest capacity. If John McCain had used his brand more frequently, it may have been more successful but instead it was forgotten.

The McCain-Palin brand most seem to remember is “maverick.” Originally applied to Senator McCain early in his career, the trademark gained in popularity as a descriptor of the McCain-Palin Campaign. If the campaign attempted to flood the market with any brand, it was “maverick.” The brand had appeal, perhaps because the country was ready for something different than a staunch party-line candidate. Of course “maverick” was not suitable to chants and was not coupled with logos, unlike Obama’s brand. It also lacked the broad appeal the “change” brand provided. The unpredictable connotation of “maverick” could also have been seen as a negative in uncertain times.

6 Stuart Rothenberg, Barack Obama the Underdog Against Change Slogan, June 19, 2012. Available at: [http://www.rollcall.com/issues/57\\_153/Barack-Obama-the-Underdog-Against-Change-Slogan-215453-1.html](http://www.rollcall.com/issues/57_153/Barack-Obama-the-Underdog-Against-Change-Slogan-215453-1.html).

7 Aaron Kwittken, Lessons from ‘Brand Obama,’ August 20, 2009. Available at: <http://www.entrepreneur.com/article/203114>.

The final two lessons come not from successes, but from headlining bloopers.

### Lesson Four: Music Licensing.

You mean I can’t just publicly play whatever song I want? Likely due to the liberal leaning of the music industry, the licensing hurdle almost exclusively trips up Republican candidates. In 2008 alone, candidates were hammered for using music without a license by artists including the Foo Fighters, John Mellencamp, Jackson Brown, Heart, and Boston.<sup>8</sup> John McCain was actually sued by Jackson Brown for his use of the song “Running on Empty” in a commercial attacking Barack Obama’s energy policy. Obama also came under attack for his unauthorized use of Sam Moore’s “Soul Man.”

This is not a new obstacle. Even the untouchable Ronald Reagan suffered a black eye from this campaign obstacle. Reagan faced a severe public rebuke from Bruce Springsteen for using “Born in the USA” to invoke patriotism when the song was intended to be a dark essay on the fractured American dream.<sup>9</sup>

There appear to be two major reasons the music licensing hurdle is so difficult for candidates. First, obtaining a license for a song is time consuming and requires contacting all the rights holders (the musician, the song writer, the recording label, and sometimes more). This is expensive and often impossible given the fast-paced nature of a campaign. There are blanket compulsory licenses available that allow the purchase of rights to play any song in a large library for a limited time for a flat fee. The three major performing rights organizations offering such licenses are ASCAP, BMI, and SESAC.

However, even using songs under a blanket license may not insulate a candidate from a public black eye and legal action.

In the 2008 case Jackson Brown brought against John McCain and the Ohio Republican Committee, the song actually had been used under a blanket license. McCain’s defense was solid, but it didn’t stop the artist from suing over the particular use of his song. How a song is used is generally covered by “moral rights”—rights that have little protection under American law. In much of the world, artists can legally enforce their moral rights, and as long as artists in the United States are fighting to expand their rights, the candidate may get sued, even if the music is used under a blanket license.

Interestingly, after enough run-ins with copyright holders McCain ultimately resorted to hiring his own musician to compose a song specifically for his campaign!<sup>10</sup> Many just take the

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8 Sean Michaels, Foo Fighters slam John McCain over use of song, October 9, 2008. Available at: <http://www.guardian.co.uk/music/2008/oct/09/foo.fighters.slam.john.mccain>

9 Andrew Malcolm, Jackson Browne sues John McCain over song use, August 14, 2008. Available at: <http://latimesblogs.latimes.com/washington/2008/08/jackson-browne.html>.

10 Scott Conroy, Country Music Star John Rich Pens Pro-McCain Song, July 31, 2008. Available at: [http://www.cbsnews.com/8301-502163\\_162-4312120-502163.html](http://www.cbsnews.com/8301-502163_162-4312120-502163.html).

# Branding

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risk and forge ahead. Be warned, however, campaigns frequently take note of the music the opposing candidate uses. If they can catch the opponent infringing, it can turn into quick and high profile round of mudslinging. The candidate that proceeds without a license should be prepared to get publicly lambasted as a copyright infringer by the superstar whose song the campaign chose to use.

## Lesson Five: Art and Photography Licensing—Fair Use and the Shepard Fairey “Hope” Poster

In 2008, the Los Angeles based street artist, Shepard Fairey, provided possibly the biggest and most publicized legal drama to come from the '08 campaign. Though not directly a part of the Obama Campaign team, the Obama Campaign team contacted the independent Fairey and gave him the go-ahead to create an Obama campaign poster. The “Hope” poster (shown below) that Fairey created became wildly popular, and tens of thousands of copies were sold across the country.

NPR interviewed Fairey in April 2008 about the popular



Copyright 2006 Mannie Garcia/Associated Press

## The Shepard Fairey “Hope” Poster and the Mannie Garcia Photo

**Left:** the Shepard Fairey poster. **Right:** the photograph taken by Mannie Garcia that was used without a license by Fairey to create the poster. As the poster’s popularity spread the Garcia learned of the infringement. A heated legal battle ensued involving copyright issues such as fair use and work for hire.

poster. Listening to the interview was a freelance photographer, Mannie Garcia, who did work for the Associated Press. Thinking about the image, Garcia wondered if the photo behind the poster might be one he had taken. Sure enough, Garcia found the photo. He had taken it of Senator Obama and George Clooney at a press conference about Darfur in 2006. (See photo above.) Naturally, Garcia wanted credit and compensation for his work. The AP also joined the fray, claiming that the photo was a work-for-hire to which they owned the rights. Fairey pre-emptively filed suit when the AP was unsatisfied with Fairey’s offer to pay the standard license fee he would have had to pay to lawfully use the photo in

the first place.

Fairey claimed that although he copied the image, he was protected by the doctrine of “fair use.” The first and most critical factor in a fair use analysis looks at the purpose and character of the work. In other words, whether the work is transformational and whether it is made for commercial purposes.<sup>11</sup> The more the allegedly infringing work adds something new or alters “the first with new expression, meaning, or message,” the more transformative it is and the less likely that it is an infringement.<sup>12</sup> The fact that Fairey profited financially and did little to change the photo other than to crop it and alter the shading of the photo cut against Fairey’s claim of fair use.

Unfortunately, the case settled before the courts issued a ruling on the fair use issue. The case was a close enough call on the fair use issue that debate on the merits of the case continue today. Should Fairey have won, it would have represented an expansion of the fair use doctrine that would have strengthened the ability of artists that don’t have the means to always seek a license to use works they find on the internet or elsewhere. Unfortunately, the question of fair use remains grey and must be evaluated on a case by case basis.

An additional lesson, of course, is to be aware of the risk of proceeding without a license. Shepard Fairey’s self-described mode of operation was, “I don’t get permission. I just do it.”<sup>13</sup> How many graphic artists have a similar motto? Fairey himself did not anticipate the popularity that the poster would have. He explained, “[t]he part that I didn’t expect was once it was posted online what it would achieve virally.”<sup>14</sup> Admittedly, the chances of an artist running into an issue this large are slim. However, internet popularity is impossible to predict, so the risk for any artist is ever present. If the work infringed is registered, the statutory penalties alone could be as high as \$150,000.<sup>15</sup>

A final big lesson is to not lie or spoil evidence. When the copying was discovered, Fairey tried to cover it up by destroying photographs and denying that he copied. When his attorneys learned he had not been truthful, they withdrew from the case. Many believe that even if his fair use argument gained traction, his chances of prevailing were slim because his lies had caused him to lose credibility. Additionally, Fairey was found guilty of criminal contempt and faced a potential sentence of six months in jail and a \$5,000 fine.<sup>16</sup>

## II. Grading the Class of 2012

Now for the fun part. Let’s see how well the candidates of 2012 learned the lessons of 2008. Here we grade the candidates’ performance thus far in the 2012 election cycle.

**See “report card” graphics, pgs. 16-18**  
**Story continues pg. 18**

11 *Campbell v. Acuff Rose*, 510 U.S. 569, 578-79 (1994).

12 *Id.*

13 Alex Cohen, NPR News, April 7, 2008. Available at: <http://www.npr.org/templates/story/story.php?storyId=89431734> (last visited August 7, 2012).

14 *Id.*

15 See 17 USC § 504(c).

16 David Ng, Shepard Fairey enters guilty plea in criminal case with AP, February 24, 2012. Available at: <http://latimesblogs.latimes.com/culturemonster/2012/02/shepard-fairey-enters-guilty-plea-in-criminal-case-with-ap.html>.

# 2012 candidate report card for marketing and branding

## Obama

Overall Grade: B

**General Comments:** Obama is having nowhere near the success he had in 2008 with his branding and marketing. But compared to other campaigns of recent years he is still doing fairly well.

Category	Mark/Slogan/Incident	Grade	Comments
Trademark		A	The Obama "O" is still easily recognized and well known. We considered giving it an A- because it is not fresh and may symbolize empty promises to some, but it is still an effective mark and has been integrated into the new slogan "forward" (see below).
Slogan		C-	Seems to not be gaining momentum. Not being chanted. Not being repeated. Not coinciding with speech messages. "Forward" seems a bit boring after the success of "Hope" and "Change we can believe in." It has been an easy target for conservative jokes and has drawn comparison to communist messages. Liberals call it a critique on the "backward" vision of the Republican agenda. Ultimately, we don't get the sense that Obama believes in his own slogan, at least not nearly to the degree he did in '08, which spells trouble for its effectiveness.
Flooding the Market		C	"Forward" is only getting moderate usage compared to the 08' slogans. Perhaps the campaign is intentionally staying off the throttle because of the mixed response it has drawn. (We had this at a "D" until recently when forward seems to be showing up more and more.)
Music	Commercial featuring Mitt Romney singing America the Beautiful (A stinging satirical commercial that features Mitt Romney mustering a mediocre America the Beautiful.)	A	Obama appears to legitimately stand on a narrow "political fact" and "fair use" exception to the general rule that political satire is not fair use (see further discussion below). Even though Romney may have rights to the performance as the performer, since he is also the candidate, and the critique is of the candidate (as a candidate and performer), usage of the performance is likely a fair and protected as promulgation of a political fact. Moreover, America the Beautiful (the original) is likely in the public domain, so the songwriter has no rights either. Romney likely didn't register his copyright in the performance so his right to sue and damages would be limited. For the effective and likely legal satire, Obama earned an A on this one.
Art		N/A	We've seen no headliners in this category so far, though the parody and satire flowing from the "forward" slogan are plenty entertaining. (just google "Obama forward" and look at the images)

# 2012 candidate report card for marketing and branding

## Romney

Overall Grade: B-

**General comments:** He's not doing terrible, but he's not doing great either. He would get a B, but repeated IP gaffes and missteps bring him down.

Category	Mark/Slogan/Incident	Grade	Mark/Slogan/Incident
Trademark		B+	Appears to have taken the lesson of using a letter in your name so that voters can associate it with the name they will actually see on the ballot. Iconic enough that the Romney campaign is merchandising it. However, its symbolism is not as powerful as the Obama "O", rising sun. It appears to be silhouettes of people or a peacefully flowing flag. How this corresponds to the Romney campaign message is not clear. On the other hand it has been critiqued as a "droopy R," a "limp flag," or Aquafresh toothpaste. Romney's "R" is the next best logo we've seen, after the Obama "O."
Slogan	"Believe in America"	B	Believe in America is simple and catchy. But it is not easily chantable or repeatable. It does a decent job of targeting a fear the country has that America's ability to provide the American Dream may be slipping away. It's just lacking the ability to catch fire and get burned into our brains like "Yes we can" was in '08.
Flooding the Market		C	"Believe in America" does not seem to be used as often as it could be to be a prominent theme (maybe an Ohioan would disagree with us). If this was the only problem Romney would get a B or B-. "Believe in America" Gaffe- when the campaign hastily released an iPhone app that mis-spelled "America" his attempt to flood the market backfired. "Believe in America" quickly became a popular punch line for late night pundits.
Music	Posting a YouTube video of Obama singing an Al Green Song, "Let's Stay Together", on the Romney campaign web-site	D	The video was immediately removed from YouTube, apparently due to a Copyright infringement claim from BMG Rights Management. <sup>17</sup> This appears to have been Romney's attempt to retaliate for the "America the Beautiful" commercial in which Romney was singing. Unfortunately for Romney, the Al Green song was not in the public domain, so the copyright owner likely had valid grounds to call for its removal.
Art		N/A	We've seen no headlines on this so far, though Romney's iPhone photo apps with "I'm with Mitt" overlays have been an innovative twist.

<sup>17</sup> Jonathan Miller, *Romney Video Mocking Obama's Singing Pulled Over Copyright Issues*, July 17, 2012. Available at: <http://www.nationaljournal.com/2012-presidential-campaign/romney-video-mocking-obama-s-singing-pulled-over-copyright-issues-20120717>.

## Other Candidates

### > Herman Cain

Trademark	"9-9-9"	B+	This gimmicky tax plan turned trademark proved so catchy that Cain rode it all the way to Republican front runner status. He repeated 9-9-9 constantly, and it was easily attached to the Cain Campaign. Herman Cain only gained footing in the race after 9-9-9 legitimized him as a potential presidential candidate. Catchy? Yes. Repeatable? Yes. His flame out goes to show that it takes more than a catchy trademark to survive a gruelling primary process. This grade is for the trademark alone, which proved simple, catchy, and wildly popular.
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### > Rick Santorum

Trademark	The Sweater Vest	B-	Sweater Vest- Santorum is well known for his quirky and consistent wearing of Sweater vests. It may not have initially been intended as a trademark, but it caught on, allowing him to capitalize on his appearance and literally sell his image. Santorum sold his sweater vests for a \$100 donation towards his political campaign. <sup>18</sup> However, beyond conveying an image that roughly corresponded with the constituents he was reaching out to, this trademark did not necessarily have broad appeal.
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### > Newt Gingrich

Music	Unauthorized use of Survivor's "Eye of the Tiger"	F	"Eye of the Tiger"-A former Survivor band member and co-author of "Eye of the Tiger" filed a lawsuit against Gingrich for using his song. <sup>19</sup> Even after a cease and desist letter was issued Gingrich brazenly continued to display videos on his website in which the song was played. Now his bankrupt campaign is paying for a lawsuit for the infringing use.
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## III. Two other notable obstacles

### Trademark infringement

Does a candidate have to worry about accidentally stealing a registered trademark? Probably not. These cases have been few and far between and the candidates virtually always win. This issue came up in the 1984 primary when Walter Mondale asked his primary opponent "Where's the Beef?," drawing on the famous Wendy's ad campaign.<sup>20</sup> In 2000, Mastercard sued Ralph Nader for his satirical use of the term "Priceless"—a phrase taken from Mastercard's highly successful marketing campaign that was run during the Sidney Olympics.<sup>21</sup>

<sup>18</sup> You can get your Santorum sweater vest at: <https://www.ricksantorum.com/civicrm/contribute/transact?reset=1&id=38>.

<sup>19</sup> James C. McKinley Jr., Gingrich Sued Over Use of Eye of the Tiger, July 31, 2008. Available at: <http://thecaucus.blogs.nytimes.com/2012/01/31/gingrich-sued-over-use-of-eye-of-the-tiger/>.

<sup>20</sup> See video of Mondale's use of the Wendy's trademark at: <http://www.youtube.com/watch?v=pjw8m7Gmla4>

<sup>21</sup> Lauren Gelman, Ralph Nader Wins Summary Judgment Against Mastercard in Dispute Over "Priceless" Parody Ad, March 23, 2004. Available at: <http://cyberlaw.stanford.edu/packets002050.shtml>.

These types of cases are rare and appear to arise when high profile candidates borrow from high profile commercial ad campaigns. The candidates tend to win because the courts find that there is no likelihood of confusion and that candidates' use of marks gets heightened protections as political speech.<sup>22</sup>

### Political Satire

The general rule is that comedians can get away with it (without a license) but politicians can't. Under the fair use exception to copyright law, a parody is allowed as a protected form of free speech, while a satire is not. Parody is defined as direct commentary or critique on a work (think Weird Al Yankovich). A satire is commentary on society, a candidate, or a certain institution using a copyrighted work (such as satirical lyrics put to a copyrighted song). When the primary purpose for the satire is to win votes or persuade voters, the satire loses its fair use protection.

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22 Id

# Branding

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The policy behind the rule may help it make sense. Free-loading on the fame of another's work to achieve a personal objective is what constitutes infringement if done without a license. Comedians create their parody and satire primarily as critique and commentary on candidates (as political speech) or of the underlying work (parody). Even if there is a secondary motive to persuade voters, or earn a living, the comedian is in the business of selling comedy and commentary, and will typically be protected under the fair use doctrine. Because the line between parody and satire is not always clear, some artists, including Weird Al, make it a practice to obtain a license.

During political campaigns satire rather than parody is almost always used. Ads issued by the candidates are often soaked with sarcasm, back-handed comments, and indirect insult; all considered satire. To stay out of trouble a candidate should obtain a license for the video or song being used. Of course, this takes time and money. It also takes the rights

holder approving of the candidate. Sometimes too tall of an order.

As you can see, there are plenty of challenging IP obstacles for candidates to traverse. We hope this was an informative primer on the IP gauntlet of campaign branding and marketing. Given the

fast-paced nature of campaigning and the difficulty of legally mass marketing, we can count on the "wipeouts" continuing. So sit back, relax, and enjoy the thrills and spills that are bound to unfold over the next few months!

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For more information, contact the School of Law at 406.243.6509

***The 60<sup>th</sup> Annual Tax Institute registration information,  
schedule and speaker info is online at [umt.edu/law](http://umt.edu/law)***

## Joseph P. Mazurek



Mazurek

Joseph P. Mazurek, former Montana attorney general, died Tuesday among family and friends at age 64. Joe Mazurek was the gold standard as a political leader, public servant and family man. He served his country, state, community and family with distinction.

Joe was born July 27, 1948 in San Diego, Calif., to Priscilla and Thomas Mazurek. When he was nine months of age, the family relocated to Helena, Mont. He graduated from Helena High School in 1966 after serving as student body president. There he met and courted his future bride, Patty, the summer before his junior year.

Joe attended the University of Montana where he served as ASUM President and participated in the ROTC program. After graduating and marrying Patty on June 13, 1970, he served his country as a 1st Lieutenant in the United States Army from 1970-1972. He then attended the University of Montana School of Law and directed the Montana Law Review as associate editor, graduating in 1975. He went on to practice with the Helena firm of Gough, Shanahan, Johnson & Waterman, PLLP, from 1975-1992. Continuing with his political interests, Joe was elected for three consecutive terms in the Montana state Senate where he served as Senate president and Judiciary Committee chairman. He was twice elected as Montana attorney general, a position he held from 1993-2000. Joe worked with the Crowley

Fleck law firm after holding office until his retirement in 2008.

Throughout his professional and political career, Joe was known for his integrity, honesty, and respect for ethics. He was a unifying leader and bridge-builder. He was an extraordinary political leader revered for working across party lines to advance the best interests of the people of Montana.

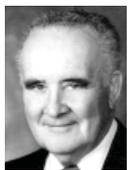
As a point of pride for Joe, he worked to pass spending increases for K-12 and higher education while in the Senate, led the state's involvement with the FBI to bring the Freeman standoff in eastern Montana to a peaceful conclusion, secured Montana's settlement against the tobacco companies, and argued successfully before the U.S. Supreme Court as attorney general. He was a commissioner of the National Uniform State Law Commission from 1984 and was designated a "life member."

Joe was known for his infectious enthusiasm for good work and honor in service. He demonstrated genuine concern for others and inspired many. He served on the boards of directors for the Special Olympics of Montana, Big Brothers and Sisters of Helena, Helena Youth Resources and a number of other charitable organizations. Joe championed all those around him and helped create a better future for his community.

Despite his numerous obligations and commitments outside his home, Joe always put his family first. He was a shining

**MAZUREK, Page 21**

## William Mathias Scott



Scott

William Mathias Scott, 91, passed away July 21 at the family Swan Lake cabin. He practiced law in Great Falls for 65 years.

A third generation Montanan, Bill graduated from Great Falls High School at 16 and, that fall, entered the University of Montana on a speech and debate scholarship. There, he won Pacific Northwest regional extemporaneous speaking and debate titles. He continued at U of MT's law school where he served as law review editor before graduating with honors in 1943, finishing both undergraduate and law school in five years.

After law school he joined the Navy and served as skipper in charge of a landing craft (LCT-A-2309) in both the European and Asian theaters. While Bill's group was training for D-Day in England, his colleagues marveled at his ability to enter any noisy London pub and find at least one Montanan he knew in the crowd.

On D-Day, his LCT was scheduled to land on Normandy's Utah beach in the third wave, but the first two waves sank, leaving him in the first wave. The landing craft on each side took numerous German artillery hits, but his boat was

spared. True to his promise to the tank commander of the three Sherman tanks aboard, he got them to shore safely. Bill frequently quoted poet Robert Service: "A promise made is a debt unpaid."

In 1946, Scott returned to Great Falls and opened a law practice. Since 1983, Bill was associated with the Great Falls law firm Scott, Tokerud and McCarty.

His practice mostly consisted of estate planning for farmers and ranchers. He loved his clients, many of whom became life-long friends (and blessed him with many hunting and fishing opportunities). Bill was a gifted wordsmith, sometimes masked by his indecipherable handwriting.

When he retired in 2008 at the age of 87, he was tied with his friend former Justice Skiff Sheehy as Montana's oldest practicing lawyer.

Bill leaves behind a legacy of lawyers, including his daughter Laurie Scott-Paddock (Denver), son Duncan Scott and daughter-in-law Suzanne Kinney (Kalispell), son-in-law Keith Tokerud (Great Falls), and granddaughter Hannah Tokerud (senior at U. of MT law school).

For those who want to honor Bill, please hug a loved one, pet a labrador, take a youngster hunting, celebrate America's blessings of liberty and freedom, and pull the lever this fall for Republicans.

### MAZUREK, from page 21

example of family commitment as a loving father and husband. He and Patty were blessed with 42 years of marriage, three children and two grandchildren. He was a sweet and sincere spouse and raised his boys, Tom, Jeff and Dan to be honorable men. He could often be found on the sidelines of his sons' sporting events, or even as coach in their younger years, shouting his encouragement and whistling his signature whistle. An outdoor enthusiast, he enjoyed river trips, fishing, hunting, skiing, golfing, and hiking. He shared his love for the outdoors with his family. He guided his family with a simple adage to "work hard and make your family a good name" which will forever be observed and cherished.

Joe was recognized for his exceptional accomplishments and service when he received the University of Montana Distinguished Alumni Award in 2010. Despite his own humility, he was praised as a man of distinction, honor, and decency. He was a gift to all those who had the privilege of knowing him, and will be deeply missed.

Joe is survived by his wife, Patty Mazurek of Helena, sons, Tom (Kathryn) Mazurek of Bozeman, Jeff (Danielle) Mazurek of Helena, and Dan Mazurek of Helena; and siblings, Byron (Sue) Mazurek of Butte, Charles (Skoge) Mazurek of Clancy,

Bill (Lorraine) Mazurek of Oregon, David Mazurek of Helena, and Sonia (John Hagey) Mazurek and Nancy Mazurek, both of Fairbanks, Alaska. Also surviving are grandchildren Elizabeth Mazurek and Tyler Mazurek. Joe was preceded in death by his mother, Priscilla, and father, Tom and Tom's second wife, Jane.

A vigil service was held at the Carroll College P.E. Center, Thursday, Aug. 30. Mass of Resurrection was celebrated at the Cathedral of St. Helena on Friday, Aug. 31, led by Our Lady of the Valley Parish, where Joe was a member.

The family requests that any memorials need to be made to the following:

- Special Olympics Montana: [www.somt.org](http://www.somt.org)
- McLaughlin Research Institute-Alzheimer's Research: [www.mclaughlinresearch.org](http://www.mclaughlinresearch.org).

On Thursday, Aug. 30, Gov. Brian Schweitzer ordered flags to be flown at half staff in honor of Joe.

Several Montana newspapers published retrospective pieces about Joe:

- Great Falls Tribune: <http://bit.ly/O6tvsN>
- Helena IR: <http://bit.ly/Ozch6H>

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Deputy County Attorney generally works in an office setting but some evening meetings may be required. On occasion, employee may be required to lift up to 25 pounds. Requires occasional travel within Montana. Salary depends on qualifications and experience. Applicable County benefits provided.

Submit a letter of interest, resume, writing sample, law school transcript and two (2) recent letters of recommendation to: Carolyn Berkram, Glacier County Attorney, P.O. Box 428, Cut Bank, Montana 59427

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**AVAILABLE FOR MEDIATIONS:** Brent Cromley, of counsel to Moulton Bellingham PC, Billings. 406-248-7731.

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A part-time position (three days/week) is available in the Public Finance Group of

Cont., Next Page

## Cont., from previous page

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