

# MONTANA LAWYER

State Bar  
— of —  
Montana

December/January 2014/2015  
Vol. 40, No. 3



## PITFALLS OF NAMING **YOUR BUSINESS** COMMON MISTAKES CAN INVITE LEGAL TROUBLE, CONFUSION

By Trent Hooper and Bobbi Owen

*Page 10*

---

### Also in this edition:

- > Elder Care Section offers tips for a quality holiday season for elders and those with special needs
- > Fastcase free webinars for 2015
- > President's Message to new legislators
- > Edward Snowden: Hero or Traitor?  
Creighton University Law Professor G. Michael Fenner takes an in-depth look
- > Guest opinion by former Montana Supreme Court Justice James C. Nelson
- > Reception in Billings will honor new Ninth Circuit Chief Judge Sidney Thomas

The official magazine of the State Bar of Montana published every month except January and July by the State Bar of Montana, 7 W. Sixth Ave., Suite 2B, P.O. Box 577, Helena MT 59624. (406) 442-7660; Fax (406) 442-7763. E-mail: [jmenden@montanabar.org](mailto:jmenden@montanabar.org)

#### State Bar Officers

President  
*Mark D. Parker, Billings*

President-Elect  
*Matthew Thiel, Missoula*

Secretary-Treasurer  
*Bruce M. Spencer, Helena*

Immediate Past President  
*Randall Snyder, Bigfork*

Chair of the Board  
*Leslie Halligan, Missoula*

#### Board of Trustees

*Marybeth Sampsel, Kalispell*  
*Elizabeth Brennan, Missoula*  
*Leslie Shoquist, Missoula*  
*Tammy Wyatt-Shaw, Missoula*  
*Ellen Donohue, Anaconda*  
*Jason Holden, Great Falls*  
*Shari Gianarelli, Conrad*  
*Kent Sipe, Roundup*  
*Luke Berger, Helena*  
*Kate Ellis, Helena*  
*J. Stuart Segrest, Helena*  
*Jane Mersen, Bozeman*  
*Lynda White, Bozeman*  
*Juli Pierce, Billings*  
*Ross McLinden, Billings*  
*Monique Voigt, Billings*

#### ABA Delegates

*Damon L. Gannett, Billings*  
*Shane Vannatta, Missoula*

#### Montana Lawyer Staff

Publisher | *Christopher L. Manos*  
Editor | *Joe Menden*  
(406) 447-2200; fax: 442-7763  
e-mail: [jmenden@montanabar.org](mailto:jmenden@montanabar.org)

**Subscriptions** are a benefit of State Bar membership.

**Advertising rates** are available upon request. Statements and expressions of opinion appearing herein are those of the advertisers or authors and do not necessarily reflect the views of the State Bar of Montana.

**Postmaster:** Send address changes to Montana Lawyer, P.O. Box 577, Helena MT 59624.

# INDEX

## January 2014

### Feature Stories

Tips on Having Enjoyable Holiday Season with Elders.....	8
Wisely Choosing a Defensible Business Name .....	10
Edward Snowden: Hero or Traitor? .....	14
Fastcase Free Webinars in 2015 .....	21
Attorney Match Mentorship Service .....	26
Guest Opinion: Citizens United Decision.....	28

### Regular Features

Member News .....	5
Court orders .....	7
State Bar News.....	24
CLE .....	24
Job Postings/Classifieds.....	29-31

### From the cover

Common mistakes made by business owners when naming their business can cost them legal trouble and money. Authors Trent Hooper from Crowley Fleck in Billings and student Bobbi Owen give attorneys tips for arming their clients for trademark skirmishes — or avoiding them altogether.

# Put Some Drama Into Your CLE!

**Try Our ENTERTAINING and EDUCATIONAL CLE Movies as Live Webcasts or Video on Demand for Self-Study!**

All Webcasts begin at 10:00 a.m. MT, VOD at Your Convenience

## THURGOOD MARSHALL'S COMING!



Featuring T. Mychal Rambo  
Winner of the ABA 2005 Silver  
Gavel Honorable Mention Award  
in Theatre!

**December 10, 2014**  
**\$149-169**  
**2.50 Hours Ethics**

## Clarence Darrow: Crimes, Causes and the Courtroom



Featuring Graham Thatcher  
as Clarence Darrow

**December 17, 2014**  
**February 11, 2015**  
**\$149-169**  
**3 Hours Ethics**

## Impeach Justice Douglas!



Featuring Graham Thatcher  
as Justice William O. Douglas

**March 11, 2015**  
**\$149-169**  
**3 Hours Ethics**

**Periaktos Productions is an Accredited CLE Provider in Montana and all programs are approved for CLE credit.**

## DOUBLE FEATURE CLE



**December 29, 2014**

**Each \$65-85/Both \$129-149**  
**Ben Franklin on Ethics**  
**(1 Hr Ethics) and/or**  
**Lincoln on Professionalism**  
**(1.25 Hrs Ethics)**

## THE ART OF ADVOCACY



Featuring Alan Blumenfeld  
and Katherine James,  
Produced by ACT of Communication®

**December 3, 2014**  
**February 25, 2015**  
**\$149-169 / 3 Hours General**

**What Can Lawyers Learn from Actors?** <sup>SM</sup> Series

**Check Our Website  
for ALL 2015 Dates!**

<http://periaktos.bizvision.com/>

## MAKE YOUR WITNESS A STAR!



Facilitated by Katherine James  
Produced by ACT of Communication®

**May 13, 2015**  
**\$129-149**  
**2.25 Hours General**

**What Can Lawyers Learn from Actors?** <sup>SM</sup> Series

Brought to you by ...

**PERIAKTOS**  
PRODUCTIONS, LLC

... the *Dramatic* difference in CLE®

3213 West Main Street #272 • Rapid City, SD 57702  
605-787-7099 • [productions@periaktos.com](mailto:productions@periaktos.com)

For program details, all 2015 dates, accreditation in other states and registration go to <http://periaktos.bizvision.com> or contact Anna Marie Thatcher, J.D. Managing Producer, 605-787-7099, [productions@periaktos.com](mailto:productions@periaktos.com).

# A letter from Bar president to Montana's 150 legislators

Well, this year's over, or close to it. We combine the December-January issue of the Montana Lawyer, so the next time you hear from me you will have made it through, happily I hope, the holiday season. This year I am hoping that the dour commentators who drone on about "Christmas being too commercial" (ironically a paid gig for most of them) keep their mouths shut. Who cares, really? Let everyone celebrate Christmas or their holiday of choice as they please, without background noise.

My present to the State Bar of Montana will be relief from having to read a "Christmas Letter" about me and my family's diseases, successes, travels, awards, etc. But, don't rejoice too much yet. I do have a letter you can read on some cold wintry night. It's my letter to 150 Montana legislators.

*Dear Montana Legislators,*

*On behalf of the State Bar of Montana, I thank each of you for serving in our legislature. You have made the sacrifices, and deserve the thanks. Door to door dodging dogs, and dog drop-pings. Getting home after the kids are in bed, and being out the door before they get up. Asking your employees; employers; family; friends and complete strangers to make sacrifices so you can serve them. Whether you are a farmer, teacher, rancher, business owner or fry chef, now you will decide everything from the "state fossil" to methods of execution. The line of people wanting money will wend around the nose of the Sleeping Giant. The line of people wanting to pay more taxes will fit in the phone booth.*

*People will scream in your ear "The government must do something about this!" and "We need to get government out of our lives!" in the same rant and never see a speck of inconsistency, and bristle when you point it out.*

*There is an unfortunate and, regrettably, unavoidable consequence of your sacrifice and success. As a Legislator (much like Lawyers and Lobbyists) you are now an unprotected class – The*

*"L" class. Political commentators, media personalities, and some snotty citizens who should know better, will roll cheap generalizations and insults off their lips about you with not a whit of concern that there will be any backlash. No one will stand up and castigate unfair, dishonest and downright mean generalizations, stereotypes and, dare I say, bigotry about Legislators. You can say "All politicians are crooks" in this country without a bit of protest. For many of you, this will be the first time you have been in such a position. It's not fun, it's not fair, and I have decided that I am going to speak up for you when I get a chance. Probably won't work but I will try.*

*As a lawyer, I am numb to it. Lawyer jokes are treated as fair game even among those who claim to champion all causes of equality and fairness. You can say "Lawyers are crooks" with less public angst than uttering the tautology "All crooks are crooks." Lobbyists also catch it in the chops, and unfairly so.*

*The State Bar of Montana has two Lobbyists, Ed Bartlett and Bruce Spencer. Call on them at any time for anything. We hire them on a flat fee. Bruce and Ed represent a few thousand lawyers, who in turn represent a few hundred thousand Montanans. The State Bar will probably have no opinion on most matters. But, if you want to know whether a bill will increase or decrease the legal, governmental, regulatory or other burdens on a citizen, Bruce or Ed will know, or find someone who does know.*

*The State Bar will speak up on a few matters. We will vocalize our support for the judiciary. The State Bar has resolved to support the Office of Public Defender in its effort to discharge its constitutional charge to defend indigents. Lastly, we will try to be of some help to our mutual goal of making family law more accessible, and less cumbersome, to our citizenry. If we don't do these things, no one else will.*

*Again, thanks for making the sacrifice. Have fun. Take care of yourself. The session is tough work, and we appreciate the effort.*

*Mark D. Parker*

*There is an unfortunate and, regrettably, unavoidable consequence of your sacrifice and success. As a Legislator (much like Lawyers and Lobbyists) you are now part of an unprotected class — the 'L' class.*



### Nowels joins Garlington, Lohn & Robinson



Nowels

Robert Nowels recently joined Garlington, Lohn & Robinson PLLP in the firm's commercial and real estate practice.

Nowels earned his Bachelor of Arts degree in business management from the University of Utah and his J.D. from the University of Montana School of Law. Prior to law school he worked in hotel management at Snowbird Ski Resort.

Nowels can be reached at [rlnowels@garlington.com](mailto:rlnowels@garlington.com), or at 406-523-2500. Garlington, Lohn & Robinson is on the Web at [www.garlington.com](http://www.garlington.com).

### O'Brien joins St. Peter Law Offices

St. Peter Law Offices, P.C., located in Missoula, announces that Michael O'Brien has joined the firm as an associate attorney.



O'Brien

O'Brien earned his Juris Doctorate from the University of Montana School of Law in 2013 and received degrees in political science and public administration from Carroll College in 2002. He served the Hon. Robert G. Olson as a law clerk in Glacier, Toole, Pondera, and Teton Counties in Montana from 2013-2014. In the summer of 2014, he returned home to Missoula to join St. Peter Law

Offices, P.C.

O'Brien's practice includes all facets of litigation, including contract disputes, estate proceedings and construction litigation. Previously he oversaw the Business Services Division in the Montana Secretary of State's Office and has expertise in small business legal issues, including corporate, limited-liability company, and business-entity formation, UCC filings and business regulation. O'Brien is admitted to practice before the Montana Supreme Court, the United States District Court for the State of Montana, and the Blackfeet Tribal Court. He can be contacted at 406-728-8282; or [mike@stplawoffices.com](mailto:mike@stplawoffices.com).

### Bozeman firm welcomes Haus

Guza, Nesbitt & Putzier, PLLC, a full-service litigation, family law and transactional law firm is pleased to announce the addition of Matthew A. Haus as an associate attorney.

Haus graduated from the University of California – San Diego with a B.A. in U.S. history and psychology in 2008. He attended law school at the University of Minnesota. While in law school, he served as the teaching director for the University of Minnesota's Civil Rights Moot Court and as a certified student prosecutor for the city of St. Louis Park, Minnesota, where he prosecuted individuals charged with misdemeanor and gross misdemeanor crimes.



Haus

After graduating magna cum laude from the University of Minnesota Law School and passing the Minnesota State Bar Exam in 2012, Haus worked for Pearson VUE's legal department, negotiating commercial contracts impacting

millions of dollars of revenue and managed disputes with other commercial entities.

Haus' practice will focus on the general practice of law with an emphasis on business litigation, transactional and business law matters, civil litigation, employment law and criminal law. He passed the Montana State Bar Exam in 2013 and is a member of the Federal District Court of Montana, the State Bars of Montana and Minnesota, and the Gallatin County Bar Association.

When not working, Haus enjoys hiking, backpacking, canoeing, fishing, cycling, downhill skiing and Nordic skiing.

He can be contacted at [mhaus@gnpaw.com](mailto:mhaus@gnpaw.com) or 406-586-2228.

### Crowley Fleck welcomes new associates

Crowley Fleck PLLP welcomes the following new associates:

- David C. Clukey graduated cum laude in 2014 from Gonzaga University School of Law. He received a Bachelor of Science in communication with an emphasis in public relations from Brigham Young University in 2011. At BYU, he was a co-coordinator, assistant coach and player in the school's intra-mural lacrosse league. Clukey will practice in the Billings office focusing on commercial litigation, construction law, environmental law, intellectual property and health care law. He can be reached at 406-252-3441 or [dclukey@crowleyfleck.com](mailto:dclukey@crowleyfleck.com).

- Molly S. Considine graduated magna cum laude from Hamline University School of Law in St. Paul, Minnesota, in 2014. While in law school, Molly served as a Notes and Comments Editor for Hamline Law Review and captain of Phi Alpha Delta's 2014 mock trial team. She received a Bachelor of Science in business management in 2009 from the University of Montana and graduated with honors. She will practice in the Billings office, focusing on estate planning, estate and gift tax, and estate and trust administration. Molly can be reached at 406-252-3441 or [mconsidine@crowleyfleck.com](mailto:mconsidine@crowleyfleck.com).

- James M. Duncan graduated with distinction from the University of Iowa College of Law in 2014. While in law school, he interned with the Iowa City Attorney's Office and competed in several moot court competitions. He earned his undergraduate degree in music performance at Brigham Young University, where he sang many lead tenor roles in BYU Opera productions. He will practice in the Billings Commercial Litigation Department. He can be reached at 406-252-3441 or [jduncan@crowleyfleck.com](mailto:jduncan@crowleyfleck.com).

- Justin D. Hoskins graduated in 2014 from the University of Montana School of Law. He graduated magna cum laude in 2009 from Montana State University with a Bachelor of Science in business administration in accountancy. He is also a CPA, but presently maintains his certificate in a non-practice status. Hoskins will practice in the Billings office focusing on tax, trusts, estates and wealth planning. He can be reached at 406-252-3441 or [jhoskins@crowleyfleck.com](mailto:jhoskins@crowleyfleck.com).

- Gage H. Zobell graduated magna cum laude, Order of the Coif, in April 2014 from the J. Reuben Clark Law School at Brigham Young University. He earned a Bachelor of Science in economics, magna cum laude, from Brigham Young University

Member News, page 6

in 2011. While in law school, he served as the president of Council of Advocates (moot court) and competed nationally for the law school. Zobell will practice in the Billings office focusing on energy and natural resource law, including mining, oil and gas, Indian law, title examination, water rights, and farm and ranch law. He can be reached at 406-252-3441 or gzobell@crowleyfleck.com.

- Shalise C. Zobell graduated magna cum laude from the J. Reuben Clark Law School at Brigham Young University in 2014. She received a Bachelor of Science in mathematics, with a minor in political science from Brigham Young University in 2011. She interned with the state of Washington Attorney General's Office in 2012, the Harris County District Attorney's Office in Houston in 2013, and was editor-in-chief of BYU's Journal of Public Law from 2013-2014. She will practice in the Billings office focusing on a variety of areas of civil litigation. She can be reached at 406-252-3441 or szobell@crowleyfleck.com.

- Mark R. Feddes graduated magna cum laude from Pepperdine University School of Law in 2014. He graduated summa cum laude in 2010 from Whitworth University receiving a Bachelor of Science in political science. He also participated in Whitworth's Political Activism Club. Feddes will practice in the Bozeman Litigation Department. He can be reached at 406-446-1430 or mfeddes@crowleyfleck.com.

- Carina L. Wilmot graduated with high honors in 2014 from the University of Montana School of Law. She received a Master's in Intercultural Communication in 1997 from the University of New Mexico and a Bachelor of Science in social sciences from the University of Wyoming in 1995. While in law school, she was intake editor of the Montana Law Review and interned with the Hon. Donald W. Molloy. Wilmot will practice in the Helena Litigation and Commercial Departments. She can be reached at 406-449-4165 or cwilmot@crowleyfleck.com.

- Kayleigh Brown received her Juris Doctorate, magna cum laude, from the University of Minnesota Law School in 2013. She graduated summa cum laude and Phi Beta Kappa with a degree in government from Georgetown University in 2010. Before joining the firm, Brown clerked for the Hon. Brian Morris at both the United States District Court for the District of Montana in Great Falls and the Montana Supreme Court. Brown will practice in the Helena Litigation Department and focus her practice on employment litigation, health care litigation, and medical malpractice. She can be reached at 406-449-4165 or kbrown@crowleyfleck.com

- Christopher K. LeCates graduated magna cum laude from the University of North Dakota School of Law in 2013. He received a Bachelor of Science in economics in 2009 from Utah State University. While in law school, he interned at the U.S. District Court and clerked at Serkland Law Firm, both in Fargo, North Dakota. After law school, he served as law clerk to the Hon. Justice Dale V. Sandstrom of the North Dakota Supreme Court. LeCates will practice in the Bismarck Energy Department. He can be reached at 701-223-6585 or clecates@crowleyfleck.com.

- Aaron W. Nicolson graduated magna cum laude from the University of North Dakota School of Law in May 2013.

He received a Bachelor of Arts degree in history from Montana State University Billings in 2009. He clerked for the Hon. District Court Judge Joel Medd and completed an externship with the United States Attorney's Office. After graduation, Nicholson completed a one-year clerkship with the Hon. Chief Justice Gerald VandeWalle of the North Dakota Supreme Court. Nicholson will practice in the Bismarck, North Dakota Commercial and Litigation Departments. He can be reached at 701-223-6585 or anicholson@crowleyfleck.com.

- Alexander T. Tsomaya graduated with honors from the University of Montana School of Law in 2014. He attended Northland College in Ashland, Wisconsin, where he was a member of the baseball team for four years and received a Bachelor of Science in business administration in 2011. While in law school, Tsomaya interned for the Office of the Federal Defender and clerked for a Missoula-based litigation firm. He will practice in the Bismarck, North Dakota, Litigation Department. He can be reached at 701-223-6585 or atsomaya@crowleyfleck.com.

- Nicholas T. Haderlie received his Juris Doctorate with honors from the University of Wyoming College of Law in 2011. He also received a Master of Arts in environmental and natural resources from the University of Wyoming Haub School & Ruckelshaus Institute. With a strong background in environment and natural resources, he brings a unique perspective on possibilities for conflict resolution between energy resources. Haderlie will practice in the Sheridan, Wyoming, focusing on energy, environment and natural resources throughout the Rocky Mountain region. Nick can be reached at 307-673-3000 or nhaderlie@crowleyfleck.com.

- Trevor A. Hunter graduated in 2014 from Southwestern Law School in Los Angeles. He received a Bachelor of Arts in both history and political science from the Davidson Honors College at the University of Montana with University Scholar distinction. During his final year he served as president of the Associated Students of the University of Montana (ASUM) and as president of the Montana Associated Students, a statewide organization. Hunter will practice in the Williston, North Dakota Commercial and Litigation Departments. He can be reached at 701-572-2200 or thunter@crowleyfleck.com.

## Watson featured in Top Women in Energy report

Rebecca W. Watson is featured in a special report, Who's Who in Energy 2014, in the Nov. 28 issue of the Denver Business Journal.

Watson was also selected to the publication's 2014 inaugural class of "Top Women in Energy" through nominations submitted to the Denver Business Journal and Women in Energy – Denver. Watson was selected to receive this honor in recognition of her commitment to professional excellence and her contribution to the energy industry in Colorado. She, along with 40 others, was honored in a supplemental section to the Denver Business Journal published on Oct. 31.

Watson is a shareholder at Welborn, Sullivan, Meck & Tooley in Denver and is a member of the State Bar of Montana.

### Biehl joins Church, Harris, Johnson & Williams

The law firm of Church, Harris, Johnson & Williams, P.C. has announced that Eric B. Biehl has joined the firm as an associate attorney.



Biehl

Eric is a member of the firm's litigation team and advocates for clients in disputed matters both in and out of the courts.

Eric is a fifth-generation Montanan and grew up in Red Lodge and Great Falls. He received a B.A. in Film and Television Production from Montana State University in 2006 and received his law degree from Pepperdine University School of Law in 2010.

While in law school, Eric focused on business and intellectual

property law, and spent two semesters in London, England studying international law. He interned at a boutique solicitor firm and in the business and legal affairs department of one of the United Kingdom's largest production companies. He also interned in Great Falls on civil litigation cases while a law student.

Prior to joining the firm, Eric practiced locally, providing litigation services and focusing on personal injury claims. Eric is admitted to practice law in California, Montana, North Dakota, Washington, D.C., and before U.S. District Courts, District of Central California and District of Montana. Eric is a member of the bar in those jurisdictions, the American Bar Association, Cascade County Bar Association and the Montana Trial Lawyers Association. In his free time Eric enjoys the many outdoor opportunities available in Montana, cooking, and traveling.

## Court Orders

# Court orders 90-day comment period on proposal to adopt reciprocity rules

### Summarized from Nov. 5 order No. AF 11-0244

The Montana Supreme Court on Nov. 5 ordered a 90-day comment period on a proposal to adopt reciprocity rules for admission to the State Bar of Montana.

Since 1998, passing the bar examination in Montana has been a requirement for admission to the bar "unless waived by the Supreme Court." In 2003, the State Bar recommended to the Supreme Court that it adopt reciprocity rules. The court unanimously denied the bar's motion after receiving mostly negative public comment.

In its Wednesday order, the court noted that much has changed since 2003. In 2012, the court adopted the Uniform Bar Examination. Now, attorneys who have taken the UBE in

other states within the last three years may be admitted to the bar if they are certified by the Commission on Character and Fitness and complete the Montana Law Seminar. Also, the court noted that the Montana bar examination no longer tests on Montana law. One of the chief arguments against admission on motion in 2003 was that attorneys admitted that way would not be required to pass the portion of the bar that tested knowledge of Montana law.

Montana is currently the only UBE state that does not allow admissions on motion and is only one of 12 states in the country that does not do so.

All comments must be made in writing and filed with the clerk of the Supreme Court.

## IN RE THE ADOPTION OF TEMPORARY ELECTRONIC FILING RULES

### Summarized from Order No. AF 14-0745

The Montana Supreme Court issued an order on Nov. 19 approving and adopting temporary electronic filing rules.

Initially, only direct appeals to the Supreme Court will be enabled for E-filing. The following case subtypes will be filed electronically:

- Civil commitments for developmental disability
- Civil commitments for mental illness,
- Civil dependent neglect
- Civil postconviction
- Criminal

Watch future issues of the Montana Lawyer and [www.montanabar.org](http://www.montanabar.org) for more information about the rollout of E-filing in the Montana court system. To read the temporary

electronic filing rules approved by the court, go to <http://supremecourtdocket.mt.gov/search/case?case=17445>.

## THE MATTER OF APPOINTMENT OF A DISTRICT JUDGE TO JUDICIAL STANDARDS COMMISSION

### Summarized from Order No. AF 07-0386

The Hon. Blair Jones of the 22nd Judicial District Court was elected chairman of the Judicial Standards Commission, and the Hon. Mike Menahan was elected as a member of the commission. Supreme Court Chief Justice Mike McGrath certified on Nov. 24.

The two were chosen by an election held by the District Court Judges.

Menahan's term on the commission runs from Jan. 1, 2015, to June 30, 2017.

# Tips for making a quality holiday season for elders and those with special needs

*Compiled by the members of the State Bar of Montana Elder Assistance Committee, Chair Twyla Sketchley. (Special thanks to Garrett Norcott, Bruce Larson, Julie Sirrs, Anne Yates, Gail Bourguignon, Keith Maristuen and Twyla Sketchley for their contributions)*

Elder law is the holistic approach to the legal issues faced by elders, individuals with disabilities and their families with the goal to create the highest quality of life possible. The holiday season can be particularly stressful for our elders and family members with disabilities. To that end, this article, compiled by the Elder Assistance Committee, is to help families this holiday season with practical travel tips, gift ideas and alternatives for accommodating and including the special needs of loved ones in all holiday activities in an effort to improve the quality of the holidays for everyone.

## Practical Considerations for Holiday Gathering

One of the first considerations when planning a family gathering for our frail, elderly or disabled loved ones is the possibility of spreading illness. If possible, ask all family members attending a family gathering to get a flu shot before the gathering. Keep a box of tissues in each room and make sure, as much as possible, drinks are provided in disposable cups or bottles that can be easily marked for identification.

To accommodate the special needs of our loved ones, be sure there is one room set aside to be a quiet space where a family member can go to escape the hustle and bustle of a family gathering when needed. A quiet space is particularly important for individuals with autism, elders with dementia and small children. Elders and small children may also need a quiet place to rest amidst a family gathering.

## Food

Food is a centerpiece of all holiday gatherings. In addition to accommodating food allergies, families may also have to accommodate dietary restrictions and physical limitations during meal. This section includes recipes the whole family can share.

### Garret Norcott's Grandma's Christmas Coffee Cake

An easy-to-eat food for anyone in the family that can become a beloved family tradition.

#### Cake:

- 1 cup butter
- 1 ¼ cup sugar
- 3 egg whites
- 1 cup nonfat sour cream
- 1 teaspoon vanilla
- 2 cups flour
- 1 teaspoon baking powder

½ teaspoon baking soda

#### Topping:

- ½ cup slivered almonds
- ½ teaspoon cinnamon
- 2 tablespoons sugar

Topping after cooking: powdered sugar

Preheat oven 350 degrees

Grease angel food cake pan with butter (bottom, sides and center). Cream butter and sugar. Add egg whites, sour cream and vanilla. Beat well and then gradually add flour, baking powder and baking soda. Place 1/2 mixture in buttered pan and sprinkle with 1/2 topping. Place remaining half of batter in pan (drop on top and carefully spread around) and sprinkle with remaining topping.

Bake for one hour or until knife comes out clean. Top with powdered sugar while hot. Cool completely before serving.

### Tofu Supplemented Smoothies (one serving)

Good for all family members, but especially good for family members who are on thickened liquid diets or need extra calories.

- ½ cup of soft tofu
- ½ cup milk (dairy, soy, rice, or almond)
- ½ cup yogurt (dairy, soy, coconut)
- ½ banana
- ½ cup of strawberries

Blend ingredients in a blender until smooth. The fruit options can be interchanged with any kind of berry, and juice can substitute for the milk.

### Cranberry Raspberry Jello

Good for all family members, but especially good for family members who require a liquid or soft diet.

1 box of instant raspberry Jello

Cranberry juice (chilled)

Make Jello in accordance with the instructions on the package, but replace the cold water with chilled cranberry juice. \

## Gifts

No matter how big or small, gifts are part of almost every holiday tradition. Finding the right gifts for elderly, frail or disabled loved ones can be a challenge. Here is a list of gifts that can accommodate any hard-to-buy-for family member.

- An iPod or MP3 player with a simplified speaker system, preloaded with the songs or music that the family member enjoys
- Warm socks with skid-proof bottoms
- A soft lap blanket (there are many online retailers that will



allow you to have a family photo printed on a fleece lap blanket to make the gift extra special)

- A family album with photos collected from various family members (good for family members with memory deficits)
- Pedicures (older family members may have difficulty with foot care)
- Walker or wheelchair bag fitted to the particular walker or wheelchair and in favorite team colors or animal print
- A sensory pillow that includes various textures, ribbons and buttons (good for family members with cognitive deficits)
- Gift cards for favorite restaurants or activities (older family members often live on limited budgets or are reluctant to spend money on items they determine are unnecessary)
- A talking electronic photo frame with the recorded voices of grandchildren
- An electronic photo frame with photos from many family members and programmed to rotate through the photos (great for family members who live in nursing homes or assisted-living facilities)
- A shadow box of family photos and small memorabilia (great for family members who live in nursing homes or assisted-living facilities)
- A monthly delivery of fruit or favorite food
- A basket of favorite foods, candy and treats
- A framed family photo with as many family members as possible in the photo
- Handmade pictures or crafts from grandchildren
- An e-reader with enlarged print and preloaded books
- A family “coupon” book with coupons for activities, yard work, housekeeping and events
- A talking clock or clock with large numbers
- Clothing that is easy to put on in favorite colors
- A low-maintenance pet (good for those who have difficulty leaving home)

### Family Time

Often families find family time at the holiday season awkward and stressful, especially when trying to accommodate family members with special needs. With a few accommodations, such as a quiet room, family time can be a cherished highlight of the holiday family gathering. These tips are designed to help all family members interact with one another regardless of the limitations.

- Have younger children who are just learning to read “show off” their new skills by reading to an elderly or disabled relative.
- Have younger children draw the name of an elderly relative from a hat and draw that relative a picture and tell that relative the story about the picture.
- Have an elderly relative tell a younger child a story and child draw a photo for the story as the elder tells the story.
- Have older children draw the name of an older relative from a hat and interview that relative about a particular topic. For example: How did they meet their spouse; all the places they have lived; or the famous people they met.
- Have elderly relatives show younger children photos and tell who was in the photo and when it was taken.
- Create a family game tournament with age and cognitively appropriate games.

- Pair an older family member and a younger family member to make or help prepare a particular dish for a meal.
- Task the children with creating placemats for each of the other relatives with their names and a drawing.

### Travel

Finally, one of the most difficult things that can happen during the holidays for an elderly, frail or disabled family member is travel. Travel is never stress free, but these tips can help make it a little less stressful.

- When traveling, build in time for your loved one to rest, make sure travel days are short, and that your loved one has enough to eat and drink.
- Park as close as possible to all events.
- If traveling by airplane, contact the Transportation Safety Administration (TSA) and request a TSA Passenger Support Specialist to assist you and your loved one through security and advise you of issues related to those with disabilities. <http://www.tsa.gov/traveler-information/travelers-disabilities-and-medical-conditions>
- When traveling by airplane, make sure you and your loved one wear slip-on shoes and clothing without metal zippers, belt buckles or snaps to make going through the airport security easier.
- If your loved one has medical devices such as knee or hip replacements, braces or pacemakers, make sure you alert the airport security as you start through security checks.
- Arrange for wheelchair assistance for your loved one throughout the airport.
- If you are traveling with a loved one who has dementia, create a small card that you can hand to airport security, flight attendants and gate personnel that says: “My loved one has dementia, can become easily confused and needs extra assistance. His or her name is \_\_\_\_\_.” This will allow you to alert those around your loved one of their need for help without upsetting them.
- Whenever traveling, make sure your loved one has all their medications and you have a list of those medications, the dosages and when they need to be taken.
- Make sure your loved one is carrying identification, emergency contact information, the travel schedule, and a list of medical concerns in the event he/she is separated from you. A neck wallet is an easy way to carry these items.
- Carry a copy of your loved one’s Medicare, health insurance, identification cards and a copy of the legal documents that you use to make decisions for them (health care directives, durable powers of attorney or guardianship orders).
- Keep a folder with copies of all the contents of your loved one’s wallet, important papers and medical information with a trusted friend who can get you the information quickly if needed.
- If available in your area, your loved one can be equipped with a tracking device which can be tracked with a smart-phone app or through local law enforcement in the event your loved one wanders away or becomes separated from you.

***The Elder Assistance Committee wishes everyone a wonderful holiday season. We hope these suggestions and tips will make the holiday season for you and your clients the loving celebration it should be.***

# War stories for wisely choosing a defensible business name

## Arming your client for trademark skirmishes — or avoiding them altogether

By Trent Hooper<sup>1</sup> and Bobbi Owen<sup>2</sup>

What's in a name? When it comes to a business, the name represents the hard-earned goodwill of a business owner. The name is a trademark and represents the power to bring back previous customers and build a reputation that can result in a valuable revenue stream. Yet it is not uncommon to see businesses choose their business names with little or no knowledge or guidance about whether the name is available or defensible. Expensive and painful trademark skirmishes over business and product names are not uncommon in Montana. Most of these disputes are resolved before trial through a confidential settlement of some kind. Consequently these issues are often out of the public eye — but not always.

Below we highlight several skirmishes that expose common trademark pitfalls in choosing a business name. These issues can often be avoided through: (1) careful selection of a mark; (2) proper clearance of the mark; and (3) registration of the mark. Ultimately, careful selection of a business name can not only help the client build a powerful and profitable brand, but it can help the client avoid the painful and expensive experience of consumer confusion, or worse, litigation and potentially losing a business name.

### Careful Selection of a Mark: Yellowstone Outfitters

For a strong protectable mark, avoid surnames, geographically descriptive marks, acronyms, or piggybacking famous marks. Geographically descriptive marks seem particularly popular, for example, Yellowstone [fill in the blank], Bitterroot [fill in the blank], Montana [fill in the blank], Capital City [fill in the blank]. While these marks have some marketing value, they leave the business owners with little or no way to protect their name, stop consumer confusion, or prevent a competitor from cropping up with a nearly identical name. Case in

point...

In the early '80s two outfitters sprang up near Yellowstone National Park, both by the name of Yellowstone Outfitters. The two apparently were unaware of each other until a few years had passed. Ultimately one of the outfitters filed suit and moved for a preliminary injunction seeking to stop the other from using the mark. The district court denied the preliminary injunction. On appeal the Montana Supreme Court affirmed. There is no protection under state law or federal law for geographically descriptive marks, absent proof of secondary meaning, i.e., the mark has been in use that customers have come to associate the descriptive mark with a specific business. The Montana Supreme Court stated the rule clearly: "[N]o one can apply the name of a district or country to a well-known article of commerce, and obtain thereby such exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district from truthfully using the same designation."<sup>3</sup> Most of these types of cases are governed by federal law, which is the same in its refusing protection to geographically descriptive marks.

So where did that leave the outfitters? The outfitters and others in that situation are left to deal with the consequences of ongoing customer confusion, mail delivery confusion, lost profits, blended reputations, etc., unless one of the two changes their name. More commonly the names are close, but not quite the same. Obviously once a business has been operating for a number of years, changing its name can be incredibly painful and expensive. Many choose to endure the profit dampening consequences for years.

The reputation dilution and confusion can carry significant risk. The client's reputation can end up rising and falling based on the service and reputation of their similarly named competitor. And in a less likely but potentially foreseeable situation, if the competing owner ends up in the headlines for some sort of reputation-destroying activity such as meth distribution or sexual assault charges, the public may confuse your client as the criminal.

These risks apply not only to geographically descriptive names, but surnames, acronyms and other merely descriptive terms. Trademark law does not let business owners monopolize last names, geographic locations, or descriptive terms to

<sup>1</sup> Attorney, Crowley Fleck PLLP, Billings, Montana office.

<sup>2</sup> Currently a senior pursuing a Bachelor of Arts in political science at Carroll College.

<sup>3</sup> *Warwood v. Hubbard*, 218 Mont. 438, 439, 709 P.2d 637, 638 (1985) (citing *Esselstyn v. Holmes*, 42 Mont. 507, 114 P. 118, 121 (1911); *Delaware & Hudson Canal Co. v. Clark*, 80 U.S. 311, 20 L.Ed. 581(1871)).

# How strong is the brand?

This chart shows where some famous brands fit on the trademark spectrum of distinctiveness, with “fanciful” being the strongest and “generic” the weakest. Descriptive and suggestive marks can become strong marks by proof of secondary meaning, but even when famous are more limited in protection than fanciful or arbitrary marks. The same spectrum of strength applies to Montana brands as to these brands.

STRONG				WEAK	
FANCIFUL	ARBITRARY	SUGGESTIVE	DESCRIPTIVE	GENERIC	
Original, contrived terms with no linguistic significance	Common words with no distinct link with the goods or services	Words suggest the nature of goods or services but do not directly describe them	Words describe goods or services or a region, a surname or aspects of goods or services	A brand name or trademark that has become synonymous with a product	
				ASPIRIN	
				ESCALATOR	
				SHREDDED WHEAT	
				YO-YO	

Montana Lawyer graphic

the exclusion of other business owners — that is until they can show that their marks have acquired secondary meaning become famous (discussed further in the following paragraph). The U.S. Patent and Trademark Office (USPTO) will typically reject these types of marks. If the USPTO issues a registration for this type of mark, the mark may still be difficult to enforce and subject to cancellation by a challenging party, depending on the facts of the particular case. For a more complete list of marks that are not typically eligible for registration, see 15 U.S.C. § 1052 and MCA 30-13-303.

The risks of a weak or unregistrable mark can be avoided through careful selection of an “arbitrary,” “fanciful,” or “suggestive” trademark. For a basic reference of what constitutes a weak or a strong trademark, see the trademark spectrum of distinctiveness above. Of course, in reality many clients are already so committed to their chosen name by the time they

come and speak with an attorney that they are not inclined to go back to the drawing board. One consolation for these clients is that their otherwise unprotectable surname or geographically descriptive mark can become protectable by building a reputation (or “secondary meaning”) over time. A business owner must be able to prove secondary meaning to the USPTO or the courts through evidence such as the length of time that the name has been used in commerce, the amount of money expended on advertisements, and/or consumer surveys indicating that the public connects the mark with the particular business. Some examples of once weak marks that became protectable by gaining secondary meaning include Kentucky Fried Chicken and McDonald’s.

Careful choice of the mark is the easiest way to avoid

# Naming A Business

from page 11

trademark disputes. Once the mark is chosen, the availability of the mark needs to be assessed.

## Proper Clearance of the Mark: Advanta v. Avanta

The fact that a client has searched a business name and thinks that it is available may not mean that is the case. Though a business name appears available through a search of the Montana Secretary of State website, there still may be risk of a trademark infringement suit. An informal search should be followed by a professional search for a better look at users of the mark, or similar marks, across the entire country and globe. There are many companies that specialize in compiling such searches for only a few hundred dollars. The attorney can then review the search results and identify others who may have superior rights to the mark and give the client a “clearance opinion” as to whether it is advisable to proceed with the mark. The cost is small compared to even the cost of responding to a cease-and-desist letter. Case in point...

Laurel Federal Credit Union had its doors open for business for many years before changing its name to Avanta Federal Credit Union in July 2004.<sup>4</sup> Laurel Federal Credit Union officials felt a need to change the name because many people thought that it was a requirement to live in Laurel in order to bank there.<sup>5</sup> When it originally considered changing its name, credit union officials considered names such as “America First” and “First Community.”<sup>6</sup> However, through their own research they found that those names were already used by other banks and credit unions.<sup>7</sup> According to one executive, “Avanta was picked because it was a name that meant nothing but was easy and had a clean, progressive feel.”<sup>8</sup> Indeed, Avanta would fall into the class of a strong “fanciful” trademark, not descriptive of the services offered, and would in theory make for a strong mark.

While the credit union believed they had selected a unique safe name, this was not the case. The Montana Secretary of State and National Credit Union Association both cleared the name and the credit union incurred the expenses of changing its name. However, when Advanta Federal Credit Union in Utah learned of the new name, they felt it was too close to their own federally registered name.<sup>9</sup> The Utah-based credit union gave Avanta one year to change its name before they would file a lawsuit.<sup>10</sup> Avanta conferred with its attorneys who advised them that Advanta’s case was strong and that it was

advisable to move away from the newly chosen name.<sup>11</sup> An executive of Avanta commented that “We thought we’d done due diligence before, but the attorney said it is close enough and you won’t win.”<sup>12</sup>

Avanta avoided a lawsuit, but at a substantial cost. It paid \$80,000 to change the new signs at its seven locations.<sup>13</sup> Presumably they incurred additional expenses to change the credit union’s name on debit cards, credit cards, advertising materials, etc.<sup>14</sup> While the client had cleared the initial “knock out” search for competing names, the expensive second name change could likely have been avoided by obtaining a clearance opinion that would have utilized a comprehensive trademark clearance search.

A second Montana example is a business formerly known as Rattlesnake Creek Vineyard, which faced similar problems when the owners of a Washington winery claimed that they had already registered this name.<sup>15</sup> When the owners of the Missoula-based winery first opened their doors for business, they did not do a nationwide search before selecting the name.<sup>16</sup> If they had done so, they may have identified that a Washington winery had registered the mark “Rattlesnake Ridge” in 1997.<sup>17</sup> The owner of the Missoula winery admits that when he initially saw the cease-and-desist letter from the Washington winery, he thought, “How dare they?”<sup>18</sup> He was ready to fight for the name, and he originally believed that he would have a good argument in court.<sup>19</sup> The name was chosen because the winery was near Rattlesnake Creek, so the Missoula winery believed they had a valid claim to it.<sup>20</sup> However, after consulting counsel, the Missoula winery learned that their case was weak in the face of Rattlesnake Ridge’s federal trademark, which had been in place for several years. Rattlesnake Creek decided to change their name.<sup>21</sup>

Trademark lawsuits are often expensive. They typically require an analysis of consumer confusion which requires surveys and survey experts that can cost tens of thousands of dollars. Legal expenses could easily run \$200,000 or more if taken to trial.<sup>22</sup> Therefore, even a case that is “winnable” may cause serious financial hardship to a business.

Like Avanta, Rattlesnake Creek dodged a lawsuit by changing its name, but the failure to properly clear the name before launching into business was still costly.<sup>23</sup> At the time the Missoula winemakers had 2,000 bottles of wine with the “Rattlesnake Creek” label waiting to be sold.<sup>24</sup> If Rattlesnake Ridge would have prevailed in a trademark infringement

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 Robert Struckman, *Trademark complaint forces Missoula winery to find another name*, Missoulian, December 11, 2005, available at [http://missoulian.com/news/local/trademark-complaint-forces-missoula-winery-to-find-another-name/article\\_6fc1d0ea-7c19-50d2-8ad7-4b24e2f49745.html](http://missoulian.com/news/local/trademark-complaint-forces-missoula-winery-to-find-another-name/article_6fc1d0ea-7c19-50d2-8ad7-4b24e2f49745.html).

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

4 Jan Falstad, *Have you heard? Laurel Credit Union changes its moniker*, Billings Gazette, July 13, 2004, available at [http://billingsgazette.com/business/have-you-heard-laurel-credit-union-changes-its-moniker/article\\_a1b4f012-faa5-5988-923f-896b483510d1.html](http://billingsgazette.com/business/have-you-heard-laurel-credit-union-changes-its-moniker/article_a1b4f012-faa5-5988-923f-896b483510d1.html).

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 Advanta Forces Avanta to Become ‘Altana,’ <http://thefinancialbrand.com/6794/avanta-fcu-becomes-altana/> (last visited August 16, 2014).

10 *Id.*



suit, they could have been awarded all profits obtained under the infringing mark. They also could have demanded that infringing product be turned over or destroyed. Of course these consequences were avoided by changing the name. The Missoula winemaker renamed the business with a more arbitrary mark, “Ten Spoons,” which is a combination of the letters of their last names.<sup>25</sup> However, this story still demonstrates the importance of being careful when you select a business name.

The lessons from Avanta and Rattlesnake Creek are clear. Regardless of the strength of your name, proper clearance of a trademark is critical before launching into business. Trademark clearance typically takes place in two steps: (i) an informal search on search engines and the United States Patent and Trademark Office for the mark or confusingly similar marks, and (ii), a search report from a company that specializes in trademark search reports. The reports are relatively inexpensive (typically \$300-\$400), and they provide a fairly comprehensive look at uses of the mark or similar marks in commerce. The searches cover federal marks, state marks in all 50 states, domain names, international marks, and scores of trade journals and commercial publications. Once the clearance search has been done, it can be used to analyze the critical questions of whether the mark is a good candidate for federal registration, the risk the client faces in being challenged by another mark holder, and the strength of your client’s mark should it need to stop infringers in the future.

Once a strong mark is chosen and cleared, it is ready for registration.

### Registration of the Mark: ‘Hold my beer and watch this’

Last winter Big Sky Brewing Co., armed with a federally registered trademark, was successful in pressuring Anheuser Busch to drop a popular advertising campaign that infringed Big Sky Brewing’s mark. Anheuser-Busch, the nation’s leading brewer, launched a popular advertising campaign for its Bud Light label featuring videos with the theme “hold my beer and watch this.”<sup>26</sup> Big Sky Brewing Co. had been using this tag line with its IPA since 2004.<sup>27</sup> In 2009 Big Sky obtained federal registration of the mark.<sup>28</sup>

Armed with a federal trademark, and in spite of Anheuser-Busch’s command of 47 percent of the national market, Big Sky filed suit in federal court within four weeks of the launch of the campaign.<sup>29</sup> While Anheuser-Busch was defiant in public statements, it chose to abandon the ad campaign rather than fight the suit. Anheuser-Busch was apparently savvy enough to know the strength of a federal registration. It was also likely aware that if it lost to Big Sky, it could be forced to disgorge all of its profits that a judge or jury might deem

were the result of the popular ad campaign — which of course could be substantial.

For its part, Big Sky made clear that it had no animosity toward Anheuser-Busch, but that it wanted to protect its claim to the trademark and avoid the public thinking that Big Sky had copied the phrase from Anheuser-Busch.<sup>30</sup> Whether or not Big Sky intended to pursue a suit through trial, Big Sky was able to confidently protect its mark because it owned the federal registration. The consequences were a relatively swift resolution, the ability to continue to use the mark, and the windfall of national media attention for Big Sky.

If Big Sky had not registered the mark, the story could have been very different. Anheuser-Busch might have registered the mark, and Big Sky might have ended up on the receiving end of a cease-and-desist letter. Big Sky could have been forced to abandon the mark or defend a lawsuit. At best, Big Sky might have succeeded in defending its right to use the mark in the limited geographic region that it had prior to an Anheuser-Busch registration. But even this result may have required substantial litigation expense.

In short, there can be tremendous value, both defensively and offensively, in owning a federal trademark registration. The process may cost a couple of thousand dollars initially, this is a bargain compared to the tens of thousands of dollars

<sup>30</sup> *Id.*

Naming A Business, page 23



Montanans recently voted to retain me as a member of the Montana Supreme Court. I attribute my victory to your overwhelming and strong support. I am deeply grateful for the friendship and encouragement from so many of my Montana State Bar Association colleagues. Thank you very much.

————— Justice Mike Wheat —————

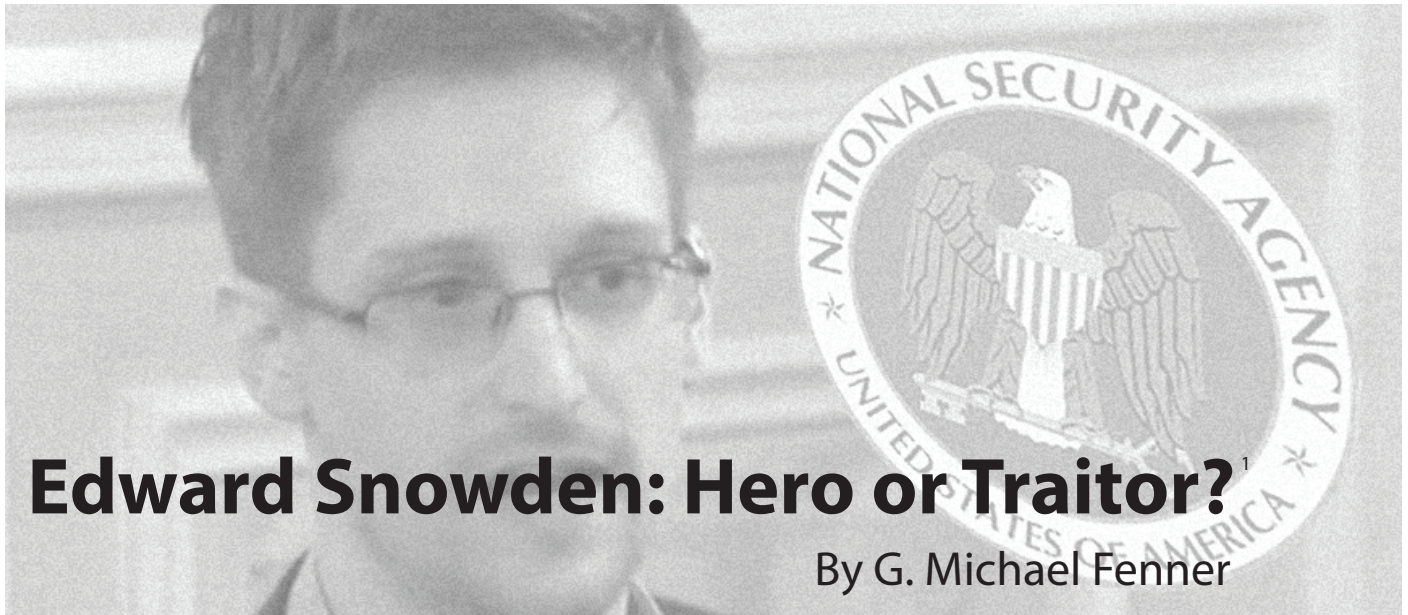
<sup>25</sup> *Id.*

<sup>26</sup> Alice Miller, *Big Sky Brewing Co. not a stranger to dealing with trademark infringement*, Missoulian, Jan. 12, 2014, available at: [http://missoulian.com/news/local/big-sky-brewing-co-not-a-stranger-to-dealing-with/article\\_cbe2066a-7586-11e3-9e8c-001a4bcf887a.html](http://missoulian.com/news/local/big-sky-brewing-co-not-a-stranger-to-dealing-with/article_cbe2066a-7586-11e3-9e8c-001a4bcf887a.html); see also, Lisa Brown, *A-B, Big Sky settle trademark dispute*, St. Louis Post-Dispatch, January 23, 2014, available at: [http://www.stltoday.com/business/local/a-b-big-sky-settle-trade-mark-dispute/article\\_4f5bdaf1-e59a-5569-ab94-fb0ca53adb05.html](http://www.stltoday.com/business/local/a-b-big-sky-settle-trade-mark-dispute/article_4f5bdaf1-e59a-5569-ab94-fb0ca53adb05.html).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*



# Edward Snowden: Hero or Traitor?<sup>1</sup>

By G. Michael Fenner

*Note: This article by Creighton University Constitutional Law Professor G. Michael Fenner was originally published in The Nebraska Lawyer and is reprinted with permission.*

Is Edward Snowden a hero or a traitor? Let me work my way up to an answer to that question.

## I. A brief history of U.S. surveillance of domestic communications

I will start with an oversimplified history of American surveillance of domestic communications: not surveillance of communications taking place outside the U.S. As someone once said, “Outside the United States, the CIA prowls the alleys without a leash.”<sup>2</sup>

If your data leaves the country — even if only routed through an outside server — our intelligence community can access it at will. We learned not so long ago that the CIA got a hold of Mayer, Brown & Platt attorney-client privileged documents because the client was outside the U.S. and the documents were captured outside the U.S.

**CIVIL WAR:** Domestic surveillance by the federal government was first used on a significant scale under President Abraham Lincoln during the Civil War. But, of course, this was surveillance of an enemy that was operating domestically.

**WORLD WAR I:** During WWI a Military Intelligence Division (MID) was created within the Army. Its charge included locating German spies and saboteurs. It didn’t find many enemy agents, so it turned its attention to the investigation of Americans MID considered dangerous: real or suspected labor unionists, pacifists, socialists, Communists and civil rights activists.

**AFTER WWI:** After the war, MID joined with the newly

created FBI. They compiled dossiers on thousands of American citizens, conducted illegal raids, made illegal arrests and subjected many citizens to interrogation. They helped local authorities crush labor strikes and suppress racial disturbances.

**WORLD WAR II:** During World War II, domestic military surveillance expanded substantially. By then, military intelligence was called G-2. FDR gave G-2 responsibility for protecting defense plants, and it established a network of thousands of informants. G-2 reported on radical labor and political groups and what it called “semiradical” groups concerned with pacifism and civil liberties. Do you see a pattern here?

**AFTER WWII:** Shortly after WWII the federal government persuaded—and here’s where the surveillance begins to look a little bit modern. The federal government persuaded the three major American telegraph companies to hand over most of their traffic. That program continued until 1975 and collected the telegrams of 75,000 American citizens.<sup>3</sup>

**THE 1960s:** In the ’60s, under J. Edgar Hoover, the FBI devoted considerable resources to the secret surveillance of anti-war protestors, desegregationists and Communists. At the same time, the CIA was heavily engaged in secret domestic surveillance. Much of Hoover’s surveillance was illegal. And all domestic surveillance by the CIA was directly contrary to federal statutory law. The causative events were, by and large, the civil rights movement and the protests against the war in Vietnam.

When this FBI and CIA surveillance came to light, Congress did three things. But first ....

**MARCH 8, 1971:** How did we learn of this ’60s surveillance? The first trickle of information came to the media in the form of documents stolen from the FBI. The theft happened under cover of darkness on March 8, 1971, the night the country’s attention was focused on the Fight of the Century: the Ali-Frazier fight in Madison Square Garden. Burglars took a lock pick and



a crowbar and broke into the Media, Pennsylvania, office of the FBI. They put nearly every document in the office into boxes, carted them off to a house in the Pennsylvania woods and anonymously mailed the stolen documents to various newspaper reporters.

Here is what one of the burglars said, “When you talked to people ... about what the FBI was doing, nobody wanted to believe it. There was only one way to convince people that it was true, and that was to get it in their handwriting.”<sup>4</sup>

One of the documents was a memo from Hoover that urged agents to step up their interviews of antiwar activists and members of dissident student groups. Hoover wrote, “[I]t will enhance the paranoia endemic in these circles and will further serve to get the point across that there is an FBI agent behind every mailbox.”<sup>5</sup> Likely the most absurd of these documents revealed that the FBI sent Martin Luther King an anonymous blackmail letter threatening to expose his extramarital affairs if he did not commit suicide.<sup>6</sup>

**FISA, FISC, & SENATE SELECT COMMITTEE:** When this FBI and CIA surveillance came to light, Congress stepped in. The year was 1978, 36 years ago.

- Congress passed a statute, Foreign Intelligence Surveillance Act (FISA) to put a leash on domestic surveillance.
- Congress created the Federal Intelligence Surveillance Court (FISC) where, in part, the executive branch is to seek warrants allowing domestic surveillance.
- Congress created the Senate Select Committee on Intelligence to oversee our intelligence agencies.

Thirty-six years ago Congress separated the surveillance power leaving some with the executive branch and giving some to a court and some to a legislative-oversight committee — creating two buffers between executive branch surveillance and us.

**EXPLOSIONS:** The next-to-the-last stop in this brief history of domestic surveillance: (1) Technology has exploded. (2) Our ability to communicate worldwide, to transmit data and documents — instantaneously, continuously and essentially for free — has exploded. (3) Our ability to collect, categorize, collate and store that information has exploded. (4) The ability of our enemies to terrorize us has exploded. (5) On 9-11 the Twin Towers exploded.

The law is having trouble keeping up.

**JUNE 15, 2013, THE GUARDIAN:** On June 15, 2013, the British newspaper The Guardian reported the first of several leaks of classified material from Edward Snowden. Former Deputy CIA Director Michael Morell said that this was the “most serious compromise of classified information in the history of U.S. intelligence.” I don’t know about that. I am not qualified to judge it. I just know that it was said by a man who might be qualified to judge.

**LESSONS TO BE LEARNED:** Of course there are lessons to be learned from this history. First, these powers are conferred in times of war or domestic turmoil. Historically “turmoil” has included labor-union organization, civil-rights activism and war protests.

**Hero or Traitor?, page 16**



## JESSICA RUTZICK & ASSOCIATES, PC

### ERISA First Party Insurance Bad Faith

- health insurance
- life insurance
- disability insurance
- property insurance
- commercial general liability
- failure to defend

Wyoming • Montana • Idaho

60 East Simpson  
P.O. Box 4114  
Jackson, WY 83001

(307) 733-8140  
jrutzick@rutzicklaw.com  
www.rutzicklaw.com

The Wyoming State Bar does not certify any lawyer as a specialist or expert. Anyone considering a lawyer should independently investigate the lawyer’s credentials and ability, and not rely upon advertisements or self-proclaimed expertise.

# Hero or Traitor?

from page 15

Second, once granted, these powers are always expanded and often in ways that are ultra vires. Like censorship, the surveiller first surveils the one thing and then looks for something more to surveil. We all want to keep our jobs; we all want our organizations to grow. The power of the surveiller expands, the scope of the surveillance expands, and it keeps expanding until something or someone stops it.

Third, whenever we set up this kind of security system there is a great tendency to produce “false-positive errors: [to] label as suspicious people and events that are actually perfectly normal.”<sup>8</sup> To label as suspicious, for example, desegregationists, antiwar protesters and union organizers — those opposed to those in power.

## II. Where are we today with domestic surveillance?

■ Today the NSA collects metadata: Telephone metadata includes the number called, the number from which the call came, the length of the call, how often the one number calls the other. Internet metadata includes email and I.P. addresses, who an email is from and to whom it is sent, frequency of communication and location information. It includes Web sites visited. It includes the electronic traces left when a person goes online.

■ According to a recent study, people worldwide send 182 billion emails each day;<sup>9</sup> over 67 trillion messages a year. The NSA collects this metadata randomly. They collect as much of it as they can and they keep the records for 5 years.<sup>10</sup>

Last December, Gen. Keith Alexander — at the time he led the NSA and the U.S. Cyber Command — said that “[t]he NSA is collecting metadata of more than 300 million Americans.”<sup>11</sup> Last December the population of the United States was just over 317 million.<sup>12</sup> 300 million is most of us. At the turn of this year the Washington Post reported that the NSA collects 5 billion new records a day.<sup>13</sup>

In February of this year the Wall Street Journal reported the story under this head- line: “NSA Gets Only 20% Of Phone Records.” The article reports that the NSA gets 20% of the phone records of 95% of us. Their stated intention is to “catch up.”<sup>14</sup>

We’ve come a long way since the days of telegram surveillance when, over 30 years, the Government collected information on 75,000 citizens by reading their telegrams.

■ FISA, the statute, requires that when the NSA wants to collect metadata it must get a FISC surveillance warrant. The warrant allows the NSA to collect metadata only — not the contents of the calls, emails and the like. If the news reports and Gen. Alexander are correct and the NSA is collecting some metadata of most Americans, then the surveillance court is either

- very busy, or
- issuing general warrants, or
- rubber-stamping warrants, or
- the NSA is not abiding by FISC’s rulings,<sup>15</sup> or

- the NSA is not going to FISC for warrants.
- And it appears that it may be mostly the latter two.

Why would the NSA engage in warrantless surveillance?

FISA requires a warrant, but the executive branch has opinions from Justice Department and White House lawyers stating that the NSA can conduct national security operations without a warrant. What we know about these legal opinions is that they rely on a congressional resolution declaring war against al-Qaida, the President’s commander-in-chief powers and his inherent powers over military and foreign affairs.

I say, “What we know about these legal opinions” because the opinions are classified. They are secret. The details of the analysis have not been disclosed.

■ So, we have secret justifications for the NSA not going to FISC for warrants. Add this: It is difficult to tell exactly how many requests for surveillance warrants FISC gets per year. This is secret as well. But there are some fairly reliable, if vague, figures that indicate that FISC gets thousands of warrant requests each year and that it approves all but a very few.

A retired federal judge who is a friend of mine and was on FISC, said that the reason there are so few denials is this. Often the Court will tell the government that their warrant request is not sufficient and the government will take it back and investigate further and redo the request to make it sufficient. Sometimes that goes on multiple times with the same warrant request, until the government meets the legal standard. Or until the government gives up and withdraws its request.

That, he told me, is why there are not many judgments of denial. But there are many de facto denials. And, he said, the court is not a rubber stamp. I believe him because I believe him.

## III. Is It Legal?

The first problem with deciding if this surveillance is legal is the problem of finding out just what is being done. It is almost all done in secret — as surely some of it has to be. Most of what we know about what is actually being done is a result of Snowden’s leaks and subsequent admissions by the intelligence community that would not have been made but for Snowden’s leaks.

The second problem is that when the intelligence community does tell us what they are doing, it is difficult to determine if they are telling us the truth. For example, in March of 2013, James Clapper, a retired Air Force general and President Obama’s Director of National Intelligence testified before the Senate Intelligence Committee. Sen. Ron Wyden asked Clapper a question. As a courtesy, he had provided him a writ ten copy of the question in advance of the hearing. Clapper was not taken by surprise.

Wyden: “Does the NSA collect any type of data at all on millions or hundreds of millions of Americans?”

Clapper: “No sir.” Wyden: “It does not?”

Clapper: “Not wittingly. There are cases where they could inadvertently perhaps collect, but not wittingly.”<sup>16</sup>

Sen. Wyden did not believe him. His office contacted Clapper’s office and asked Clapper to acknowledge that his answer had been wrong. Clapper declined. Subsequently,



Snowden's leaks clearly showed that the Director of National Intelligence's answer was incorrect. After the leak, Director Clapper wrote to the Intelligence Committee, saying "My response was clearly erroneous, for which I apologize."<sup>17</sup>

It is difficult to know what exactly is being done because it is largely being done in secret. And, when told what is being done, it is difficult to know whether we are being told the truth ... until we "get it in their own handwriting." Snowden got it in their own handwriting.

#### A. Statutory Law

Since the Snowden revelations a number of FISC judges have criticized the NSA for continually collecting more information than the statute and the court's opinions allow and for continuing to misrepresent its activities to the court. One judge wrote that he was "exceptionally concerned" that the NSA has been operating in "flagrant violation" of the court's orders and "directly contrary" to the NSA's own sworn statements.<sup>18</sup>

On the other hand, as I said earlier, the White House has secret legal opinions stating that the NSA can collect much of this information without a warrant and so neither FISA nor FISC control what it can do.

Is this surveillance program illegal under statutory law? It depends on how much you know about what is being done and whether you agree with the Executive Branch's legal opinions that, in this regard, the President does not have to follow statutory law or court orders.

I will say this: Justice Robert H. Jackson once famously wrote that the President's power is strongest "[w]hen [he] acts pursuant to an express or implied authorization of Congress." It is weakest when he "takes measures incompatible with the expressed or implied will of Congress."<sup>19</sup> The president seems to be taking action "incompatible with" the express will of Congress and the Court.

#### B. Constitutional Law

And what about the Constitution?

■ Search and Seizure: When thinking about these surveillance cases we tend to jump to the 4th Amendment. Is this an unreasonable search and seizure? Well, in many ways the 4th Amendment is irrelevant here. It is self-executing in criminal trials. There is no trial here.

Regardless, the NSA argues that the 4th Amendment does not apply to the collection of metadata. First, they argue that the Fourth Amendment applies only to "law enforcement" and they are not involved in law enforcement. They are just gathering data relevant to national security and foreign affairs.<sup>20</sup> Second, they cite a 1979 Supreme Court opinion, *Smith v. Maryland*.<sup>21</sup>

*Smith v. Maryland* (1979): A pen register is a device that records all numbers called from a particular telephone landline. A victim was being called by the man who had robbed her. At the phone company, and without a warrant, the police installed a pen register on Smith's line. Sure enough, he called the victim. Smith argued that the pen-register evidence was an unreasonable search and seizure.

The Supreme Court held that Smith did not have an expectation of privacy regarding phone numbers he called. First, those numbers were automatically given out to a third party — the phone company that routed the calls to the recipient. Second, if Smith did have a personal expectation of privacy, it was not

"reasonable." No warrant required. The intelligence community argues that the kind of information they are gathering is automatically released to third parties — phone companies; Internet service providers; routers; web sites; tracking services; Google; and the like.

Well, a pen register provides phone numbers called. Metadata reveals whom we call, how often and how long we talk; to whom we send emails and who all is on the distribution list; what websites we visit and how long we stay — it is one thing if a person stumbles into a pornography site, a gambling site, a support group for those with Parkinson's disease, or the site of a suspicious charity and it is another to linger. And remember what Gen. Alexander said last December: The NSA is collecting some metadata of approximately 95 percent of all Americans.

Earlier this year a federal district court judge issued a preliminary injunction against some of this NSA surveillance.<sup>22</sup> He found the surveillance program likely an unconstitutional search and seizure. He wrote that much has changed in the 34 years since *Smith* was decided. Our relationship with our phones has changed. And metadata reveals so much more about us than just the number we call. He granted a preliminary injunction against surveillance of the plaintiffs. The government appealed directly to the Supreme Court, which declined to take the appeal.

*U.S. v. Jones* (2012): More recently there is *U.S. v. Jones*. The police attached a GPS to a car. The owner made several trips to a crack distribution center. A unanimous Supreme Court held this tracking was an unreasonable search and seizure.<sup>23</sup> With metadata the NSA is tracking us — even tracking us to crack distribution centers. We can buy crack over the Internet, from the comfort of our living rooms. The federal government arrested a young American who they allege was running a major drug distribution business from his laptop computer. His site put buyers in touch with sellers, took a piece of each sale and had a rating system where buyers and sellers could rate each other. The drugs were delivered by UPS and USPS. The money was electronic.<sup>24</sup> He got rich before he got caught.

*Riley v. California* (2014): And there is a third case, one from this year. *Riley v. California* involved a warrantless search of the data on the cellphone of a man who had been arrested. Regarding exceptions from the Constitution's requirement that the police get a warrant, the Court said that it assesses the degree to which the search intrudes on privacy versus the degree the search is needed for the protection of legitimate government interests. "Modern cell phones," said the Court,

have an immense storage capacity. Before cellphones, a search of a person was ... only a narrow intrusion on privacy. But cell phones can store millions of pages of text, thousands of pictures, or hundreds of videos.

[T]he Fourth Amendment was the founding generation's response to the reviled "general warrants" ... of the colonial era, which allowed British officers to rummage through homes in

# Hero or Traitor?

from page 17

an unrestrained search for evidence of criminal activity.<sup>25</sup>

The court said that the police need a warrant before they can search a cellphone. It also recognized that, “One well-recognized exception applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.”<sup>26</sup>

If the test for exceptions to the warrant requirement is a balance of the degree of intrusion on one’s privacy and the degree to which the search is necessary to serve legitimate government interests, then let us consider each side of that balance.

On the one side, the intrusion into privacy seems pretty serious. The Court said that the 4th Amendment was a reaction “to the reviled ‘general warrants’ ... of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.” This sounds a lot like what the NSA is doing today: rummaging in an unrestrained search for evidence of criminal activity.

On the other side, the government’s interest today is one right at the top of the list: national security. But national security was the interest of the British “general warrant” as well. The extent to which this much surveillance is needed to serve national security is difficult to determine. Both the surveillance and whatever security it has provided are secret.

Exigent circumstances include terrorist situations. But what we have here is not a “terrorist situation,” but the NSA spreading a wide net to see if they can find something that looks like it could possibly be a terrorist situation.

One response may be, “Well, the NSA is going to FISC and getting warrants.” And perhaps they are, but 300 million warrants? It sounds a lot like those “reviled ‘general warrants.’”

And there is a history of NSA clouding the issue, if not outright lying about what they are doing. It is, after all, the culture of spying that the spies must lie about even the most basic fact — who they are. There is also evidence that the NSA does not always comply with the FISC Court’s orders. It all looks a lot like unrestrained rummaging.

■ **Privacy:** Second, there is the independent right-to-privacy argument — independent of the Fourth Amendment search-and-seizure argument. This is not likely to get very far with the current Supreme Court. It is too amorphous a right for this court and too tied into abortion.

Outside of the 4th Amendment, there currently is no right to privacy regarding surveillance. But perhaps there should be. Even if the NSA is only collecting metadata, it can learn a lot about the private parts of your life. Are you going to porn sites, gambling sites, or Alzheimer’s sites? Are your porn sites heterosexual, homosexual, transsexual — or do they involve children? What do you watch on TV, what books do you order from Amazon, what movies do you order from Netflix, what magazines do you read online? Do you regularly call an AIDS clinic, a psychiatrist or a woman who is someone else’s wife? And do you do so from the privacy of your home?

■ **Free Speech:** Some argue that the real constitutional problem here is freedom of speech. We become hesitant to speak if we believe government is listening. Interpretation of the free speech — preventing government from taking actions that cause the timid and the poor to refrain from speaking for fear of prosecution and the attendant costs, both financial and psychological.

During the Civil Rights movement of the ’60s, Southern sheriffs would go around to NAACP meetings and the like with cameras with no film in them. They pretended to take pictures of those in attendance. It was a form of intimidation. And it worked on some people.

Remember the FBI memo quoted earlier? Hoover urged agents to step up their interviews with antiwar activists and members of dissident student groups. “It will enhance the paranoia endemic in these circles and will further serve to get the point across that there is an FBI agent behind every mailbox.” Current NSA practices get the point across that we are under surveillance in record numbers and concerning record amounts of personal information.

The problem, some say, is that all of this surveillance of phone calls, emails, tweets, web searches and the like chills speech. And most days on the news we hear examples of surveillance chilling speech in places like China, Russia and the Middle East. Some see it happening here.

## C. Is It Legal? — I Don’t Know

Justice David Souter once wrote, “In my own ignorance I have to accept the real possibility that ‘if we had to decide today ... just what the First Amendment should mean in cyberspace, we would get it fundamentally wrong.’”<sup>27</sup> Justice Anthony Kennedy has written, “The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.”<sup>28</sup> I think the problem with discussing the law as applied to this massive surveillance is that we are applying old models to new technologies. How do you govern 21st century communication with 19th and 20th century models? Not well.

Judge Leon from the District of Columbia was addressing the Supreme Court’s opinion in the Smith case, the case heavily relied on by the NSA, when he said, “The notion that the government could collect similar data on hundreds of millions of people and retain that data for a five-year period, updating it with new data every day in perpetuity, was ..., in 1979, the stuff of science fiction.”<sup>29</sup>

Is it legal? I don’t know. We are using 100+ year-old models to solve today’s problems. So much is secret and shrouded in half-truths or outright lies. Members of FISC have criticized the NSA for violating FISA and the surveillance court’s orders. The executive branch says that it does not have to comply with legislative or judicial mandates. One federal judge has found that this surveillance is likely unconstitutional, a couple of others have said it is not unconstitutional.

Is it legal? We won’t know until the Supreme Court tells us. And that Court has had a couple of opportunities to take this up and has denied cert.

## IV. Who Guards the Guardians?

There are serious national security concerns at risk here.

And a first-job of government is keeping its people safe and secure. We must protect the homeland.

Let's go back to our ancient roots for a moment, when we hunted by day and we either lived in caves or envied those who had caves. That is when we learned this: No matter how strong you are, you are vulnerable when you go to sleep. It is just as true today, when we live in grand homes and others live in caves. No matter how strong we are, we are vulnerable when we go to sleep. Someone has to stay alert.

There is a pyramid famous in some circles: Maslow's hierarchy of needs. What we as humans need first is food, drink, shelter and warmth. What we need second is security. All other needs build on that base. Government must prevent the use of force directed against its people.

But of course, there is another side to this: On the one hand, our guardians must remain awake and alert. On the other hand, as Justice Kennedy put it, "Liberty protects the person from unwarranted government intrusions ..." <sup>30</sup> The intrusions keep us safe so that we may have liberty. And yet, each intrusion costs us some measure of liberty.

So the question becomes, How do we protect ourselves from those who protect us? How do we maintain the balance between safety and liberty? And who decides where that balance lies?

So far it seems to be mostly the Executive Branch. You may trust this President, but not his predecessor. Or vice versa. I'll tell you who I do not trust with this power: NIXON & HOOVER. Over the long haul of history, I don't trust presidents to make these kinds of decisions. And I am pretty sure it would have troubled our Founding Fathers.

■ Regarding presidential war powers, the war against terror will outlive me and my friends. It may have been fine in the past to give a President this kind of unfettered power when we were at war with a defined enemy and one side or the other was going to win in a few years. War no longer comes in such neat packages.

■ Regarding the unitary executive, as most recently defined by John Yoo and Dick Cheney, it justifies effectively unchecked presidential power intelligence gathering. "Unchecked" includes at least these two things: the President can set aside laws that attempt to limit his power over national security; and his actions are not subject to judicial review.

This is what the Founding Fathers knew: When you give the Chief Executive too much power, it does not end well. Too much power in a king, general, or president leads to suppression, repression, even genocide. The Arab Spring lasted about as long as Spring in North Dakota.

Who draws the line between security and liberty? Well, it is all three branches. But, since *Marbury v. Madison*, in the end it is the Judicial Branch. The courts must play a big role. Of course courts can only react to what they know. For this to work, one branch cannot be allowed to hide the ball from the others. Our judges need to hold the secret-keepers' feet to the fire. As Judge Leon has done, courts must hold the NSA to FISA's warrant requirement and they need to hold the NSA to offering some evidence that it needs the information — that in each application they have the compelling interest of national security on their side.

Judge Leon wrote that there is little evidence that any

significant terror plots have been thwarted. And, you'd think that if there were some solid evidence of thwarted plots the government could have submitted that evidence to the Court — and this can be done in camera.<sup>31</sup> Secrets needn't be revealed. It does not have to be done in open court. As with the Nixon tapes, it can be turned over to the judge. Eyes only.

It is difficult to assess what is being done because so much of it is done in secret. And when they do tell us something, their record of telling the truth is not a very good one. The intelligence community must regain the trust of the Courts by being open and candid with federal judges. The executive branch has to tell the truth, at least to the other Branches. Separation of powers cannot work when two of the three branches do not know what is going on.

The question for the intelligence community should not be "Can we keep this all secret?" Rather, the question should be "How much do we really need to keep secret?" The real problem with secrecy is not secrets, but stupidity. The problem with spying is not spying, but stupidity. One of the lessons of the history of secrecy is that once we begin keeping secrets, we don't seem to stop. We don't ever stop with keeping the big things secret. We move on and stamp small things as secret as well. Likewise, once we spy on the one, we move on and spy on the other.

It was revealed last August that the CIA — you remember: overseas it prowls the alleys without a leash, but is forbidden from domestic spying — admitted that it has been spying on the Senate Select Committee on Intelligence. It secretly monitored the emails of its guardian.

## V. Edward Snowden: Hero or Traitor?

Snowden, hero or traitor? There are, I suppose, four positions. Traitor. Hero. Both. Too soon to tell. My position is the latter. History will judge Edward Snowden. Right now it is too soon to tell.

He surely is a criminal, but then so was Martin Luther King, Jr. He was a criminal who broke segregationist laws in his crusade for racial justice. And he is a hero. Edward Snowden is a criminal. He broke the law, he says, to stop massive illegal domestic spying by the NSA, as if the Watergate burglary had been classified secret and he'd leaked that information. He says he is protecting our liberty, just what MLK Jr. was doing. Will history judge Snowden to be a hero? I don't know.

Perhaps a close analogy is Daniel Ellsberg. In the late '60's the Rand Corporation conducted a study of government decision making during the War in Vietnam. The report was not favorable to the United States. It concluded, among other things, that the executive branch had consistently lied to Congress and the American people about the war. In 1969 Ellsberg secretly photocopied that report. He provided photocopies to the New York Times. He released a stolen national-security document to the press and the public.

As with Snowden, at the time some considered Ellsberg a traitor and others considered him a hero. Perhaps in Snowden's case the answer to the hero/traitor question is that both are right, but that in the end, like Daniel Ellsberg, one day Snowden will not have a national holiday named after him and will be

# Hero or Traitor?

from page 19

largely forgotten. But in his wake, he might have left some positive changes in the oversight of our national security system. Hero or traitor? “Maybe so and maybe not.”<sup>32</sup>

**G. Michael Fenner received his Bachelor of Arts degree from Kansas University in 1965; and his JD, with distinction, from the University of Missouri-Kansas City in 1969. From 1969-1972 he was a trial attorney in the Honors Law Graduate Program with the United States Department of Justice. He joined the Creighton Law faculty in 1972. He served as president of the Nebraska State Bar Association in 2013-2014.**

## Endnotes

- 1 This article began as a 20-minute speech to the Omaha Bar Association and became a one-hour speech to the 8th Circuit Judicial Conference.
- 2 John Rasdan, “The Unresolved Equation of Espionage and International Law” (2007), reprinted in “Ethics of Spying: A Reader for the Intelligence Professional” (Jan Goldman ed. 2010).
- 3 Up to this point, much of this history is based on material found at The Oxford Companion To American Military History Domestic Surveillance (Oxford University Press, Inc., 2000) found at Answers.com 19 Oct. 2014. <http://www.answers.com/topic/domestic-surveillance> (last visited Oct. 19, 2014).
- 4 Newsfeed.Time.com (Jan. 7, 2014) available at <http://newsfeed.time.com/2014/01/07/new-details-on-historic-fbi-office-burglary-and-other-fascinating-news-on-the-web/> (last visited Oct. 19, 2014).
- 5 Betty Medsger, “Remembering an Earlier Time when a Theft Unmasked Government Surveillance,” The Washington Post (Jan. 10, 2014) available at [http://www.washingtonpost.com/lifestyle/style/remembering-an-earlier-time-when-a-theft-unmasked-government-surveillance/2014/01/10/30e9ee44-7963-11e3-8963-b4b654bcc9b2\\_story.html](http://www.washingtonpost.com/lifestyle/style/remembering-an-earlier-time-when-a-theft-unmasked-government-surveillance/2014/01/10/30e9ee44-7963-11e3-8963-b4b654bcc9b2_story.html) (last visited Oct. 19, 2014).
- 6 Editorial: Los Angeles Daily News (Jan. 7, 2014), available at <http://www.dailynews.com/opinion/20140107/unchecked-gov-ernment-power-leads-to-dangerous-excess-editorial> (last visited Oct. 19, 2014).
- 7 CBS News, “60 Minutes,” John Miller interview with Mike Morell (Oct. 30, 2013) available at <http://www.cbsnews.com/news/the-deputy-director-mike-morell/> (last visited Oct. 19, 2014).
- 8 Malcolm Gladwell, “Trust No One,” The New Yorker 70, 73 (July 28, 2014).
- 9 “8 Reasons Why Email is Vital for Online Campaigning and Fundraising,” <http://www.campaignion.org/blog/8-reasons-why-email-vital-online-campaigning-and-fundraising> (last visited Oct. 19, 2014).
- 10 PRO PUBLICO, FAQ: “What You Need to Know About the NSA’s Surveillance Programs,” <http://www.propublica.org/article/nsa-data-collection-faq> (last visited Oct. 19, 2014).
- 11 CBS News, “60 Minutes,” John Miller interview with Gen. Keith Alexander (Dec. 15, 2013) available at <http://www.cbsnews.com/news/nsa-speaks-out-on-snowden-spying/> (last visited Oct. 19, 2014).
- 12 <http://www.census.gov/popclock/> (last visited Oct. 19, 2014).
- 13 Bryan Fung, The Washington Post, “The Switchboard: NSA Is Collecting 5 Billion Cellphone Geolocation Records a Day,” found at <http://www.washingtonpost.com/blogs/the-switch/wp/2013/12/05/the-switchboard-nsa-is-collecting-5-billion-cell-phone-geolocation-records-a-day/> (last visited Oct. 19, 2014).
- 14 Wall Street Journal (Saturday/Sunday Feb.8-9 (2014).
- 15 As for the NSA not following the Orders of the FISC, see Ryan Liza, State of Deception, The New Yorker, Dec. 16, 2013, at 56.
- 16 Id. at 48.
- 17 Id. at 50.
- 18 Id. at 56.
- 19 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
- 20 See federal register, executive order 12333—United States Intelligence Activities, 46 F.R. 59941, 3 C.F.R. 1981 Comp, at 200, found at <http://www.archives.gov/federal-register/codification/executive-order/12333.html> (last visited Oct. 19, 2014).
- 21 *Smith v. Maryland*, 442 U.S. 735 (1979).
- 22 *Klayman v. Obama*, 957 F. Supp. 2d 1 (D.C. D.C. 2013).
- 23 *United States v. Jones*, 132 S.Ct. 945 (2012).
- 24 Danny Yardon, The Wall Street Journal, “Arrest Made of Alleged Head of Secret Online Drug Market,” (Oct. 2, 2013), available at <http://online.wsj.com/articles/SB10001424052702303492504579111804007803082> (last visited Oct. 19, 2014).
- 25 *Riley v. California*, 537 U.S. , 134 S.Ct. 2473, 2489-94
- 26 Id. (internal quotation marks omitted).
- 27 *Denver Area Educ. Telcoms. Consortium v. FCC*, 727, 777 (1996) (Souter, J., concurring) (quoting Lawrence Lessig, The Path of Cyberlaw, 104 Yale L. J. 1743, 1745 (1995)).
- 28 *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010).
- 29 Klayman, *supra* at 47.
- 30 *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).
- 31 Klayman, *supra* at 41 n.65.
- 32 Trey Anastasio & Thomas Marshall, Phish, *Stash*, on “A Live One” (Electra Entertainment Group 1995).



# Fastcase announces lineup of free webinars on schedule for 2015



Fastcase provides free live training webinars so that you can learn how to use Fastcase right from the comfort of your own computer. Each of our webinars carries free CLE credit from participating bar associations or partners. Credit may be restricted to members of that bar association or partner organization, so please check with your bar association or partner organization for further details. For webinar handouts or to review our accreditation listings, please go to [www.fastcase.com/webinars](http://www.fastcase.com/webinars). The 2015 Fastcase webinar schedule is below.

## Introduction to Legal Research on Fastcase

Introduction to Legal Research is designed for new Fastcase users. The presentations cover basic Fastcase features with a focus on case-law searches and statute searches. (60 min.) Sign up to learn more using the links below.

- Tue, Jan 6, 2015 12:00 PM - 1:00 PM EST — <https://www1.gotomeeting.com/register/245018184>
- Tue, Feb 3, 2015 12:00 PM - 1:00 PM EST — <https://www1.gotomeeting.com/register/144636649>
- Tue, Mar 3, 2015 4:00 PM - 5:00 PM EST — <https://www1.gotomeeting.com/register/544779888>
- Tue, Apr 7, 2015 12:00 PM - 1:00 PM EDT — <https://www1.gotomeeting.com/register/958058312>
- Tue, May 5, 2015 3:00 PM - 4:00 PM EDT — <https://www1.gotomeeting.com/register/170446529>
- Tue, Jul 7, 2015 4:00 PM - 5:00 PM EDT — <https://www1.gotomeeting.com/register/677219216>
- Tue, Aug 4, 2015 12:00 PM - 1:00 PM EDT — <https://www1.gotomeeting.com/register/146107337>
- Tue, Sep 8, 2015 3:00 PM - 4:00 PM EDT — <https://www1.gotomeeting.com/register/349328984>
- Tue, Oct 6, 2015 4:00 PM - 5:00 PM EDT — <https://www1.gotomeeting.com/register/252081632>

## Advanced Tips for Enhanced Legal Research on Fastcase

Advanced Tips for Enhanced Legal Research on Fastcase offers a quick refresher on case law search basics as well as a number of research tips that highlight advanced features. (60

min.) Sign up to learn more using the links below.

- Wed, Jan 7, 2015 12:00 PM - 1:00 PM EST — <https://www1.gotomeeting.com/register/581222648>
- Thu, Feb 5, 2015 12:00 PM - 1:00 PM EST — <https://www1.gotomeeting.com/register/236570929>
- Wed, Mar 4, 2015 4:00 PM - 5:00 PM EST — <https://www1.gotomeeting.com/register/813840976>
- Thu, Apr 9, 2015 12:00 PM - 1:00 PM EDT — <https://www1.gotomeeting.com/register/961359488>
- Thu, May 7, 2015 9:00 PM - 10:00 PM EDT — <https://www1.gotomeeting.com/register/612194928>
- Thu, Jul 9, 2015 4:00 PM - 5:00 PM EDT — <https://www1.gotomeeting.com/register/647081280>
- Thu, Aug 6, 2015 12:00 PM - 1:00 PM EDT — <https://www1.gotomeeting.com/register/777675625>
- Thu, Sep 10, 2015 3:00 PM - 4:00 PM EDT — <https://www1.gotomeeting.com/register/448329793>
- Thu, Oct 8, 2015 4:00 PM - 5:00 PM EDT — <https://www1.gotomeeting.com/register/414858904>

## Introduction to Boolean (Keyword) Searches

Introduction to Boolean (Keyword) Searches is designed for users who are already familiar with the basics of Fastcase but are new to Boolean (keyword) searches or want to learn how to be more efficient using Boolean logic on any legal search engine. (60 min.) Sign up to learn more using the links below.

- Tue, Jan 13, 2015 12:00 PM - 1:00 PM EST — <https://www1.gotomeeting.com/register/647258344>
- Tue, Feb 10, 2015 12:00 PM - 1:00 PM EST — <https://www1.gotomeeting.com/register/382941577>
- Tue, Mar 10, 2015 4:00 PM - 5:00 PM EDT — <https://www1.gotomeeting.com/register/893259217>
- Tue, Apr 14, 2015 12:00 PM - 1:00 PM EDT — <https://www1.gotomeeting.com/register/233925584>
- Tue, May 12, 2015 3:00 PM - 4:00 PM EDT — <https://www1.gotomeeting.com/register/132471424>
- Tue, Jul 14, 2015 4:00 PM - 5:00 PM EDT — <https://www1.gotomeeting.com/register/906998793>
- Tue, Aug 11, 2015 12:00 PM - 1:00 PM EDT — <https://www1.gotomeeting.com/register/964664072>
- Tue, Sep 15, 2015 3:00 PM - 4:00 PM EDT — <https://www1.gotomeeting.com/register/179757072>
- Tue, Oct 13, 2015 4:00 PM - 5:00 PM EDT — <https://www1.gotomeeting.com/register/510292481>



## STATE BAR OF MONTANA

Serving the people of Montana and their attorneys

# Unlock your member benefits at [www.montanabar.org](http://www.montanabar.org)

If you haven't visited us online since our new website launched in July, you should! You will need to set up a password, if you haven't already. Select "forgot password" to set one up.

On the site, you can access many member benefits, including:

- Fastcase legal research, free to active attorneys and Paralegal Section
- Discounts from many partners, including ABA publications, ALPS, DSI disability insurance program, Hertz, Leavitt Group and many more
- Searchable issues of the Montana Lawyer through HeinOnline
- Find your Bar number
- Easy dues payment
- Opt in or opt out of electronic newsletters from the State Bar

## Been to any CLE lately?



Attorneys should report attendance information throughout the year as they attend CLE programming\*

**Please send attendance certificates or other documentation of CLE attendance to:**

Montana Commission of CLE  
P.O. Box 577  
Helena, MT 59624

Or you may email documentation  
or any reporting questions  
to [CLE@montanabar.org](mailto:CLE@montanabar.org)

\* Not necessary for State Bar-sponsored CLE

in legal expense or lost goodwill that the client may incur by not clearing its trademark rights.

State trademark registrations are another option. They are inexpensive and have a number of benefits, including making the client's use of the mark known to others, and providing a registration number that can be used to dissuade others from infringing uses. Unless a mark is registered federally, however, it is enforceable only within the geographical region where it is actually being used. If a business owner has any intention

of expanding its territory in the future, or of licensing its work to others, he or she should seriously consider obtaining a federal trademark registration.

## Conclusion

As demonstrated by these cases, proper selection, clearance and registration of a trademark are critical aspects to choosing a business name. This can be a hard pill to swallow for a cash-strapped business looking to cut costs. The selection of a weak mark, failing to properly clear the marks or failing to federally register the mark can create risks. The analysis is not always simple, but the benefits to the client can be huge.

# Lawyer Referral & Information Service

When your clients are looking for **you** ... They call **us**

**How does the LRIS work?** Calls coming into the LRIS represent every segment of society with every type of legal issue imaginable. Many of the calls we receive are from out of State or even out of the country, looking for a Montana attorney. When a call comes into the LRIS line, the caller is asked about the nature of the problem or issue. Many callers "just have a question" or "don't have any money to pay an attorney". As often as possible, we try to help people find the answers to their questions or direct them to another resource for assistance. If an attorney is needed, they are provided with the name and phone number of an attorney based on location and area of practice. It is then up to the caller to contact the attorney referred to schedule an initial consultation.

**It's inexpensive:** The yearly cost to join the LRIS is minimal: free to attorneys their first year in practice, \$125 for attorneys in practice for less than five years, and \$200 for those in practice longer than five years. Best of all, unlike most referral programs, Montana LRIS doesn't require that you share a percentage of your fees generated from the referrals!

**You don't have to take the case:** If you are unable, or not interested in taking a case, just let the prospective client know. The LRIS can refer the client to another attorney.

**You pick your areas of law:** The LRIS will only refer prospective clients in the areas of law that you register for. No cold calls from prospective clients seeking help in areas that you do not handle.

**It's easy to join:** Membership of the LRIS is open to any active member of the State Bar of Montana in good standing who maintains a lawyers' professional liability insurance policy. To join the service simply fill out the Membership Application at [www.montanabar.org](http://www.montanabar.org) -> Need Legal Help?-> Lawyer Referral (<http://goo.gl/BP2iXn>) and forward to the State Bar office. You pay the registration fee and the LRIS will handle the rest. **If you have questions or would like more information, call Kathie Lynch at (406) 447-2210 or email [klynch@montanabar.org](mailto:klynch@montanabar.org).** Kathie is happy to better explain the program and answer any questions you may have. We'd also be happy to come speak to your office staff, local Bar or organization about LRIS or the Modest Means Program.

## Reception for Chief Judge Thomas is Jan. 22

There will be a reception to honor the Hon. Sidney Thomas, the new chief judge of the Ninth Circuit Court of Appeals, on Jan. 22 in Billings.

The reception will be from 4 to 6 p.m. at the Petroleum Club in Billings. It is being sponsored by the Federal Practice Section of the State Bar of Montana, the State Bar of Montana and the Yellowstone Area Bar Association.

Thomas, 61, a Montana native, took over as chief judge on Dec. 1. He has served on the Ninth Circuit since Jan. 2, 1996. He received his bachelor's degree from Montana State



Thomas

University in 1975 and his Juris Doctor from the University of Montana School of Law in 1978. His court is in Billings.

Also, the Federal Practice Section will be presenting a federal practice CLE in conjunction with the reception.

Details on the CLE were unavailable as of press time. Watch for brochures in the mail or check the calendar at [montanabar.org](http://montanabar.org) for details.

## 11 Bar members, 1 UM law student win election to Montana Legislature

There were 11 members of the State Bar of Montana elected to the Montana Legislature on Nov. 4.

Elected to the state Senate were Sen. Kris Hansen, SD14, Havre; and Sen. Nels Swandal, SD30, Livingston.

Elected to the state House were Rep. Steve Fitzpatrick, HD20; Rep. Austin Knudsen, HD34; Rep. Jeff Essman, HD54; Rep. Art Wittich, HD68; Rep. Matthew Monforton, HD69; Rep. Nate McConnell, HD89; Rep. Ellie Boldman Hill, HD90; Rep. Kimberly Dudik, HD 94, Missoula; and Rep. Andrea Olsen, HD100, Missoula.

Another winner, Rep. Andrew Person, HD96, currently is a student at the University of Montana School of Law.

The State Bar will be tracking several bills throughout the session. Check [www.montanabar.org](http://www.montanabar.org) for more information as the session nears.



Dudik



Essmann



Fitzpatrick



Hansen



Hill



Knudsen



McConnell



Monforton



Olsen



Swandal



Wittich



Person

## Continuing Legal Education

### Annual CLE & Ski program is Jan. 16-18 at Big Sky

The popular Annual CLE & Ski program has been scheduled for Jan. 16-18 at Big Sky Resort.

Presentations include training on Fastcase legal research; a look at the Skiers Responsibility Act; a presentation by Montana Attorney General Tim Fox; and a judicial panel and Supreme Court update from Chief Justice Mike McGrath and Justice Mike Wheat.

Faculty presenters are Mikel Moore, of Moore, Cockrell, Goiooechea & Axelberg P.C. in Kalispell; Kristen Juras, adjunct professor at the University of Montana School of Law; Greg Munro, interim dean of the University of Montana School of Law; Mark D. Parker, of Parker, Heitz & Cosgrove PLLC in Billings; Bruce Spencer, Law Offices of Bruce M. Spencer, Helena; and Tom Singer, Axilon Law Group, Billings. Co-moderators will be Susan Gecho Gobbs, of the People's Law Center, Helena; and

Brian Taylor, of Hall & Evans, Billings.

A new feature for this CLE is the option to order CLE materials on a USB drive. Cost is \$10 per USB drive. To take advantage of this offer, visit the online registration page in the calendar at [www.montanabar.org](http://www.montanabar.org), or call 406-447-2206.

#### UPCOMING CLE

- CLE & Ski—Jan. 16-18, 2015, Big Sky Resort, Yellowstone Conference Center
- Trust Account Management Webinar – Jan. 21, 2015
- Annual Real Estate CLE (Fairmont) — Feb. 13, 2015
- Current Issues in Adjudicating Existing Rights — SB 355 and Filing Exempt Water Rights Webinar – Feb. 18, 2015



STATE BAR OF MONTANA

2015

# CLE & SKI

## **MODERATORS**

Susan Gecho Gobbs, *People's Law Center, Helena*  
Brian Taylor, *Hall & Evans, Billings*

## **FACULTY**

Mikel Moore, *Moore, Cockrell, Goioechea & Axelberg, Kalispell*  
Greg Munro, *UM School of Law* | Kristen Juras, *UM School of Law*  
Mark D. Parker, *Parker, Heitz & Cosgrove, Billings*  
Bruce Spencer, *Law Offices of Bruce Spencer, Helena*  
Tom Singer, *Axilon Law Group, Billings*

## **SPECIAL GUEST SPEAKERS**

Montana Supreme Court Chief Justice Mike McGrath  
Montana Supreme Court Justice Mike Wheat  
Montana Attorney General Tim Fox



BIG SKY RESORT | JAN. 16-18

# Next generation of lawyers can meet their match with mentorship service

*"What we've got here is failure to communicate."*

— The Captain in 'Cool Hand Luke'

**By Matt Lubaroff**

"Cool Hand Luke" centers on the plight of Luke Jackson's fight against a broken system. Our current legal system may not be as broken, but we are facing a communication barrier on the cusp of leaving large swaths of rural America with no access to legal services.

The most recent data about the law school graduating class of 2013 shows that the job market continues to be tough for new lawyers. Not quite as dire as Paul Newman's character's plight, but with only 57 percent of 2013 graduates being placed in long-term, full-time positions where bar passage was required; the news isn't exactly uplifting.

However, we also know that over the next 10 years an estimated 400,000 attorneys will be looking to retire; many of them are solo attorneys with no succession or transition plans for their practices. In communities where there are attorneys, many of them are of the Baby Boomer generation; and while retirement may not be on the doorstep; that knock will come sooner rather than later.

Mentorship is an important and vital step in the training of the next generation of lawyers, as well as providing the opportunity for experienced attorneys to find potential successors. The need to connect our young lawyers with our retiring lawyers is significant and in many cases, urgent. Mentorship helps young attorneys learn the real life scenarios that may affect their practice while forging relationships between the current and future leaders of the legal industry. It also helps established lawyers give back to the profession and makes it better as a result.

If the jobs are there, if retiring attorneys want and need

to connect with up and coming lawyers, if the practice of law is substantive and rewarding, and if our system continues to matriculate qualified and licensed attorneys, then where is the breakdown?

It may come down to communication. In rural areas of the country, it's the challenge of communicating the benefits of living and working on Main Street, USA, and not chasing the highest salary possible to help climb the mountain of debt faced by more and more law school graduates. In these rural communities, the prospect of building a law practice while enjoying the quality of life that a smaller town can provide can be an appealing option. Indeed the work being done by practicing attorneys in more rural areas is impactful case work, work that an associate in a large firm may not get to see for years.

Successful communication, as Cool Hand Luke learned,

requires not just the impact of sending a message, but also another person willing and able to receive that message. To help facilitate the communication is ALPS Attorney Match, a free resource that brings together attorneys from every walk

of the profession. Designed by ALPS, this easy-to-use service is a conduit for mentorship and clerkship opportunities throughout the legal community. From a risk management perspective, stronger communication among lawyers, whether in the form of developing a mentorship relationship or working on a blueprint for succession, helps mitigate risk through shared experiences and proactive planning.

Whether you're a young lawyer looking for a mentor or you're a seasoned attorney looking to transition your practice in a few years, the time is now to establish your connections. Visit [www.alpsattorneymatch.com](http://www.alpsattorneymatch.com) today and sign up to see how you can make a match.

**Matt Lubaroff is director of client services with ALPS**



## 1-888-385-9119

### Montana's Lawyers Assistance Program Hotline

Call if you or a judge or attorney you know needs help with stress and depression issues or drug or alcohol addiction .

# *Season's Greetings from the Montana Justice Foundation*



Because all people deserve equal access to safety, security, and opportunity, the Montana Justice Foundation works to achieve equal access to justice for all Montanans.

- Legal Aid Grants
- Law Related Education
- Loan Repayment Assistance Program

**Many thanks for your support!** May the joy of the season be with you the whole year through.



To learn more about the Foundation and our work or to make a tax-deductible gift please visit us at: [www.mtjustice.org](http://www.mtjustice.org)



# Citizens United decision: A thumbscrew that just keeps turning on We the People

By James C. Nelson

The thumbscrew was a favorite of medieval torturers and 18<sup>th</sup> century slave traders — the thumbs or toes of the victim were inserted into the device, and then were slowly and painfully crushed by incremental turns of the screw. The U.S. Supreme Court's 2010 decision in *Citizens United* (CU) works like that — every little turn of the CU screw crushes another constitutional right of its victims, ordinary people.

We know that CU let slip the dogs of Big Money, Big Business, Big Politics and Big Religion to spend unlimited amounts of dark, mega-money to buy “speech” so as to “inform” the public about candidates and issues. Only fools, or the Roberts’ majority, could fail to foresee that this monetary deluge would corrupt campaigns, deceive voters, and drown out the voices and votes of ordinary citizens. But, then, I repeat myself.

So, here's the latest turn of the CU screw. The nonpartisan American Constitution Society has just released a follow-up to its 2013 *Justice at Risk* report. Authored by Emory law professors Joanna Shepherd and Michael S. Kang, *Skewed Justice: Citizens United, Television Advertising, and State Supreme Court Justices' Decisions in Criminal Cases*<sup>1</sup> describes further empirical research on the corrosive impact of CU on expenditures in judicial elections and judicial decision making. Not surprisingly, the pernicious effects of money in politics has spread from judicial decision-making in civil cases to criminal cases as well — one more turn of the screw.

*Skewed Justice* reaches two principal conclusions: First, the more TV ads aired during state supreme court judicial elections in a state, the less likely justices are to vote in favor of criminal defendants. Second, justices in states whose bans on corporate and union spending on elections were struck down by CU were less likely to vote in favor of criminal defendants than they were before the decision. The results are statistically significant across different specifications and with different control variables.

The tactic the dark-money spenders use is to cherry-pick the disfavored judicial candidate's decisions by selecting one or two criminal cases with which to charge the candidate as being “soft on crime” — for example, “Justice Jones sides with child molester.” We have all seen and heard these “Willie Horton” ads.

Even though the Constitution and law required Justice Jones to vote the way she did, truth is not the objective of the ad; rather, it is to inflame a gullible public and to prejudice the candidate.

Economic and political priorities do not have a whole lot to do with criminal justice policy, but the dark money crowd understands that “soft on crime” attack ads are frequently the

best way to remove from office a justice they oppose—i.e. one who fails to march lockstep with their economic or political agenda. And, sadly, as *Skewed Justice* shows, this misleading and malevolent tactic works. “The influence of campaign spending on judicial decision making extends to a wide range of cases beyond the primary policy interests of the contributors themselves” — to the prejudice of the fundamental rights in which all Americans have a stake.

*Skewed Justice* demonstrates that because of the explosion of independent expenditures resulting from *Citizens United*, outside groups get what they want by buying TV ads that either help sympathetic justices win or that defeat those who are not in step — thus these groups can spend their way into shaping the ideological composition of the judiciary. Furthermore, the study shows that judicial candidates, recognizing this fact, either consciously or unconsciously bias their decisions to avoid — or take advantage of — these ads.

Bottom line: when judicial candidates are forced to look over their shoulders for fear of being saddled with an unpopular, albeit legally correct, decision in a criminal case, they may well vote against the criminal defendant, and, in so doing, negate his or her right to a fair trial, fair sentence or fair appeal. And, that hurts us all; any one of us may wind up in court.

Every person who appears in a court of justice, deserves justice — whether an individual or a business in a civil case or a person who killed an innocent pedestrian while driving intoxicated. Justice is denied when courts and judges fear the consequences of basing their decisions only on the facts and law and ruling in a fair, impartial and independent manner.

Interestingly, the federal Constitution does not textually guarantee a single, solitary right to any entity except to natural human beings. Not one. Every constitutional right which non-human entities presently enjoy—every one of those—has been created from whole cloth by the Supreme Court of the United States. That includes the right of free speech and unlimited political speech.

But that is today's reality. And because of it, dark money perverts and skews the system against criminally accused and convicted persons. Not that the 1 percent of the 1 percent that now fund American politics care, of course. They're happy to turn the screw down another notch and watch the blood flow. Those fundamental constitutional rights guaranteed to We the People — we human beings — just don't fit in with their play books. But, no problem.

As long as the Supreme Court keeps creating constitutional rights out of thin air just for U.S.A. Inc., the big spenders have nothing to worry about. After all, those are the rights that count.

**James C. Nelson is a retired Montana Supreme Court justice.**

<sup>1</sup> [www.skewedjustice.org](http://www.skewedjustice.org)



## Job Postings and Classified Advertisements

**CLASSIFIEDS Contact** | Joe Menden at [jmenden@montanabar.org](mailto:jmenden@montanabar.org) or call him at 406-447-2200.

### ATTORNEYS

**ASSOCIATE ATTORNEY:** Silverman Law Office, PLLC is a rapidly growing firm focusing in the legal areas of tax/transactional/business/real estate/estate planning/Liquor and Gaming Law. We are seeking an attorney with 3+ years experience, that can handle a fast-paced work environment while providing first rate customer service. Applicant must have excellent communication and people skills, as well as a desire to be a team player. Applicant is required to be admitted in Montana. Starting salary D.O.E. Please send your cover letter, references, resume and writing sample to [sandy@mttaxlaw.com](mailto:sandy@mttaxlaw.com).

**CHIEF DEPUTY COUNTY ATTORNEY:** The Yellowstone County Attorney's Office is accepting applications for Chief Deputy of the Felony Division. Starting salary is \$48.06 / hour + longevity and county benefits. Works at the direction of the County Attorney and in conjunction with the Deputy Chief to supervise attorneys and coordinate support staff in all divisions with a focus in the Felony Division. Minimum Requirements: Juris Doctorate; Member of the Montana State Bar; and Minimum 10 years' experience practicing law, criminal litigation, and/or government law in Montana. TO APPLY Submit Résumé, Names and phone numbers of three 3 professional/employment references, Names and cause numbers of three district court level cases worked as primary litigator, and Letter of Interest by 5 p.m., on Dec. 9, 2014, by Mail to Scott Twito, Yellowstone County Attorney, PO Box 35025, Billings, Montana, 59107 OR email to: Scott Twito and Amy Tolzien at [atolzien@co.yellowstone.mt.gov](mailto:atolzien@co.yellowstone.mt.gov). Applicants who require special accommodation due to disability should contact Linnea Forseth at 406- 256-2870.

**CIVIL SOCIAL JUSTICE ATTORNEY:** The Idaho Coalition Against Sexual & Domestic Violence is hiring a full-time attorney to represent the civil legal needs of individuals age 11 to 24 who have been victims of sexual assault and to actively engage in state and national policy work on gender violence and related social justice issues such as economic justice, immigration reform, and reproductive justice. The Idaho Coalition thrives as a multi-cultural organization for the benefit of our team, work and movement to end gender violence. The Idaho Coalition is an Equal Opportunity Employer and strongly encourages applicants from racially or ethnically diverse communities, LGBTQ communities, and individuals with disabilities to apply. Candidates need to have a law degree with a license to practice law in Idaho or commitment to take the Idaho Bar. Position is located in Boise, Idaho with a highly competitive salary and generous benefits including flexible hours and relocation and Bar Exam costs if applicable. A copy of the position posting is attached. To find out more about the Idaho Coalition, go to

[www.engagingvoices.org](http://www.engagingvoices.org).

**CITY ATTORNEY:** The City of Livingston is recruiting for a City Attorney. Required: Juris Doctor degree from accredited law school, license to practice law in Montana and be a member in good standing of the Montana Bar Association. Preferred: 4 years' experience in civil, criminal and/or labor law. Salary: \$65,000 - \$80,000 DOE. Position open until filled. Send resume and letter of interest clearly stating your reasons for choosing a law career in municipal government to: Lisa L Lowy, MHA, Administrative Services Director, City of Livingston, 229 River Rd., Livingston, MT 59047; or [lhowy@livingstonmontana.org](mailto:lhowy@livingstonmontana.org)

**COMMERCIAL/BUSINESS ATTORNEY:** Moulton Bellingham PC seeks an attorney with 3 years or more experience in commercial and business law. Background in accounting, tax law, commercial transactions and/or commercial litigation preferred. LLM Degree in taxation preferred, but not required. Please submit cover letter, resume and references to John Jones, Moulton Bellingham PC, P. O. Box 2559, Billings, MT 59103 or [John.Jones@MoultonBellingham.com](mailto:John.Jones@MoultonBellingham.com).

**ERISA ATTORNEY:** The State Bar of Montana Group Benefits Trust is seeking a qualified ERISA attorney/firm to assist in administering an employee benefit plan to assure the Trust is meeting standards of trustee and fiduciary responsibility and related requirements of ERISA. Fiduciaries to benefit plans must safeguard plan investments, act prudently, avoid conflicts of interest, prevent myriad types of "prohibited transactions" defined by ERISA, make truthful and accurate disclosures to plan participants and be aware of their responsibilities as "co-fiduciaries" to prevent or remedy breaches of responsibility by others. Fiduciary responsibilities and ERISA-prohibited transaction issues can arise in plan investment decisions, benefit claim determinations, service provider hiring, contract negotiations and a wide variety of other contexts. Send applications to: Leavitt Great West, c/o Mary Kay Puckett, 3390 Colton St., Suite A, Helena, MT 59602.

**PROSECUTOR:** The City of Bozeman seeks an attorney to join the City's criminal prosecution services team. F/T career position w/excellent benefits. Criminal law experienced preferred. Salary: \$63,013 – \$69,245 per year as earned DOQ. PREFERRED APPLICATION DEADLINE: 5 p.m Monday, Dec. 15, 2014. Position open until filled. EOE/ADA/Vet Pref. See the full announcement and application instructions at [www.bozeman.net/jobs](http://www.bozeman.net/jobs).

**More classifieds on page 30**

## More classifieds on page 29

**PUBLIC FINANCE/CORPORATE ASSOCIATE:** Dorsey & Whitney LLP is seeking a junior-level associate attorney to join its Missoula office. This associate will have the opportunity to work on both public finance and corporate matters. For more information and to apply, visit [www.dorsey.com/careers/attorneys/openings](http://www.dorsey.com/careers/attorneys/openings). Dorsey & Whitney LLP is an Equal Opportunity Employer.

### OFFICE STAFF

**LEGAL ASSISTANT:** Civil/Criminal Litigation. Send resume/references to: Datsopoulos, MacDonald & Lind, P.C. Attn: Office Admin 201 W. Main, Suite 201, Missoula, MT 59802 [cwekkin@dmllaw.com](mailto:cwekkin@dmllaw.com) ALL INQUIRIES STRICTLY CONFIDENTIAL

**LEGAL SECRETARY/ASSISTANT:** Now searching for a qualified, experienced Legal Secretary/Legal Assistant for an active Solo Practitioner Civil and Criminal Litigation practice. Requirements: 3 plus years' experience ; solid understanding of the litigation process in State and Federal Court. Compensation/Benefits: Competitive, DOE. Contact: 406-690-3535 or [darcy@energyjobsolutions.com](mailto:darcy@energyjobsolutions.com)

### ATTORNEY SUPPORT/RESEARCH/WRITING

**ENHANCE YOUR PRACTICE** with help from an AV-rated attorney with 33 years of broad-based experience. I can research, write and/or edit your trial or appellate briefs, analyze legal issues or otherwise assist with litigation. Please visit my new website at [www.denevilegal.com](http://www.denevilegal.com) to learn more. [mdenevi@bresnan.net](mailto:mdenevi@bresnan.net), 406-541-0416.

**RESEARCH, WRITING, SUPPORT:** Experienced attorneys at Strickland & Baldwin, PLLP, offer legal research, writing, and support. We have over 25 years of combined experience representing both plaintiffs and defendants, and we use that experience to assist you. Find the help you need, read practice tips, obtain CLE credit, and more at [www.mylegal-writing.com](http://www.mylegal-writing.com).

**COMPLICATED CASE?** I can help you sort through issues, design a strategy, and write excellent briefs, at either the trial or appellate level. 17+ years experience in state and federal courts, including 5 years teaching at UM Law School and 1 year clerking for Hon. D.W. Molloy. Let me help you help your clients. Beth Brennan, Brennan Law & Mediation, (406) 240-0145, [babrennan@gmail.com](mailto:babrennan@gmail.com).

**BUSY PRACTICE?** I can help. Former MSC law clerk and UM Law honors graduate available for all types of contract work, including legal/factual research, brief writing, court/depo appearances, pre/post trial jury investigations, and document

review. For more information, visit [www.meguirelaw.com](http://www.meguirelaw.com); e-mail [robin@meguirelaw.com](mailto:robin@meguirelaw.com); or call 406-442-8317.

### OFFICE SPACE/SHARE

**BOZEMAN:** Walk to Law & Justice center from law office with five exec. offices, two small private offices, conf. room, kitchen, two baths, 2nd fl. stor. space w/shower, new paint and carpet, 2900 sq. ft., ample parking. Contact Mike McKenna: [mckennamt@gmail.com](mailto:mckennamt@gmail.com) or call 406-587-0792.

**BOZEMAN:** Professional office space available for rent shared with other well established attorneys in great location with quick access to the courts, downtown, 19th Avenue, and university. Ready to occupy with potential referral opportunities. Office amenities include: copy machine, postage meter, two conference rooms, kitchen and reception area with lobby coverage. Contact: Charlotte char@dmwlawmt.com or 406-582-0027.

**STEVENSVILLE:** Professional office building downtown on Main Street available for lease starting October 1. Detached 1 story building with 10-car parking lot. Approx. 2,800 sq. ft. leasable space includes full first floor and basement. Ready to occupy modern offices, conference room and reception/waiting room. Central heat, a/c, lovely landscaping. Perfect for small firm or growing solo practitioner. Contact [hellkorb@stjohns.edu](mailto:hellkorb@stjohns.edu) or call 917-282-9023

### MEDIATION

**MEDIATION SERVICES:** Effective Jan. 1, 2015, Stuart Kellner will provide mediation services under the name Kellner Mediations. He plans to operate primarily electronically regarding scheduling, engagement letters, receipt of mediation memos and billing at [kellnermediations@montana.com](mailto:kellnermediations@montana.com). Any necessary mailings may be sent to P.O.Box 1166, Helena, MT 59624. His business cell phone is 406-431-1027.

**AVAILABLE FOR MEDIATIONS AND ARBITRATIONS:** As former executive vice president and chief counsel of ninth largest private employer in the U.S. and with over 45 years legal experience, my practice focuses on mediation and arbitration. Available as a neutral resource for complex commercial, class-action, ERISA and governmental agency disputes. Detail of experience, professional associations and cases provided on request. Francis J. (Hank) Raucci, 406-442-8560 or [www.gsjw.com](http://www.gsjw.com).

### CONSULTANTS & EXPERTS

**FORENSIC DOCUMENT EXAMINER:** Trained by the U.S. Secret Service and U.S. Postal Inspection Crime Lab. Retired from the Eugene, Ore., P.D. Qualified in state and federal courts. Certified by the American Board of forensic Document Examiners. Full-service laboratory for handwriting, ink and

paper comparisons. Contact Jim Green, Eugene, Ore.; 888-485-0832. Web site at [www.documentexaminer.info](http://www.documentexaminer.info).

**COMPUTER FORENSICS, DATA RECOVERY, E-DISCOVERY:**

Retrieval and examination of computer and electronically stored evidence by an internationally recognized computer forensics practitioner. Certified by the International Association of Computer Investigative Specialists (IACIS) as a Certified Forensic Computer Examiner. More than 15 years of experience. Qualified as an expert in Montana and United States District Courts. Practice limited to civil and administrative matters. Preliminary review, general advice, and technical questions are complimentary. Jimmy Weg, CFCE, Weg Computer Forensics LLC, 512 S. Roberts, Helena MT 59601; 406-449-0565 (evenings); [jimmyweg@yahoo.com](mailto:jimmyweg@yahoo.com); [www.wegcomputerforensics.com](http://www.wegcomputerforensics.com).

**BANKING EXPERT:** 34 years banking experience. Expert banking services including documentation review, workout negotiation assistance, settlement assistance, credit restructure, expert witness, preparation and/or evaluation of borrowers' and lenders' positions. Expert testimony provided for depositions and trials. Attorney references provided upon request. Michael F. Richards, Bozeman MT 406-581-8797; [mike@mrichardsconsulting.com](mailto:mike@mrichardsconsulting.com).

## INVESTIGATORS

**PRIVATE INVESTIGATOR:** Accurate Private Investigator for civil or criminal cases. Licensed in Montana for over 30 years. Zack Belcher, 541 Avenue C, Billings, Montana, 59102. Phone: 1-406-248-2652.

**INVESTIGATIONS & IMMIGRATION CONSULTING:** 37 years investigative experience with the U.S. Immigration Service, INTERPOL, and as a private investigator. President of the Montana P.I. Association. Criminal fraud, background, loss prevention, domestic, worker's compensation, discrimination/sexual harassment, asset location, real estate, surveillance, record searches, and immigration consulting. Donald M. Whitney, Orion International Corp., P.O. Box 9658, Helena MT 59604. 406-458-8796 / 7.

## EVICCTIONS

**EVICCTIONS LAWYER:** We do hundreds of evictions statewide. Send your landlord clients to us. We'll respect your "ownership" of their other business. Call for prices. Hess-Homeier Law Firm, 406-549-9611, [ted@montanaevictions.com](mailto:ted@montanaevictions.com). See website at [www.montanaevictions.com](http://www.montanaevictions.com).

# Modest Means

## Would you like to boost your income while serving low- and moderate-income Montanans?

**We invite you to participate in the Modest Means program** {which the State Bar sponsors}.

If you aren't familiar with Modest Means, it's a reduced-fee civil representation program. When Montana Legal Services is unable to serve a client due to a conflict of interest, a lack of available assistance, or if client income is slightly above Montana Legal Services Association guidelines, they refer that person to the State Bar. We will then refer them to attorneys like you.

## What are the benefits of joining Modest Means?

**While you are not required to accept a particular case, there are certainly benefits!**

You are covered by the Montana Legal Services malpractice insurance, will receive recognition in the Montana Lawyer and, when you spend 50 hours on Modest Means and / or Pro Bono work, you will receive a free CLE certificate entitling you to attend any State Bar sponsored CLE. State Bar Bookstore Law Manuals are available to you at a discount and attorney mentors can be provided. If you're unfamiliar with a particular type of case, Modest Means can provide you with an experienced attorney mentor to help you expand your knowledge.

## Questions?

**Please email:** Kathie Lynch at [klynch@montanabar.org](mailto:klynch@montanabar.org). You can also call us at 442-7660.

# MONTANA LAWYER

State Bar  
— of —  
Montana

State Bar of Montana  
P.O. Box 577  
Helena MT 59624



## ALPS MONTANA

YOUR ENDORSED LAWYERS' MALPRACTICE  
CARRIER FOR OVER 25 YEARS

(800) 367-2577 | [www.alpsnet.com](http://www.alpsnet.com)



STATE BAR OF MONTANA  
Serving the people of Montana and their attorneys

- More Montana lawyers trust ALPS than any other carrier
- Founded by lawyers for lawyers, in partnership with the State Bar of Montana
- Montana lawyer input on policy features and risk management

ALPS is proud to be endorsed by more State Bars than any other carrier, including yours.