MONTANA LAWYER

State Bar of Montana

December 2016/January 2017
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5 STEPS

TO SECURING YOUR DIGITAL ASSETS

STEP 1: IDENTIFY YOUR CYBER ASSETS

Plus: Understanding risks of IT vendor contracts

Also in this issue

MONTANA LAWYER

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E-mail: jmenden@montanabar.org

Montana Lawyer Staff
Publisher | *Christopher L. Manos*
Editor | *Joe Menden*
406-447-2200; fax: 442-7763
e-mail: jmenden@montanabar.org

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INDEX
Dec. 2016/Jan. 2017

Feature Stories

Regular Features

In Legislature, citizens make the best lobbyists

State Bar of Montana President Bruce Spencer is a solo practitioner based in Helena. His practice areas emphasize, governmental relations, creditors' rights, commercial law, automotive law, insurance law, and health care law.

Your President is a lobbyist.

I know, shocking, but true. I make a good part of my living lobbying for clients at the Montana Legislature. As we are ramping up for another session soon I thought I would pen something supporting us lobbyists who are so often maligned.

There are not hordes of lobbyists swooping down on unsuspecting legislators like locusts. Those figures given in end of session press reports of a ratio of 250-1 are based on the number of times a lobbyist registers with Montana's Commissioner of Political Practices. Most lobbyists, myself included, represent more than one principal, hence the figure is inflated. I would estimate the core group is between 50 and 75 individuals, a good portion of whom are our fellow lawyers.

Lobbying is not limited to the rich and powerful. Consumer interest groups, labor unions, others of more modest means, even your own State Bar of Montana have a lobbying presence in your state capital. In fact, the most effective testimony is from public citizens. I have seen the public, either by testifying in person at the Capitol or by contacting their representatives, have profound impact on the status of bills. Please remember that when you are concerned about a proposed bill. It's far more effective if you simply call or email your legislators personally.

Lobbyists cannot afford to lie. Much like attorneys in a small state like Montana, a lobbyist cannot afford to lie. All I have to impart is information, if it's inaccurate my credibility – and thus usefulness as a lobbyist – is shot.

The true heroes of the legislature, Montana's legislators, deserve our thanks. Legislators give tirelessly during a grueling 90-day session. They are not well paid, and as private citizens must give up their families and businesses to serve Montana. They sit for countless hours and listen to public input, lobbyists included, and continue to be gracious, thoughtful, and outstanding public servants.

Finally, we as attorneys need to thank our fellow lawyers who are serving as legislators in the 2017 legislative session. Attorneys provide a unique and vital perspective to legislators, and I would encourage all attorneys reading this to consider running for the Legislature. Thank you to the following attorneys for your sacrifice in serving as Montana state legislators: Rep. Austin Knudsen, Rep. Jeff Essman, Rep. Nate McConnell, Rep. Ellie Hill Smith, Rep. Kim Dudik, Rep. Shane Morigeau, Rep. Andrea Olsen, Sen. Steve Fitzpatrick, Sen. Kris Hansen, Sen. Nels Swandal, and Sen. Cynthia Wolken.

"I have seen the public, either by testifying in person at the Capitol or by contacting their representatives, have profound impact on the status of bills. Please remember that when you are concerned about a proposed bill."

Clausen joins Missoula office of Brown Law Firm

The Brown Law Firm, P.C., with offices in Billings and Missoula, announces that Catrina V. Clausen has joined the firm as an associate at the Missoula location.

Clausen grew up in the San Francisco Bay Area. She graduated from Chapman University in 2011 where she studied environmental policy and chemistry.

Clausen

Clausen came to Montana to pursue her love of fly-fishing and the outdoors. She earned her J.D. in 2016 from the University of Montana School of Law. While attending law school, she completed her clinical internship with the ASUM Legal Services and received the CALI Excellence of the Future Award in criminal law. She was a student representative for the Federalist Society.

During her third year, she interned for the Brown Law Firm. Catrina is admitted to practice law in both the state and federal courts of Montana. She is a member of the Yellowstone Area Bar Association, Western Montana Bar Association, and Montana Defense Trial Lawyers Association. Her legal practice focuses on civil defense litigation.

Michaels joins Bloomquist Law Firm's Dillon office

Bloomquist Law Firm P.C., with offices in Helena and Dillon, has announced that Calli J. (Oiestad) Michaels has joined the firm's Dillon office as an associate.

Michaels graduated from the University of Montana School of Law with high honors. In law school, she was president of the Rural Advocacy League, Executive Editor of the Montana Law Review, and a recipient of the Margery Hunter Brown Law Assistantship. She also worked as a summer intern for the Montana Department of Agriculture, which gave her insight into the state government framework. After law school, she clerked for the Honorable N. Randy Smith of the United States Court of Appeals for the Ninth Circuit, where she gained an understanding of appellate practice and experience conducting in-depth legal research.

Michaels

Michaels holds an undergraduate degree in range science. Prior to law school, she worked for sheep and cattle ranches, first as a ranch hand and later as a natural resource specialist for a private consulting company. As a range scientist, Michaels conducted rangeland vegetation sampling in six Western states, documented grazing use on public lands, developed rangeland management plans, and provided litigation support for permittees.

Michaels will continue her focus on rangeland management, public land use, and administrative law at Bloomquist. She proudly hails from Melville, Montana, and can be contacted in Dillon at 406-683-8795 or cmichaels@helenalaw.com.

Nygren joins as partner at Berg, Lilly & Tollefsen

Chris Nygren became a partner at Berg, Lilly & Tollefsen, P.C., in Bozeman on Nov. 1, after leaving Barnard Construction Company, where he was in-house counsel for over four years.

Nygren's professional background includes 15 years as a partner at the law firm of Milodragovich, Dale, & Steinbrenner, P.C., in Missoula and 11 years as a professional engineer. Nygren graduated from Montana State University and spent time in the U.S. Navy Submarine Service before obtaining his law degree from the University of Montana.

Nygren

Nygren will serve clients in the areas of insurance, regulatory, business, and employment law, with a focus on transactional construction work and construction and property litigation. He is a past president of the State Bar of Montana's Construction Law Section and has extensive jury trial experience in Montana, as well as in other states around the nation.

He looks forward to expanding the litigation capabilities of the Berg Law Firm as he grows his practice.

Member and Montana News

Harrison joins Matrium Law Group in Missoula

Matrium Law Group in Missoula has announced that Janet L. Harrison has joined the firm.

Harrison specializes in family law and also offers settlement conferences and mediation services. She previously practiced law as Janet Harrison Law, PLLC in Missoula. She has experience in railroad retirement issues related to marital dissolution as well as third-party parenting and grandparent visitation rights. Janet was admitted to the State Bar of Montana in October 2010 and is admitted to practice in Montana State Courts and U.S. District Courts in the District of Montana.

Harrison

Harrison received her J.D. from the University of Montana School of Law. She has a bachelor's degree in biology and a master's in computer science from the University of Denver and spent 10 years as a software engineer prior to moving to Missoula. She has lived in Missoula with her family since 1999 and enjoy hiking, biking and skiing.

If you need help with a divorce, parenting plan, adoption, child support, child custody or prenuptial agreement, let her know. You can reach her at 406-550-3772 or janet@matrium-law.com. For more information, visit Matrium Law Group's website at http://www.matriumlaw.com/.

Injunction puts overtime rule changes on hold

An article in the November edition of the Montana Lawyer detailed changes in overtime rules that were scheduled to take effect Dec. 1, 2016. Those rules, which would have made an estimated 4 million more American workers and 11,000 Montanans eligible for overtime pay heading into the holiday season, are now on hold after a federal court blocked its implementation in late November.

The U.S. District Court in the Eastern District of Texas granted the nationwide preliminary injunction on Nov. 22, saying the Department of Labor's rule exceeds the authority the agency was delegated by Congress.

The ruling is a blow to the Obama administration's labor-law plans. Overtime changes set to take effect Dec. 1 are now unlikely be in play before power shifts to a Donald Trump administration, which has spoken out against Obama-backed government regulation and generally aligns with the business groups that opposed the overtime rule.

The long-term outlook of federal overtime rules is still unclear, pending the final outcome of the legal challenge and any action taken by the next administration. The Montana Lawyer will provide updates when there is more clarity.

USA Today has more details on the ruling: https://goo.gl/Dfco3j

Bar announces discounts on MyCase, Clio practice management software

The State Bar of Montana is excited to announce that it has agreed in principle with law practice management software companies Clio and MyCase to offer discounts on their products to State Bar members.

With these partnerships, State Bar members in good standing will be eligible for 10 percent discounts on both Clio and MyCase products. Both Clio and MyCase also are offering bar members 30-day free trials.

The new benefits will roll out after the agreements are finalized in the coming weeks. Details on how to take advantage of the affinity programs will be made available at www.montanabar.org, in our Bar Briefs e-newsletter, and in future editions of the Montana Lawyer.

For more on Clio, visit clio.com. For more on MyCase, visit mycase.com.

For a listing of other State Bar member discounts available to you, go to: http://www.montanabar.org/?page=Benefits.

Voters elect new Montana District Court judges

By Joe Menden

Voters elected three new Montana District Court judges in this year's November elections.

Helena attorney Mike McMahon was elected1st Judicial District judge (Broadwater and Lewis and Clark counties); Missoula attorney Matthew J. Cuffe was elected 19th Judicial District judge (Lincoln County); and Flathead County Justice of the Peace Dan Wilson was elected 11th Judicial District judge (Flathead County).

McMahon

McMahon defeated current District Judge DeeAnn Cooney in the most hotly contested of the races. Judge Cooney was appointed in January 2016 to the seat formerly held by the Honorable Jeffrey Sherlock.

McMahon said he was excited at the election results, and he praised Judge Cooney for a well-run, clean campaign.

"She was a class act," he said. "I was obviously happy the way it ended. And I'm glad it's over."

McMahon said he has a great grasp on civil law, as his practice has focused largely on civil defense, but that he will face a learning curve on the criminal side and on dependency and neglect cases.

He added that he had heard of fears from some members of the plaintiffs' bar that he would be predisposed to side with civil defense, a fear he hopes to put to rest.

"That's simply not the case," he said. "My job is to apply the law to the facts that come before me, no matter who's on what side."

Cuffe

Cuffe beat William J. Managhan in the race to succeed the Honorable James B. Wheelis in Lincoln County, who is retiring at the end of his term. Cuffe and his wife, Christi, are both Libby natives, and he they are both excited to be returning to their hometown county.

"It's been a longtime dream," he said. "I'm happy the vote came out the way it did."

He said that as district judge he will apply the law in a fair and consistent manner.

Wilson was unopposed in his bid to take over for the Honorable David Ortley in Flathead County, who is retiring at the end of his term.

Wilson did not respond to an interview request.

In the only other contested district court judge race, the Honorable Jeffrey Langton beat Hamilton attorney Robert B. Myers in the 21st Judicial District (Ravalli County).

Voters elected to retain the following judges in unopposed elections:

- 1st Judicial District Judge James P. Reynolds of Helena
- 4th Judicial District Judge Leslie Halligan of Missoula
- 4th Judicial District Judge Karen S. Townsend of Missoula
- 8th Judicial District Judge Elizabeth Best of Great Falls
- 8th Judicial District Judge John A. Kutzman of Great Falls
- 11th Judicial District Judge Amy Eddy of Kalispell
- 13th Judicial District Judge Michael Glen Moses of Billings
- 13th Judicial District Judge Jane McCalla Knisely of Billings
- 16th Judicial District Judge Nickolas C. Murnion of Glasgow

Newly formed Intellectual Property Law Section plans events, programs for 2017

By Sarah J. Rhoades

Do you practice or have an interest in intellectual property law?

If you do, please consider becoming an inaugural member of the new Intellectual Property Law Section of the State Bar of Montana. The purpose of the IPL Section is to provide the opportunity and forum for the interchange of ideas and education in areas of law relating to intellectual property rights, including patents, trademarks, copyrights, trade secrets and unfair competition.

What kind of activities is the IPL Section planning?

The section held a community copyright workshop for artists, authors, and designers in November about the basics of copyright law and how to complete their own applications for registration. Two workshops were taught simultaneously – one in Billings and one in Missoula – each at local public libraries.

For the remainder of the inaugural year, we are working on initiatives like the following:

■ Hosting U.S. Patent & Trademark Office Denver regional professionals at the University of Montana in April 2017.

■ Empaneling a Q&A session with Montana IP attorneys at the University of Montana in coordination with the USPTO visit to the campus.

■ Presenting a seminar on international trademark law for the Montana business and legal communities.

■ Collectively creating and presenting a community outreach seminar for IP Attorneys to present to Montana high schools around the state about avoiding online infringement through use of file-sharing programs like BitTorrent.

■ Forming a pro bono program to assist recipients of threatening copyright infringement letters or notices of intent to disclose identity from subpoenaed internet service providers.

■ Organizing a Hot Topics CLE program for the Annual Meeting of the State Bar of Montana in September 2017.

Are there many intellectual property law attorneys in Montana?

We've identified almost 50 members of the bar who practice patent, trademark, and/or copyright law in Montana. More than a dozen of these attorneys have already joined the new IPL Section.

If I'm not a lawyer, how do I join?

Anyone with an interest in IP law can apply to join the IPL Section. Law students can join at no cost but must attend IPL Section functions. All others with an interest in intellectual property law, such as patent agents, innovators, businesses assisting innovators, and others must pay the same $30 annual fee and complete an application stating their interest and subscribing to the Purposes of the IPL Section as stated in the Bylaws.

How do I become an IP Law Section member?

Attorneys and Associate or Student applicants are all eligible to become Inaugural Section Members. The only requirements are the Section fees of $30 and any necessary application must be postmarked by Dec. 31, 2016. Contact Sarah J. Rhoades at 406-721-2729 or sarah@mjsherwoodlaw.com for more details.

Sarah J. Rhoades is a patent and trademark attorney with Sherwood Law Offices in Missoula and is the chair of the Intellectual Property Law Section.

8 Montana attorneys win seats in Legislature in November elections

Eleven Active Attorney members of the State Bar of Montana will be among the legislators in the 2017 Montana Legislative Session.

Eight attorneys were elected in November:

Sen. Steve Fitzpatrick, R-Great Falls; Rep. Austin Knudsen, R-Culbertson; Rep. Jeff Essman, R- Billings; Rep. Nate McConnell, D-Missoula; Rep. Ellie Hill Smith, D-Missoula; Rep. Kim Dudik, D-Missoula; Rep. Shane Morigeau, D-Missoula; and Rep. Andrea Olsen, D-Missoula.

Three other senators – Sen. Kris Hansen, R-Havre; Sen. Nels Swandal, R-Livingston; and Sen Cynthia Wolken, D-Missoula – were not up for re-election in 2016.


Firzpatrick


Knudsen


Essman


McConnell


Smith


Dudik


Morigeau


Olsen

Bar seeks more time to study discrimination rule

The State Bar of Montana has petitioned the Montana Supreme Court to extend its comment period on a proposal to insert an anti-discrimination provision into the Montana Rules of Professional Conduct.

The Bar's Board of Trustees voted to ask for the extension at the board's Dec. 2 meeting in Helena.

The proposal has proven to be controversial. Several bar members have submitted comment to the court opposing the new rule. Meanwhile, David Aronofsky, a former University of Montana School of Law professor and former general counsel of the university, suggested amending the proposal to clarify what would constitute the harassment aspect of the rules.

The proposed MRPC changes would create a new Rule 8.4(g) providing that it is misconduct for a lawyer to:

> engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

The proposal came after the American Bar Association on Aug. 8 adopted the above language in its Model Rules of Professional Conduct. The rule replaced similar language in the comments to the ABA Model Rules.

One of the reasons for moving the anti-discrimination provisions from the comments to the black letter of the rule was because the comments to the rule are only guidance. Supporters felt there was a need for a black letter rule that would be enforceable in disciplinary proceedings.

According to a September 2016 article by Peter Geraghty of the ABA Center for Professional Responsibility, 25 jurisdictions have already adopted an anti-discrimination provision in their black letter Rules of Professional Conduct.

The ABA Commissions on Women in the Profession, Disability Rights, Sexual Orientation and Gender Identity, Racial and Ethnic Diversity in the Profession, Diversity and Inclusion 360 Commission and the Civil Rights and Social Justice Section co-sponsored the proposal to amend the ABA Model Rules.

Some State Bar Board of Trustees members said they were surprised the court hadn't asked for guidance from the bar's Ethics Committee before calling for a comment period on the proposal, which they said has been customary in the past when adopting ABA Model Rules in the MRPC.

Proposed MRPC changes on court agenda

Three controversial proposed changes to the Montana Rules of Professional conduct are on the agenda for the Montana Supreme Court's public meeting on Tuesday, Dec. 13. They are:

- A proposed revision to Rule 1.8(e) on IOLTA reporting requirements. The proposal calls for a penalty for lawyers who fail to comply with the rule. One comment the court received to the proposal, which is printed on page 25 of this issue, calls the entire IOLTA program unconstitutional and calls on the Legislature to take action to stop it.
- A proposed Rule 4.4(c), which would prohibit a lawyer from knowingly accessing or using electronically stored information, *protected* work product, privileged or other confidential information unless the receiving lawyer has obtained permission to do so from the author. The State Bar's Ethics Committee proposed the rule, which is opposed by the State Bar Board of Trustees, the State Bar Technology Committee, and other individuals.
- A proposed Rule 8.4(g), an anti-discrimination provision. (The State Bar has asked to extend the comment period for this proposal. See related story on this page.)

BETTR Section, law school honored by MSU Extension for work on MontGuides

The State Bar of Montana's Business, Estates, Trusts, Tax and Real Property Section and the University of Montana's Alexander Blewett III School of Law were honored at Montana State University Extension's annual conference in November.

The law school and the BETTR Section won Extension's JCEP Arrowhead Award, which recognizes a community partner, for their support of MSU Extension estate planning and financial education programs.

Extension cited the section for its 30 years of support, reviewing documents for accuracy and making suggestions for improvement. Section members have reviewed 39 of Extension's estate planning MontGuides, self-learning publications that are widely used by the general public.

The law school, meanwhile, has provided countless hours reviewing the MontGuides and curriculum, providing pro bono work and helping to ensure that MSU Extension financial education information is accurate and easy to understand.

Bar to institute credit card processing fees

As of Jan. 1, 2017, members who pay fees and assessments by credit card will be charged a processing fee. To avoid this charge mail in your payment in the form of a check, cashier's check or money order.

The credit card processing fee will be reflected on State Bar fee and assessment statements when they are mailed in March.

As of Jan. 1, 2017, prices on store items at the State Bar of Montana website, www.montanabar.org, will increase to account to account for credit card fees.

Laird appointed to open 17th Judicial District judge seat

Yvonne Gaye Laird has been appointed to be the new 17th Judicial District judge, Gov. Steve Bullock announced Nov. 18.

Laird was sworn in on Dec. 5.

Laird, 48, had been a solo practitioner in Chinook since August 2011. Laird provides contract prosecution services on the Fort Belknap Indian Reservation, prosecuting serious violent crimes.

She takes over for the Honorable John McKeon, who announced earlier this year that he will resign effective Nov. 30. The 17th Judicial District encompasses Blaine, Phillips and Valley counties.

A member of the State Bar of Montana since 1996, Laird worked in the Blaine County Attorney's Office for 10 years, serving as Blaine County Attorney from 2003-2006. She also was a staff attorney at Montana Legal Services Association before opening her own firm.

A Montana native, Laird is a 1990 graduate of Concordia College in Moorhead, Minnesota, and a 1996 graduate of the University of Montana School of Law. She lists criminal law, family law and various aspects of civil law as areas of practice experience.

Laird was one of four attorneys whose names the Judicial Nomination Commission forwarded to the governor for consideration for the appointment. The others were Peter L. Helland of Glasgow, Dan O'Brien of Malta and Randy Randolph of Havre.

Photo provided
17th Judicial District Judge Yvonne Laird.

Sandefur elected to high court; district judge hunt to begin

The Honorable Dirk Sandefur's election as a justice on the Montana Supreme Court on Nov. 8 means the Judicial Nomination Commission will soon begin a search for his successor as 8th Judicial District Court judge.

Sandefur must send a letter to the state commission, notifying them he will be leaving his seat in Cascade County. The commission then will notify the public and start soliciting applications.

The application period lasts 30 days and is followed by a public comment period for another 30 days, followed by interviews of candidates, if neccessary. The commission will send the names of three to five candidates to Gov. Steve Bullock, who must choose the new judge from that list.

As of press time, that process had not yet begun. Watch the State Bar of Montana website and Bar Briefs e-newsletter for information as it is available.

3 finalists for Gallatin County District judge sent to governor

Three finalists to become Gallatin County's next district court judge have been recommended to the governor for appointment.

Following interviews Nov. 14 in Bozeman, the Montana Supreme Court's Judicial Nomination Commission recommended Gallatin County Attorney Marty Lambert and private Bozeman attorneys Rienne McElyea and James McKenna.

Gov. Steve Bullock has 30 days after receiving the nominees to select who among them will replace District Judge Mike Salvagni, who is retiring at the end of the year.

The person appointed by the governor is subject to Senate confirmation during the 2017 legislative session. The position also is subject to election in 2018. The successful candidate will serve for the remainder of Judge Salvagni's term, which expires in January 2021.

7 to interview for 5th Judicial District judge seat opening

The Judicial Nomination Commission on Dec. 19 will interview seven applicants for the position of district court judge for the 5th Judicial District (Beaverhead, Jefferson, and Madison counties). They are:

- Luke Michael Berger
- Jed Clayton Fitch
- Lori Ann Harshbarger
- Mathew James Johnson
- Alice Suzanne Nellen
- Valerie D. Wilson
- Roberta R. Zenker

Interviews will begin at 8:30 a.m. in the district court courtroom in the Beaverhead County courthouse, 2 S. Pacific St.in Dillon. Deliberations will follow the last interview. The interviews and deliberations are open to the public; however, public comment regarding the applicants will not be taken because the comment period has closed.

The commission will forward the names of three to five nominees to Gov. Steve Bullock for appointment. The person appointed by the governor is subject to Senate confirmation during the 2017 legislative session. The position is subject to election in 2018. The successful candidate will serve for a six-year term.

The seven to be interviewed are among 13 who applied for the position. The successful candidate will take over the seat currently held by the retiring District Judge Loren Tucker of Dillon.

Ostby, Montana's first female federal judge, left a lasting impact on the judiciary

Editor's Note: This article originally appeared as the Foreword in the most recent issue of the Montana Law Review.[1]

By Professor Cynthia Ford

Judge Carolyn Ostby, the first female judge in the U.S. District Court for the District of Montana, retired on Dec. 1, 2016. The University of Montana School of Law (as it was known when she attended and graduated), the Montana Law Review, the State of Montana, the federal judiciary, and the citizens of Montana and the world all have benefitted greatly from Judge Ostby's unique combination of intellect, compassion, and composure.

Judge Ostby grew up in Wolf Point, Montana, near her father's family's homestead. The three children in the Ostby family all valued education and achieved success in their own fields: Carolyn in law, Nancy (Aagenes) in naturopathic medicine and Alan Ostby in psychology. After high school, Carolyn left Montana to attend Macalester College in St. Paul, Minnesota, but returned for law school. Carolyn received her J.D. from UMLS in 1977 with High Honors. She was an editor of the Montana Law Review and received the SCRIBES (the American Society of Writers on Legal Subjects) Award, presented to the outstanding member of the Montana Law Review. One of the expressed purposes of the award is to "foster clear, succinct, and forcible style in legal writing." Judge Ostby's legal writing, both as a lawyer and as judge, shows the SCRIBES award met its mark.

Judge Ostby began her career as a law clerk to the legendary U.S. District Court Judge Russell Smith in Missoula. (The federal courthouse in Missoula is named after Judge Smith). Notably, two of UM's most prestigious faculty members wrote letters of reference supporting Carolyn's clerkship application: Dean Robert Sullivan and Professor Duke Crowley, neither known for his feminism. After her clerkship, Judge Ostby was selected to the prestigious Honors Program at the U.S. Department

Casey Page/Billings Gazette

The Honorable Carolyn Ostby

of Justice in Washington, D.C., where she worked for two years before again returning to Montana.

In 1982, Judge Ostby joined the prominent Billings law firm then known as Crowley, Haughey, Hanson, Toole and Dietrich. At that time, "the Crowley Firm" had only one office, and fewer than 30 attorneys, but its five named partners all were themselves legendary icons of the Montana Bar and, collectively, were wise enough to lure her away from the DOJ. She was the fourth woman lawyer at the firm, and ended up being the only one who stayed on for an entire career.[2]

Judge Ostby was the consummate litigator: smart, fair, honest, and very prepared. She writes well and thinks better, both without any bombast. Among her many honors, she is a member of the American College of Trial Lawyers, "limited to only those trial lawyers who are unquestionably and eminently qualified, in addition to being regarded as the best in their state/province. Qualifications must include high ethical and moral standards, as well as excellent character…" Her practice included complex commercial litigation and natural resource litigation.

After 20 years in front of the bench in both jury and non-jury trials, in 2002 she was selected by the three federal judges in the U.S. District of Montana to sit on the federal bench as a Magistrate Judge. Fourteen years later, it is clear that the appointment of Judge Ostby was inspired. U.S. District Judge Gustavo A. Gelpí, Jr. summarized the importance of this job:

"The Magistrate Judge is the face of federal courts across the nation whenever a criminal defendant, his family and friends, and any victims first walk into a federal courtroom. Likewise, in an increasing number of civil proceedings, the parties will come to court for the first time to meet a Magistrate Judge in a mediation or other proceeding."[3]

Judge Ostby embodied the best possible face for the federal system to all who entered her courtroom: lawyers, staff, parties, victims, and the public as a whole.

"Throughout her distinguished career, Judge Ostby has set a fine example for others to follow. Although possessed of a sharp intellect and known for her exacting scrutiny of legal arguments, she is unfailingly courteous, fair, and reasonable, and treats every person who appears before her with dignity and respect," Chief Judge Dana Christensen observed when he announced her retirement

Judge Ostby brought her whole self to each case, every day. In recognition of her attentiveness, ability, and judiciousness, many elected to forgo their right to ultimate resolution by an Article III judge and placed the merits of their cases in Judge Ostby's capable hands. Thus, she handled a lot of cases and handled them well, first working in Great Falls and later transferring back to her professional hometown of Billings. A quick survey of cases on WestlawNext for this year, 2016, alone, disclosed 13 opinions by Judge Ostby, reviewed by U.S. District Judge Susan Watters. In most of the cases, the parties did not file objections to Judge Ostby's determinations (but they still are reviewed for plain error). Objection or not, Judge Watters affirmed 100% of these, with only 1 minor change in 1 of the 13 cases.

Judge Ostby's impact is not limited to Montana. As a member of the federal judiciary, she was invited to join the very select Committee on International Judicial Relations of the United States Judicial Conference. As a committee member, she

Ostby, next page

Cavan sworn in as US Magistrate Judge in Billings

Timothy J. Cavan was sworn in as Montana's U.S. Magistrate Judge in Billings on Thursday, Dec. 1.

Chief U.S. District Judge Dana L. Christensen presided over the proceeding, and U.S. District Judge Susan P. Watters administered the oath of office. He succeeds the Honorable Carolyn S. Ostby, who was Montana's first female federal judge. She retired effective Dec. 1.

Cavan, of Billings, was selected from a group of finalists compiled by a court-appointed merit selection panel. He comes to the court after serving most recently as an Assistant United States Attorney.

Cavan graduated with honors from the University of Montana School of Law in 1984. He began his legal career practicing civil trial law with the Billings firm of Sandall, Cavan & Smith, where he became a partner in 1988. From 1996 to 2002, he served as assistant federal defender with the Federal Defenders of Montana, representing indigent defendants charged with federal crimes.

Casey Page/Billings Gazette

The Honorable Timothy J. Cavan was sworn in as U.S. Magistrate Judge on Thursday, Dec. 1.

He worked in the United States Attorney's Office from 2002 until this year, serving as defense counsel in cases involving civil claims against federal defendants. He has been active in various community organizations and is a member of the Yellowstone County Bar Association, the Billings YMCA, Zoo Montana, Yellowstone Art Museum, and Yellowstone Public Radio. He and his wife, Michelle, have three grown children.

Ostby, from previous page

has represented the third branch of our government in several nations where rule of law has not always been the rule, with the goal of assisting with the administration of justice worldwide. One of her first trips was to South Africa. Most recently, Judge Ostby returned from a whirlwind trip to Egypt, where she met with Egyptian lawyers and judges, and appeared on local television. Judge Ostby plans to continue her invaluable work with this committee even after her retirement.

With this litany of professional accomplishments, one might assume that Judge Ostby was entitled to a big case of "black robe disease." Nothing could be further from the truth. We know Judge Ostby to be amazingly extraordinary (the gushing is conscious); she thinks of herself as simply normal, just doing the best she can. My favorite story ever about the judge is a time when she came to Missoula to conduct a hearing and we had agreed to have breakfast before our workdays began. I suggested 7 a.m., but Judge Ostby asked for a delay so that she could finish washing and drying the sheets on her mother-in-law's guest bed. How many other federal judges, in Montana or anywhere, are that thoughtful?[4]

Judge Ostby was dedicated to her work, but she was not all about work. I can't discuss here that night at the cowboy bar, before the kids were born. I can report on her dedication to her family, and her great pride in her stellar children, Paul and Helen. Carolyn was an early pioneer in the difficult arena of combining mothering with lawyering. She once packed up baby Paul and his nanny and headed across the country with senior partner Bruce Toole to take depositions in a large civil case. Later, when she was assigned to sit in Great Falls for five long years, she made the drive to Billings and back almost every weekend so that her family wouldn't have to relocate with her. As is her norm, she never complained about the toll the dual demands of career and family imposed: she just sucked it up and got 'er done, all the while making it look effortless (which it was not!). Now that Paul is a lawyer himself and Helen has been able to combine her education with the love for travel she inherited from her mother, Judge Ostby still remains actively supportive of both from her base in Billings.

There is so much more to Judge Ostby than work and family. She is a testament to work/life balance in the best sense. She keeps in touch with old friends (of whom I am one of many) and makes new ones easily. She is a patron of the Yellowstone Art Center, and an avid reader. She is an accomplished outdoorswoman and athlete. She has, and uses well: skis, a yoga mat, more than one good bicycle, a beautiful canoe, a gym membership, and backpacking gear. Now, as of Dec. 1, she will be able to put more of these to better use, without worrying about all the cases on her desk.

The good news is that Judge Ostby's past record indicates that she will continue to contribute meaningfully to the bar and public of our great state and beyond: retirement simply marks the end of a chapter, not the end of the book. I can't wait to read the next chapter.

ENDNOTES

1 Professor Ford's Foreword was included in the **Montana Law Review**'s most recent Issue, Vol. 77, No. 2, featuring Hillary A. Wandler, *Spreading Justice to Rural Montana: Expanding Local Legal Services in Underserved Rural Communities*, 77 Mont. L. Rev. 235 (2016); Jordan Gross, *Let the Jury Fit the Crime: Increasing Native American Jury Pool Representation in Federal Judicial Districts with Indian Country Criminal Jurisdiction*, 77 Mont. L. Rev. 281 (2016); Paige Griffith, *Why Don't Punitive Damages Punish or Deter? Beyond the Constitution Toward an Economic Solution*, 77 Mont. L. Rev. 327 (2016); Lindsey W. Hromadka, *Conservation Easements & Renewable Energy: Why Conservation Values Should Embrace Wind and Solar*, 77 Mont. L. Rev. 367 (2016); Michael Pasque, *Putting Notice to the Rights to Know and Participate: Creating A Policy for the Montana University System Campuses*, 77 Mont. L. Rev. 387 (2016).

2 I left for Seattle, and then came back to teach; Laura Mitchell decided to devote herself to her twin girls; and Sherry Matteucci became the first female U.S. Attorney in Montana history

3 http://www.fedbar.org/PDFs/A-Guide-to-the-Federal-Magistrate-Judge-System.aspx?FT=.pdf, quoting **The Federal Lawyer** (May/June 2014).

4 If you, dear reader, ARE also a federal judge, I am sure that you (not your spouse!), too, change/wash/replace the linens when you stay at someone's home. If you haven't ever done that, there is always next time. Ditto for you law professors out there.

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Understand the risks and benefits when using third party vendors for IT needs

By Peter Arant and Steve Kreitner

In a survey conducted by the information security research group The Ponemon Institute, 49 percent of all respondents said their organization had experienced a data breach caused by a vendor.[1] This number will likely rise, as organizations increasingly outsource information technology (IT) functions to service providers and store their sensitive data off-site.

The use of vendors to create, store, maintain, and transmit sensitive data does not, in and of itself, mean that the data faces more risk. After all, using a vendor is sometimes advantageous precisely because the vendor can keep data more secure than the organization could on its own.

Adding a vendor to the mix simply means the circumstances have changed which, in turn, means the risks have also changed. Failing to address these risks is where organizations run into trouble.

With this in mind, this article will: (1) discuss data security risks when using vendors to manage sensitive data; (2) outline important vendor-management strategies and action steps; and (3) discuss commonly used contracting strategies for managing data security risks.

PART I: UNDERSTANDING THE DATA SECURITY RISKS POSED BY VENDORS

A. DATA SECURITY RISKS

To understand the threats and vulnerabilities facing data, including those presented by the use of vendors, it is helpful to identify the three basic goals of the data security "CIA Triad":

■ **Confidentiality**: The goal of "Confidentiality" is to keep data out of the wrong hands. If private financial or personally identifiable information is accessed by the wrong party, there can be serious consequences. These consequences can include privacy violations, having to provide legally required notifications to those affected, civil and criminal lawsuits, regulatory fines and penalties, reputational harm, and more.

■ **Integrity**: "Integrity" refers to maintaining the accuracy and trustworthiness of data. For example, if medical information regarding a patient's clinical presentation is altered, the patient's care providers might prescribe the wrong treatment, resulting in serious harm to the patient.

■ **Availability**: An organization's data must be "Available," meaning the organization can access it when needed. For instance, if a law firm lost all of its data, even for a matter of days, it would seriously affect the firm's ability to operate.

1 Ponemon Institute, *Data Risk in the Third Party Ecosystem* available at http://www.ponemon.org/library (April 2016).

Editor's note: *This article was produced by the State Bar of Montana's Health Care Law Section and is based on a Montana Bar CLE webinar presented by Peter Arant and Steve Kreitner on October 12, 2016, titled Understanding Data Security Provisions in IT Vendor Contracts.*

CLE webinar available online

To listen to the recorded webinar, please go to http://montana.inreachce.com/

B. LEGAL AND REGULATORY CONCERNS

Using vendors also poses a variety of legal and regulatory concerns. In highly regulated spaces like health care and banking, for example, there are numerous federal and state requirements regarding data-sharing with vendors. Failing to abide by these requirements can result in regulatory fines or other adverse consequences.

The particular laws and regulations applicable to each circumstance will depend on a wide range of factors: the type of data at issue, the geographic location of the data and the parties, how the data is being used, and more.

PART II: MANAGING VENDOR-RELATED DATA SECURITY RISK

First and foremost, how an organization manages vendors should be aligned with its overall risk management strategy. Taking a risk-based approach to vendor management means identifying the risks associated with each vendor, as well as assessing the likelihood and potential impact of each risk.

Think of it this way: A single vendor, on a single occasion, could cause catastrophic harm to the entire enterprise. If that were to happen, could the organization go after the vendor or rely on insurance to cover its damages?

Effective vendor management should begin with an identification and assessment of each risk facing the enterprise. Then, the organization can evaluate the risk-management strategies available to it. These risk-management strategies commonly include:

■ **Risk Avoidance**. An organization might decide a vendor poses too much risk and choose to avoid the relationship altogether.

■ **Risk Transference**. Organizations often transfer risk to another party through contractual provisions or insurance coverage.

■ **Risk Mitigation**. For instance, an organization can limit the amount of data given to a vendor so that any potential harm

from a breach is also minimized.

Once the organization's risk-management strategy is defined, it should then implement an effective vendor management approach. This involves three components:

■ **Pre-Contractual Due Diligence**: The first step is to determine whether the vendor is capable of providing the services as promised, that it can comply with any legal obligations, and that it is appropriately managing its own risks.

■ **Contracting**: During this phase, organizations must verify that the agreement contains all legally required provisions, as well as any provisions that minimize the organization's risks to the extent possible.

■ **Ongoing Management and Supervision**: After the contract is signed, the organization should follow up periodically with the vendor to see that the services are being delivered as promised and that the vendor us adhering to all its contractual obligations.

PART III: DATA SECURITY RELATED CONTRACTUAL PROVISIONS

Once an organization's risk- and vendor-management strategies are settled, it can begin to use its vendor agreements as a gateway through which those strategies are carried out. Following is a discussion of some of the most important and commonly used data security provisions used for this purpose.

Note: Sample provisions are not provided because the overall goal of this article is to identify the most commonly used data security provisions and explain why these provisions are important. For examples of the provisions discussed below, please refer to the resources mentioned at the end of the article.

A. LEGALLY REQUIRED CONTRACTS

The use of agreements to manage risks posed by vendors is not just a best practice to consider. It is sometimes a legal requirement. Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), "covered entities" must execute business associate agreements with outside parties who create, store, maintain, or transmit protected health information (PHI) on their behalf.[2] Examples of other laws requiring similar agreements include the Safeguards Rule under the Gramm Leach Bliley Act[3] and Massachusetts state law.[4]

B. TYPE OF DATA

The type of data at issue will dictate the particular laws and regulations that apply, as well as the legal and financial implications if it is compromised. For example, the fact that PHI will be shared would trigger the need for having certain safeguards.

There can also be different types of data involved, with some types requiring more precautions than others.

By clearly defining the type(s) of data involved, it can be easier to set forth any obligations or legal considerations relating to the data.

C. DATA OWNERSHIP

Ensure that each party's rights to the data are clearly defined. Does the agreement specify whether the contributing party retains all right, title and interest to the data and whether the receiving party obtains any license rights to the data?

Are there any data use and storage provisions that can affect data ownership? For example, does the vendor want to aggregate the data with that of its other customers?

D. PERMITTED USES AND DISCLOSURES

Are there any legal or regulatory requirements regarding how the data may be used? For instance, may the vendor de-identify the data and use it for other purposes? Consider whether there should be prior written consent for any use of data outside the agreement's terms.

E. DATA SECURITY PROGRAM REQUIREMENTS

What are the minimum safeguards a vendor must implement to protect a customer's data? Some agreements require that the vendor implement and maintain a written data security program that includes administrative, technical and physical safeguards designed to protect the confidentiality, integrity and availability of the data. In some agreements, these requirements are expressed as high-level statements with little detail.

Other agreements, though, provide a laundry list of security requirements the vendor must follow. Another option is to require the vendor to demonstrate that its security practices are mapped to a specific security standard or framework.[5]

Additionally, an organization sometimes has its own policies and procedures it will want a vendor to follow. If that is the case, the agreement will need to reference them specifically.

F. COMPLIANCE WITH APPLICABLE LAWS, REGULATIONS, AND STANDARDS

Is the data regulated by law (e.g., HIPAA, Gramm Leach Bliley, Sarbanes Oxley, state data-protection laws, etc.)? Are there any other standards that apply under the circumstances (e.g., the Payment Card Industry Data Security Standard)? If so, it is important to include language requiring the vendor's compliance with those regulations and standards to foster both awareness of and compliance with those regulations and standards.

G. UPSTREAM AND DOWNSTREAM PARTIES

There are often more players in the picture besides the two parties contracting with one another. For example, Party 1 shares its data with Party 2. Then, Party 2 shares this same data with Party 3. And so on.

Consider where your transaction lies in this sequence. Are there any parties upstream of the transaction? Will there be downstream parties? If so, there might be certain legal requirements or other precautions that should be spelled out in the contract.

Some organizations will require tight restrictions on a vendor's ability to share data with other parties. They might require prior written consent, an updated list of all subcontractors, etc.

IT Vendor, page 26

2 45 CFR 164.504(e).

3 16 CFR § 314.4(d)(2).

4 Standards for the Protection of Personal Information of Residents of the Commonwealth, 201 CMR § 17.03(f)(2).

5 Among the most common security standards and frameworks are those published by the National Institute for Standards and Technology, the International Organization for Standardization, ISACA, the Payment Card Industry and the Center for Internet Security.

Can I make a copy of that? A primer on copyright's doctrine of fair use

By Trent Hooper and Rio Frame

Just right click and copy. Just google it, you'll find something to use. I found this on Facebook so it's fair game right? Or my favorite, I like that album, can you make me a copy for me?

These somewhat mundane copyright issues crop up again and again, but as an attorney, more serious versions of these issues also tend to arise somewhat regularly. "Can we use music in the video we are creating?" "Can we play music at our special event?" "Can I make copies out of a book to distribute to my class?" "Can I use photos or quotes in the news article/report I'm writing?" "It's just boilerplate, I can use it right?" All of these questions are essentially the same — can I use this material without a license. The issue is whether the fair use exception to copyright applies in a particular case. Of course you're an attorney, so you know this right? Well don't feel bad if the answers don't roll off your tongue — the doctrine is not a simple bright-line rule. By the end of this article though, and with the help of "Weird Al" Yankovic and Harry Potter, you should be able to answer these questions with some confidence.

In all seriousness though, if your clients are using computer programs, flowcharts, user manuals, training material, or creating anything using art, photography, music, books, or other works of authorship, they are facing copyright issues. Yes, even in Montana. It is all around us. While this article focuses specifically on fair use, copyright issues concern all of our clients. Licensing everything our clients would like to use is often impractical or impossible. We will discuss when uses may be "fair" and also where clients can go for sources of free information. The fair use doctrine is set forth in the U.S. Code at 17 U.S.C. § 107. We'll address the enumerated fair uses and the four factor test. We'll pepper in plenty of examples, and if there ever was entertaining case law, it is in copyright fair use. So let's get started.

Fair Use: A doctrine of copying without permission

Copyright law protects "original works of authorship fixed in any tangible medium," as opposed to trademarks that protect brand names, tag lines, and other source indicators, or patents that protect new and useful technologies and methods.[1] Copyrights protect books, art, photography, music, videos, diagrams, manuals, PowerPoint slides, websites, computer code, jewelry, clothing patterns, sculpture, blueprints and any other creative work fixed in a tangible medium.

Most clients, businesses and individuals have their own copyrighted works. They are also using the copyrighted works of others, either legally or illegally. Copyright does not protect ideas or facts such as the alphabetical list in a phonebook.[2] Copyright protection exists from the moment of creation. However, in order to file suit to enforce a copyright, the copyright must be registered.[3]

It is tempting to optimistically claim fair uses liberally, but the doctrine must be approached with caution. It is only an affirmative defense. It is not a safe harbor that will prevent suit. With that said, if understood and applied properly, fair use allows users to use copyrighted works without permission and without a license, and will typically avoid suit. The function of the doctrine is to "balance the author's right to compensation for his work, on the one hand, against the public's interest in the widest possible dissemination of ideas and information on the other."[4] So let's get to what's fair.

There are two parts to a fair use analysis. First, to identify whether a particular use falls under an enumerated category of fair uses, and second, apply a four factor test to determine whether the use is fair. Just because a particular use is under one of the enumerated categories does not mean it is automatically allowed. Each case is evaluated on its facts, and must pass the four factor test. If it is in one of the enumerated categories, the likelihood that the use if fair is much higher. We will address the two steps of the analysis in succession—first, the enumerated categories, and then the four factor test. There is enough wiggle room in the analysis, it is often not too difficult to have reasonable minds differ on the appropriate outcome. After running your facts through these steps the answer will often become clear, allowing you to advise your client accordingly.

Enumerated fair use categories

The U.S. Code lists the following categories as fair uses. The legislative notes provide additional and often quite specific direction as to these categories in ways that we will not explore here.

a. Criticism

Can a journalist, critic, or other person analyzing or critiquing the work of another use quotes, photos, or other copies of the work they are criticizing? The answer is yes. They are allowed to quote or explain the original work to the extent necessary to provide their critique of the original. This can include photos or direct copies from the original, so long as the amount and quality of the copy would not commercially impact the market for the original. This protects first amendment rights, and tends to pass the four factor test addressed later in this article.

b. Comment

Comment is the expression of opinions or other reaction to the original. It

is also an expression of First Amendment rights to free speech. Perhaps the most notorious type of fair use comment is parody. Parodies give new meaning to an original work with the purpose of entertainment or comment and are a protected fair use. For some classic examples of parody, google Weird Al's "Amish Paradise", a parody of Coolio's "Gangsta's Paradise," or "Eat It," his parody of Michael Jackson's "Beat It."

Parody is generally considered transformative, meaning that although inspired by an original, it has so transformed the original that there is little harm done to the original creator's intentions of the first piece. Interestingly, although his work is clearly parody, Weird Al has made it a career practice to always seek permission.[5] This may be out of respect for the four factor test that when the person seeking to rely on fair use is doing so for commercial gain, the defense weakens.

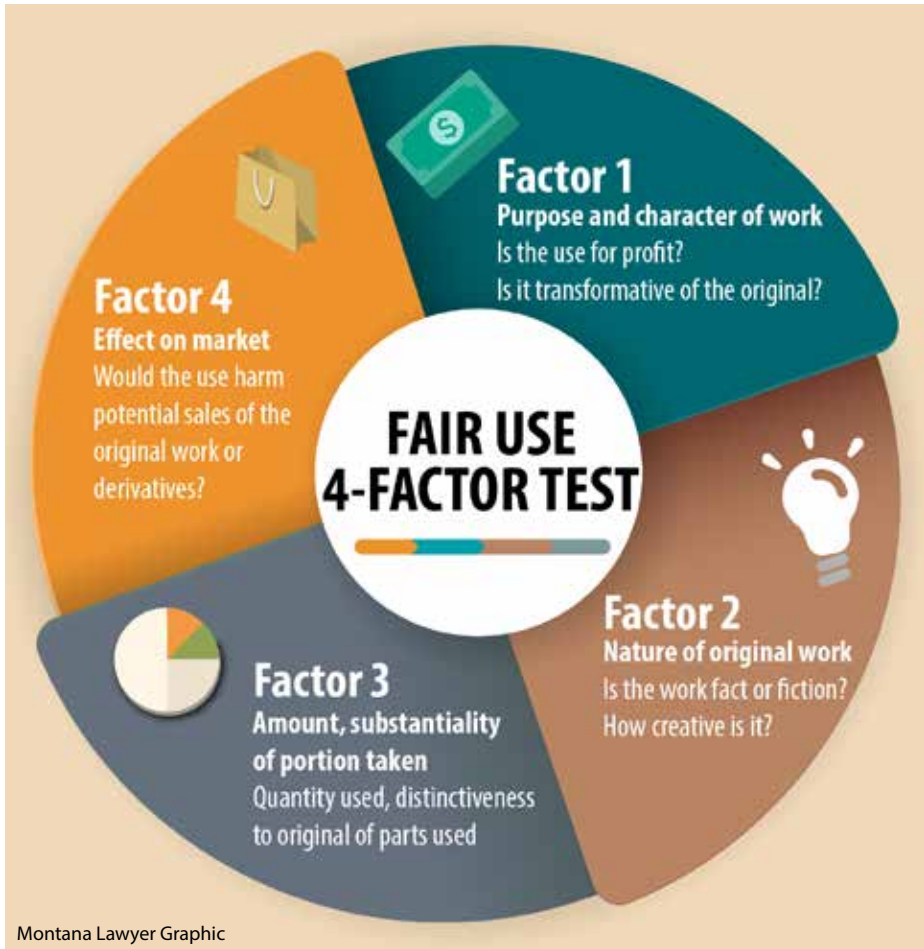
The key case on parodies and transformative uses is the Supreme Court case *Acuff-Rose Music v. Campbell*, 510 U.S. 569 (1994), (analyzing a hip-hop group's use of Roy Orbison's classic, "Pretty Woman"). This is not just a doctrine for Hollywood, however; as mentioned at the outset, it is this analysis that applies to the fair use questions that most of our clients regularly face.

c. News Reporting

This category allows for summarizing, with brief quotations, or other limited inclusion of the protected work for news reporting purposes. The courts tend to look at the quantity and quality of the copying. Furthermore, if the news reporting is based on other reported news, the court will look at whether the second work provides new and informative analysis or perspective. The facts of a story are not protected by copyright, as they are not original creative works, so it is permissible to take information from other sources and then create your own original article based on the same facts. For a recent full analysis of the news reporting fair use, see discussion. *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 561 (S.D.N.Y. 2013)

d. Teaching

Another enumerated fair use allows teachers to make limited copies of material for educational purposes. There are some very specific guidelines for this category in the statutory notes to 17 U.S.C. § 107. For example, teachers may make a single copy of a chapter from a book, an article from a periodical or newspaper for purposes of research or use in teaching a class. When the copies are for class dissemination, teachers may make multiple copies for classroom use so long as the copying is *brief*, *spontaneous*, and has a *limited cumulative effect* on the original. (Each of these terms is defined specifically in the statutory notes.) Some additional resources on this topic are found at the following links: http://libguides.bc.edu/copyright/reserves; and http://www.halldavidson.net/copyright_chart.pdf.



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e. Research and Scholarship

Quoting or referencing copyrighted material for limited scholarly, scientific, or technical work for illustration or clarification of the author's observations is allowed. Specifics are also found in the statutory notes to 17 U.S.C. § 107.

If the use falls under an enumerated category of fair use, it is much more likely to be considered fair. Either way, the analysis in every case should proceed to the four factor test.

The four factor fair use analysis

The four factors of fair use analysis are: (1) purpose and character of the use, (2) nature of the copyrighted work, (3) amount and substantiality of the portion taken, and (4) effect of the use on the potential market of the original.[6] In plain English, in essence this asks whether the use will harm the market for the original, how much of the original did it take, is the second use protected speech of some kind, and is the second work created in good faith.

A recent case involving Harry Potter provides a good example of how the analysis works. *Warner Bros. Ent. Inc. v. RDR Books*, 575 F. Supp. 2d 513, 517 (S.D.N.Y. 2008). The case arose when an author (not J.K. Rowling) published a book called "The Lexicon," which was essentially a Harry Potter glossary, and did so without permission. J.K. Rowling (through her

Fair Use, page 28

5 tips for shortening your briefs without weakening your argument

By: Michael Manning
Holland & Hart llp

As any lawyer who has been to a bench-bar CLE can attest, appellate judges routinely ask for the same thing: shorter briefs. It's an understandable request from the perspective of judges who decide hundreds or thousands of appeals every year. But it's not always an easy one to put into practice for attorneys. Even in simple appeals, it can be challenging to balance brevity with the need to both fully explain the case and make a persuasive argument. And the more complex the case, the more difficult it becomes.

That said, it's important to keep in mind the difference between asking for *shorter* briefs and asking for *short* briefs. Most appellate judges understand that some cases simply cannot be synthesized into 15 or 20 pages. They just don't want to read a 45-page brief when 30 pages would do. So here are five ways to shorten a brief without hurting your chances of prevailing on appeal (and maybe even helping them):

Limit the number of issues. If you represent the appellant, think long and hard about whether an issue is truly worth including. It is the rare appeal where the errors are so profound that including a laundry list of issues will make your brief stronger. In most cases, limiting the brief to no more than three or four issues will give you the best chance. In most cases, limiting the brief to no more than three or four issues is ideal because any more than that risks signaling to the court that you included a lot of issues because you don't have any good ones. Paring down issues can be tough, but consider things like the standard of review, the possibility that the error is harmless, and what winning would really mean. For example, if your client believes it should prevail as a matter of law, but isn't thrilled about the possibility of a second trial, you should probably leave evidentiary issues on the cutting room floor.

Eliminate repetition. Appellate briefs are often littered with the same point repeated over and over, almost as if emphasizing it will make it more persuasive. The judges are smart people; they will get it the first time. So if you find yourself explaining the same argument twice (even in a different way) or using a phrase like "as discussed above," ask yourself if it is really necessary.

Every point does not warrant rebuttal. If you represent the appellee, avoid the temptation to respond to every minor contention in the appellant's brief, even if some of them are infuriating or flatly wrong. Nothing detracts from a winning argument faster than quibbling over a non-dispositive sideshow. And every paragraph spent debating unimportant tangents forces the judges to read additional material that will not help them decide the appeal.

Cut the fluff. Sometimes, including a fact that isn't central to the legal analysis can be beneficial; maybe it is important to understanding the case or it sets the stage for the argument to come. But briefs usually include all sorts of superfluous information that does little but add length. Dates are good examples. Occasionally, they are important to allow the reader to follow the story, or for issues like waiver and statute of limitations. More often, they are irrelevant and cutting the majority of them would shorten the brief without sacrificing substance. The same is true of a lot of other background information. Bottom line, if it doesn't improve your story or bolster your argument, you should consider leaving it out.

Edit for Grammar and Style. Grammar is boring and style is personal, but paying attention to both will make your brief easier to read, more persuasive, and shorter. Here are a few suggestions to start with:

- Use possessives instead of prepositional phrases. For example, use "plaintiff's brief" instead of "brief of the plaintiff."
- Use less officious words. For example, use "before" instead of "prior to" and "under" instead of "pursuant to."
- Eliminate most adverbs. For example, if a conclusion "clearly" or "obviously" follows from your argument, it should be clear or obvious to the court without your saying so.
- Avoid or shorten lead-ins. For example, the lead-in "it should be noted that" doesn't really add anything to your point. The court will necessarily "note" whatever it is you say next. If you really feel that highlighting the point is necessary, use "notably" or "importantly" instead.

Standing alone, individual grammatical and stylistic edits may seem inconsequential. Over the course of a 30-plus-page appellate brief, however, they will add up and make your brief more readable.

* * *

Following are the Ninth Circuit cases originating in the District of Montana that resulted in published opinions from June to October 2016:

Appellate, page 27

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Minimizing client-driven indemnity provisions could be a costly mistake

Mark Bassingthwaighte, Esq.
mbass@alpsnet.com

I recently took yet another call from a lawyer wanting to know my thoughts about a new business opportunity. It's the call that starts out with so and so company wants the lawyer to be their exclusive local point person and the lawyer so wants to say yes to this wonderful new opportunity. This type of call is not infrequent and comes in many flavors. After talking about the issues as I see them, I always ask the one question these callers never seem to think about: Is there an indemnification provision in the contract? I have yet to hear any lawyer tell me no.

Truth be told, a number of the lawyers who call about contracts they are considering signing seem surprised when I ask about the presence of any indemnification language. Apparently they just gloss over certain sections of the contract; and trust me, that's a misstep. Indemnification provisions are not something that can be ignored because they raise very real and serious malpractice coverage concerns.

Stop to consider how a malpractice insurer might view client driven indemnity provisions. When drafted very broadly, the language often used significantly expands what the lawyer may ultimately be liable for. Absent said language, the lawyer would be liable for any attorney negligence. However, depending upon the specific language at issue, by agreeing to an indemnity provision the lawyer can become liable for all kinds of client losses that are not the result of any attorney negligence. A malpractice insurance policy is designed to cover lawyers for their negligence. In addition, the insurer is not a party to the contract and has not agreed to the expanded exposure. As a result and in anticipation of such contract provisions, malpractice policies typically have a provision in them that excludes coverage for any obligation that arises under contract. This is what creates the coverage problem. In short, by voluntarily agreeing to contractually expand one's exposure, a lawyer can create a serious coverage gap.

Unfortunately this concern isn't limited to contracts that a lawyer is thinking about entering into. Suppose a client inserts an indemnification clause into the boilerplate language of their guidelines and sends that to you. Might your continued representation after receiving the guidelines constitute an acceptance of that clause? I certainly wouldn't want to be the one who has to pay to find out.

In this day and age when lawyers more and more are being treated like general service providers as opposed to trusted advisers, what is one to do? At the outset, read client guidelines and contract proposals front to back. Don't continue with the representation or sign anything without understanding what your true exposure will be. If you are not comfortable with that exposure, see if the client will remove the problematic language. Other lawyers have suggested trying to insert language along the lines of "but only to the extent covered by my malpractice insurance policy" at the end of any indemnity clause and seeing if that will be acceptable. Hopefully some clients (your good clients) will understand that the risk they are asking you to assume is unfair and they will work to make the agreement acceptable. On the other hand, if any client responds by telling you everyone else signs this so if you want the work you will too, then I guess you have a tough decision to make. At least now you know it's going to boil down to how comfortable you are in self-insuring the risk.

ALPS Risk Manager Mark Bassingthwaighte, Esq. has conducted over 1,000 law firm risk management assessment visits, presented numerous continuing legal education seminars throughout the United States, and written extensively on risk management and technology.

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For more information about upcoming State Bar CLEs, contact Meagan Caprara at **mcaprara@montanabar.org**. You can also find more info and register at **www.montanabar.org**. Just click in the Calendar on the upper left of the home page to find links to registration for CLE events.

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Webinars set for December

Three programs in the State Bar's lunchtime Wednesday Webinars series are planned for December.

■ **Dec. 7, noon to 1 p.m.**

— Understanding Depression: Depression and anxiety are no strangers to those in the legal profession. Unattended stress, unreasonable demands, unhealthy coping strategies and just dealing with day to day life in the 21st century can lead some of us to the edge. This CLE will explore anxiety and depression as it relates to legal professionals, and will look at early identification strategies and resources for help. It will also provide tips for helping a colleague and for navigating the holiday season successfully. Presented by

■ **Dec. 14, noon to 1 p.m. — Basics of Landlord-Tenant Law in Montana**: This webinar will provide an overview of several aspects of landlord-tenant law, including termination and eviction, repairs, bed bugs, security deposits, fair housing, and mobile home lot rentals. Presented by Montana Legal Services Association attorney Amy Hall.

■ **Dec. 21, noon to 1 p.m. — Upcoming Healthcare Legislation to Watch:** Preview of bills in the works for the upcoming 2017 legislative session. Presented by Aimee Grmoljez of Crowley Fleck's Helena office and Lisa Kelley of Blue Cross Blue Shield of Montana.

Bills on sentencing, sex assault laws proposed

The Montana Legislature's Commission on Sentencing and the Legislature's Law and Justice Interim Committee have forwarded a total of 19 bills to the 2017 Legislature.

Commission on Sentencing

■ **Pretrial risk assessment (LC 552)**: Establishes pretrial risk assessment and deferred prosecution grant programs and allows courts to use pretrial risk assessment information; eliminates a required report from judges or justices related to drug users.

■ **Pre-sentence investigation (LC 553)**: Revises pre-sentence investigation laws, requiring training for corrections employees on risk assessment and evidence-based practices; requiring the department to use risk and needs assessments to drive supervision and correctional practices and to validate the risk-assessment tool.

■ **Generally revise sentencing laws (LC 554)**: Revises criminal sentencing laws, including drug sentences, drug education courses, persistent felony offender designation, theft and related offenses, certain mandatory minimums, and other sentencing laws.

■ **Criminal justice legislation oversight council (LC 555)**: Creates an oversight council to monitor and report on criminal justice legislation; creates reporting requirements for the Department of Corrections; requires the department's Quality Assurance Unit to adopt an evaluation toll to use to conduct program evaluations; requires the department to adopt an incentives/interventions grid to use for community supervision.

■ **Tribal resources (LC 556)**: Requests an interim committee study to explore increasing access to tribal resources for tribal members who are in the state's criminal justice system.

■ **Facility licensing (LC 557)**: Requires facilities to be licensed by the Department of Public Health and Human Services if the facility provides inpatient behavioral health treatment services and is operated by or contracts with the Department of Corrections.

■ **Certification for behavioral health peer support specialists (LC 558)**: Creates a certification process for behavioral health peer support specialists through the Board of Behavioral Health.

■ **Revise laws related to supervision of offenders/defendants (LC 559)**: Revises laws related to the supervision of probationers and of defendants servicing a deferred or suspended sentence; requires the Department of Corrections to adopt an incentives/interventions grid to use for community supervision.

■ **Generally revise laws related to the Board of Pardons and Parole (LC 560)**: Revises the board's size and structure to make it a three-member, full-time board; requires the board to adopt structured parole guidelines and provide training; revises supervision and revocation processes.

■ **Offender housing options (LC 561)**: Creates a housing policy for the state; establishes a supportive housing grant program; allows Department of Corrections to offer rental vouchers to certain offenders and to keep data on certain offenders.

■ **Crime Victims Compensation Act revisions (LC 562)**: Revises times and qualifications for claims; increases funeral benefits, adds clean-up and relocation benefits.

Bills, page 25

Morning and late afternoon CLE. A full day to ski in between!

Friday a.m.

◊ **Cybersecurity Horror Stories and Staying on the Right Side of the Rules of Professional Conduct** (2.0 Ethics) — Sam Alpert

Friday p.m.

◊ **Criminal Law for Civil Lawyers** — Brian Carl Smith
◊ **Good Employees Gone Bad — White Collar Crime** — Brian Carl Smith

Saturday a.m.

◊ **New Rules: From Technology to Harassment and Discrimination, What You Do Not Know Can Hurt You** — Professor Jordan Gross, John Mudd, University of Montana Blewett School of Law

Saturday p.m.

◊ **Legislative Update** — Bruce Spencer
◊ **Consent Judgments** — Gary Zadick

Sunday a.m.

◊ **Supreme Court Updates** — Justice Beth Baker, Justice James Shea

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Montana law now gives special consideration to state's blossoming 'cottage food' industry

By Antoinette Tease

Photo by Peter Oelschlaeger

Produce is on display at a farmers market in Missoula in 2011.

Roughly one year ago, Montana joined the bandwagon of states that have passed so-called "cottage food" laws. This, coupled with Montana's leadership in the brewery, winery and distillery industries, will help lay the groundwork for a healthy and diverse economy that takes full advantage of our agricultural resources. According to the Montana Department of Agriculture, agriculture is Montana's number one industry, with over 28,000 farms and ranches across the state.[1] Some of Montana's largest crops include wheat, sugar beets, and pulse crops, but Montanans also produce bread, jellies and jams, pasta and other specialty food products. Some of these products are manufactured in industrial kitchens, but many of them are made at home.

According to the Montana Department of Agriculture's 2016 Farmers Market Directory, there are currently more than 50 farmers markets taking place from May to October.[2] (By contrast, according to our research, Oklahoma has approximately half this number.) Each market has its own unique character; the Livingston market features local artists, and the Billings market always has several Hutterite tables replete with colorful vegetables. Vendors who sell their wares at farmers markets should be aware not only of cottage food laws but also potential intellectual property issues.

Montana's cottage food law, codified at Mont. Code Ann. § 50-50-102 *et seq.*, defines a "cottage food operation" as one in which food products are prepared in a kitchen of a domestic residence and sold directly to consumers within Montana. These products must be labeled with contact information for the cottage food operation; the name of the cottage food product; the ingredients of the cottage food product, in descending order of predominance by weight; the net quantity, weight, count, or volume of the cottage food product; allergen labeling as specified by federal and state labeling requirements; if a nutritional claim is made, an appropriate label if required by federal law; and the following statement, printed in at least the equivalent of 11-point font size in a color that provides a clear contrast to the background and is conspicuously placed on the principal label: "Made in a home kitchen that is not subject to retail food establishment regulations or inspections." Cottage food operations are not subject to licensure or inspection requirements. All cottage food operations must be registered with the state pursuant to Mont. Code Ann. § 50-50-117. Violations of the cottage food laws may result in criminal and civil penalties.

Our firm represents both large and small players in the food production industry, ranging from national companies like Rosen's Diversified Inc. and Tabatchnick Fine Foods Inc., to relative startups like Wayfare Inc. of Bozeman, to long-established niche companies like Becky's Berries of Absarokee and Montana Tamale Company of Billings. Vassallo Foods, Inc. of Kalispell, whom we also represent, sells its Country Pasta® egg noodles on Amazon.com and at Costco, Sam's Club and Walmart. Timeless Seeds offers the country's only gourmet line of heirloom organic lentils and specialty grains. Our firm has helped all of these companies build their trademark portfolios and take action against infringers when necessary.

Trademark protection is particularly important in the food industry because consumers are flooded with competing products, and consumer safety (which is directly tied to the consumers' perception of the quality of the brand) is foremost in our minds when it comes to things that we ingest. Although food patents are harder to come by, primarily because recipes — in and of themselves — are not usually patentable, we have advised numerous clients in the food industry as to the patentability of their products and processes.

Antoinette Tease is a registered patent attorney based in Billings.

Endnotes

1 http://agr.mt.gov/agr/Consumer/AgFacts/
2 http://agr.mt.gov/Portals/168/Documents/FarmersMarkets/FarmMkts_MTDirectory2016.pdf

Attorney calls IOLTA program unconstitutional, calls for Montana Legislature to put an end to it

Editor's note: The author submitted the following as comment on a proposal before the Montana Supreme Court to institute a penalty for failure to comply with Montana's IOLTA rule. The letter was also sent to Montana legislative leaders. The views and opinions expressed in this article are those of the authors and do not necessarily reflect the position of the State Bar of Montana.

By Duncan Scott

The legislature should take action to stop the Montana Supreme Court's unconstitutional program that taxes the clients of lawyers and spends the money on preferred nonprofit groups.

By judicial fiat, the Court has created the Interest on Lawyer Trust Accounts (IOLTA) program, which targets client money in lawyer trust accounts. Most private lawyers maintain a trust account, separate from the lawyer's own business bank account, so that the lawyer can manage client money without commingling funds. The need for trust accounts arises frequently in real estate transactions or when cases settle.

The Court's IOLTA program requires a lawyer to deposit client money into an IOLTA interest-bearing trust account, even over a client's objection. IOLTA states, "No client may elect whether his/her funds should be deposited in an IOLTA trust account."

IOLTA requires the banks to turn over at least quarterly the interest earned on the clients' money to a private nonprofit group that the Court selects, currently the Montana Justice Foundation. This foundation then hands out the money to groups and individuals.

When government takes money by force of law, and allocates it to third parties, it amounts to "tax and spending." Under Montana's constitution, this power to "tax and spend" belongs solely to the legislative branch, not to the judicial branch.

Our constitution provides clear separation of powers among government branches: "No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."

The Court now is considering a proposed rule to punish lawyers who fail to file annual certificates proving IOLTA compliance (this certificate is akin to an annual tax return). If a lawyer fails to file the certificate, the proposed rule would suspend the lawyer's law license.

It makes little sense to offer the Court comments on its proposal. If the Court is blind to the fact that it lacks the power to tax and spend, it likely will not be receptive to concerns about enforcement of its unconstitutional program.

Litigation obviously is not practical either. No lawyer wants to sue the Montana Supreme Court in a kamikaze lawsuit asking the Court to declare itself a lawbreaker.

The solution lies with the legislature. Separation of power disputes must be resolved at the highest level, between the affected branches, not by private litigants. Therefore, in the next legislative session, the legislature should exercise its lawful tax and spending authority by cutting the Supreme Court's budget until the Court stops unlawfully taxing and spending our client's money.

Duncan Scott is an attorney in Kalispell.

Bills, from page 22

■ **Revise offender intervention program laws (LC 563)**: Requires Board of Crime Control to adopt statewide standards for services offered through the program; allows grant funding to be used to develop and implement standards.

Law and Justice Interim Committee

■ **Revise laws regarding sexual crimes (LC272)**: Revises the definition of "consent" so that proof of force is no longer required; instead, "consent" is defined in a positive fashion requiring "words or overt actions indicating freely given agreement." The revised definition is similar to the Uniform Code of Military Justice and the definition of "consent" used in Wisconsin. Creates a new crime of aggravated sexual intercourse without consent.

■ **Revise laws regarding sexual intercourse without consent (LC273)**: Provides a maximum penalty of 5 years in prison for sexual intercourse without consent when: (1) an offender is 18 or younger and the victim is 14 or older, (2) the offense is a first offense, and (3) no force was used. Provides that an 18-year-old convicted of sexual intercourse without consent involving a victim 14 or older need not as a sex offender as long as force was not used.

■ **Revise laws related to privacy in communications (LC274)**: Creates a new subsection under the crime of privacy in communications for distributing a visual or print medium of an identifiable person engaged in sexual conduct who has not consented to its creation. Raises maximum fine for a second offense from $1,000 to $5,000.

■ **Revise laws related to criminal statutes of limitations (LC 275):** Extends the statute of limitations for sex crimes with victims who are under the age of 18 years to 20 years after the victim reaches age 18.

■ **Revise laws related to juvenile offenders and registration as a sex offender (LC 276)**: Revises the Youth Court Act so that sexual offenders who are juveniles when convicted do not have to register as sex offenders unless the court finds that registration is necessary to protect the public.

■ **Revise sexual assault and parental rights law (LC 277)**: Allows for termination of the parent-child legal relationship if the parent was convicted or if the court finds by clear evidence that the parent committed an act of sexual assault, rape, or incest and the child was born as a result. The bill also creates a process by which the victim of the act can file a petition with the court to terminate the parental rights of the other parent.

■ **Revise incest laws (LC 303)**: Revises the crime of incest to provide that consent is not a defense under this section if the victim is under18 years old.

IT Vendor, from page 15

It is also common to prohibit the use of subcontractors located outside of the U.S.

Finally, the agreement should require that the vendor will make its subcontractors agree to comply with any applicable laws, regulations and standards.

H. SECURITY INCIDENTS AND DATA BREACHES

It is important to distinguish a "security incident" from a "breach." Laws such as HIPAA supply definitions of these terms. Parties also add to these definitions or use their own definitions.

The reason for distinguishing a security incident from a breach is because the legal and/or contractual obligations can be different under each scenario.

For instance, if there is a security incident, the vendor might have to report it to the customer. How quickly it must do so (or how often it must do so in the event of common security incidents like pings on a firewall) can vary.

And if there is a breach, what are the vendor's obligations to its customer or to regulatory agencies? Below are some potential repercussions that could be included in the agreement:

- Reporting the breach to the customer or to a regulatory agency;
- Paying a cybersecurity firm to investigate and/or remediate a breach;
- Paying outside counsel to advise regarding legal obligations; and
- Providing (or paying for) legally required notifications to affected individuals.

By distinguishing between security incidents and breaches, the parties can better determine all obligations triggered under each.

I. INDEMNIFICATION, LIMITATIONS OF LIABILITY, AND INSURANCE

Consider what might happen if there is an adverse event such as a data breach caused by the vendor. What if it led to a lawsuit or other claims? To account for that possibility, should one party agree to indemnify the other?

If there is a provision outlining any limitations of liability, understand how it corresponds with any indemnification provisions. A party's promise to indemnify the other might be subject to a limitation of liability provision. There might also be certain events which are not subject to the limitations.

Also keep in mind the impact of any indemnification and limitation of liability provisions on insurance coverage. A promise to indemnify might not be covered by insurance.

Understand any other insurance-related implications: what kinds of events are covered, in what amounts, and the total duration of coverage.

Sometimes a party is contractually required to carry "cyber liability" or other insurance coverage, with minimum limits of coverage specified in the agreement.

J. EFFECTS OF TERMINATION OR EXPIRATION ON DATA

It is crucial to dictate what happens to the data after the agreement ends. What is the vendor required to do with it? And don't forget downstream parties who might have the data.

The two main options for dealing with the data upon termination are usually: (1) returning the data; and/or (2) destroying it. Know what these options actually look like under the circumstances, though. Data can be returned or destroyed in a number of ways, and some methods of destruction are less effective than others.

And if the vendor will be destroying the data, consider how you will verify that fact. For instance, you might want to require written verification of its destruction, which you can then keep for your records.

USEFUL RESOURCES

The Tech Contracts Handbook, 2nd Edition (2015) by David Tollen

Data Security Contract Clauses for Service Provider Arrangements (Pro-customer), Practical Law, available at https://iapp.org/media/pdf/resource_center/Rosenfeld_Hutnik_Contract-clauses_Service-provider.pdf

Risk-based Approach to Third Party Risk Management, Shared Assessments, http://sharedassessments.org/2014/07/risk-based-approach-third-party-risk-management/

NIST Cybersecurity Framework, https://www.nist.gov/cyber-framework

COBIT 5, https://cobitonline.isaca.org/

ISO 27001, http://www.iso.org/iso/home/standards/management-standards/iso27001.htm

FINRA Report on Cybersecurity Practices, February 2015, http://www.finra.org/sites/default/files/p602363%20Report%20on%20Cybersecurity%20Practices_0.pdf

Office of the Comptroller of the Currency, Bulletin 2013-29, Third Party Relationships: Risk Management Guidance, https://occ.gov/news-issuances/bulletins/2013/bulletin-2013-29.html

Complying with the GLBA Safeguards Rule, Federal Trade Commission, https://www.ftc.gov/tips-advice/business-center/guidance/financial-institutions-customer-information-complying.

PCI Data Security Standards, https://www.pcisecuritystandards.org/pci_security/standards_overview

Center for Internet Security Critical Controls, https://www.cisecurity.org/critical-controls/Library.cfm

CONCLUSION

Using vendors to create, store, maintain, and transmit sensitive data requires appropriately addressing the risks they present. Attorneys can play an important role in this process, given the many legal considerations that must be weighed when contracting in this context. For a more in-depth look at this topic, consult the resources listed in the box on this page.

Peter Arant is an attorney based in Missoula. His practice focuses on information security, privacy, and technology. He is a member of the State Bar of Montana's Health Care Law Section.

Steve Kreitner is Associate General Counsel for Kalispell Regional Healthcare System in Kalispell and is Vice Chair of the State Bar of Montana's Health Care Law Section.

Appellate, from page 18

IN RE BARKER, -- F.3D --, 2016 WL 6276078 (9TH CIR. OCT. 27, 2016)

Bankruptcy. A creditor wishing to participate in the distribution of a debtor's assets under a Chapter 13 bankruptcy plan has an affirmative duty to file a timely proof of claim, even when the debtor acknowledges the debt in a bankruptcy schedule. A debtor's listing of a debt in a bankruptcy schedule does not constitute an informal proof of claim because it is missing one of two essential elements: evidence of the *creditor*'s intent to hold the debtor liable. Nor does it constitute a debtor's proof of claim because Federal Rule of Bankruptcy Procedure 3004 requires some additional showing beyond the bankruptcy schedules of a debtor's desire to include an unasserted claim in a Chapter 13 plan. And allowing an equitable exception to the proof of claim deadline would both violate the applicable statutes and thwart the purpose of Chapter 13.

U.S. V. LAMOTT, 831 F.3D 1153 (9TH CIR. 2016)

Criminal. Assault by strangulation, 18 U.S.C. § 113(a)(8) — a crime added to the federal assault statute in 2013 by the Violence Against Women Act — is a general intent crime. As such, it requires only that the act was volitional (as opposed to accidental). The defendant's state of mind is not otherwise relevant. The district court thus appropriately instructed the jury to disregard evidence of the defendant's voluntary intoxication. Additionally, the district court did not plainly err by instructing the jury that it must find that the defendant intentionally "wounded" the victim by strangling her, even though use of the word "assaulted" would have more closely tracked the indictment and § 113(a)(8).

UNITED STATES V. GROVO, 826 F.3D 1207 (9TH CIR. 2016)

Criminal. The "in concert" requirement of 18 U.S.C. § 2252A(g) requires proof that the defendant agreed in a common enterprise with three other persons to distribute, receive or access with intent to view child pornography. The defendants' active participation — as opposed to mere presence — on an invite-only message board dedicated to sharing, accessing, and viewing child pornography constituted sufficient evidence to satisfy that standard. The same conduct — specifically, the defendants' posts on the message board soliciting specific images — constituted advertisements sufficient to support their convictions under 18 U.S.C. § 2251(d). Because the district court did not have the benefit of *United States v. Galan*, 804 F.3d 1287 (9th Cir. 2015), when it entered its restitution order, the Ninth Circuit remanded so the district court could disaggregate the losses caused by the original sexual abuse of the victim and the losses caused by the ongoing distribution and possession of her images.

Michael Manning is an appellate lawyer in the Billings office of Holland & Hart llp, and previously clerked for Ninth Circuit Judges N. Randy Smith and Thomas G. Nelson. His column appears quarterly in the Montana Lawyer.

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Fair Use, from page 17

rights company) sued for copyright infringement because "The Lexicon" was a derivative of her copyrighted Harry Potter series. While Rowling has not published such a glossary, it is her right to do so. In fact, Rowling has published two companion books, "Fantastic Beasts and Where to Find Them" and "Quidditch Through the Ages." "Fantastic Beasts and Where to Find Them" has now made its way into theaters. The question was whether "The Lexicon" infringed on Rowling's rights to create derivative works of her Harry Potter series and whether it was a permissible fair use. Using these facts, and other pertinent examples, we explore the factors below.

Factor One: Purpose and character of the use

Factor one looks at whether the work is for profit and whether the work is transformative of the original. The question of whether the alleged infringing work is for profit is perhaps the most heavily weighted factor. The law does not favor parties riding the coattails of others' creativity for their own gain. There are instances, however, where a company or individual can make a profit on a fair use. The further the use is from the company's' profit-making focus, the more likely it will be considered fair. For example, a company that uses a musician's poetic line in the conclusion of its employee handbook is far more likely to be able to claim fair use, than the one that used the poetic line as the tag line for its new clothing line. This may explain Weird Al's practice of seeking permission as well. Although clearly a parody, it was the very heart of his for-profit work. Looking at Harry Potter and "The Lexicon," "The Lexicon's" purpose was for profit.

The next part of factor one is how transformative the derivative work is. "The Lexicon" was found to be transformative in comparison to the original Harry Potter books, but when compared to Rowling's more recent companion books the copying of the "distinctive, original language" was too direct. The court found that since "The Lexicon" was not consistently transformative in its entirety that it "fails to minimize the expressive value of the original expression." *Id.* at 544.

Factor Two: Nature of the copyrighted work

The second factor is whether the work is fact or fiction and how distinct and creative the work is. Fiction will have greater protection than nonfiction. The facts within a nonfiction work are not copyright protected, but the creative way in which they are expressed is protected. Clearly, in the Harry Potter case, the originals were fiction so the protection was high. *Id.* at 549.

Fact-based works such as dictionaries or phone books warrant little protection. Another interesting area for this factor is computer programming. Computer programs are protectable by copyright to the extent the programming is original and creative, and there are alternative ways in which a task can be written. This can become a sticky issue with departing employees that take computer code, especially if the issue isn't addressed in the employment agreement or handbook

Factor Three: Amount and substantiality of the portion taken

This looks at both the amount, and the substantiality of the work taken. If too much direct use has occurred, then the use will not be deemed "fair." This is not just the quantity taken, but also how critical the taken parts are to the original. For example, there have been cases where an infringer's use was not considered fair even though they only took a few notes of an original song. It happened to be some of the most distinctive notes of the original, so the use was not fair. The singer Adele might have something to say if someone were to use the three simple words "Hello, it's me" in a new pop song, for this same reason.

In the Harry Potter case, the court ruled that the Lexicon used far too much of the original to be considered fair use. *Id.* at 546. The court's decision compared examples of various sections within "The Lexicon and Rowling's writings in which the language and descriptions were too similar. There is a *de minimus* use doctrine that recognizes that some uses are so insignificant or minor that they do not rise above the threshold of amount and substantiality of copying that will support a claim of infringement.

d. Factor Four: Effect of the use on the potential market

The fourth factor looks at whether the work harms the potential market for the original work, or a derivative work that the original author would be entitled to create. This is not the same as having an economic purpose, as mentioned in factor one. Factor one looks at the purpose from the infringer's point of view. This factor looks at market impact. The Harry Potter case is a good example. J.K. Rowling did in fact have plans to publish her own encyclopedia of all things Harry Potter. "The Lexicon" cut into that market. "The Lexicon" arguably only supplements the first seven stories, but it directly replaces parts of Rowling's two companion books, potentially harming sales. Therefore the court deemed it unfair.

Wrapping up our look at the four factors, the cases have been clear that all four factors must be considered, with the analysis never resting on a single factor alone. Fair use implies good faith. And the court will look at the facts of a particular case. The Harry Potter case is typical in that the court delivered its opinion on each factor individually before summing up the weight of the factors. Ultimately the court ruled in favor of Rowling, relying most heavily on the fact that the work was not transformative (the first factor) and affected the market for derivatives (the fourth factor).

Where can I get free material to use?

You may often find that your client's uses don't cleanly fall under fair use. In such cases you will obviously need to warn them of the risk of infringement, but there are options for locating information that is free or easy to license. Here are some resources:

- **Creative Commons**. Creative commons is a search engine designed to yield material, including images, music, video and more that can be used without a license for many purposes including commercial purposes. Still read the fine print, but this can be a good option.
- **Google image search, filtering by license permissions.** If you do an image search and then click "search tools," a menu comes up that lists "usage rights." This menu will allow you to search images by levels of permission that an image is tagged with.
- **Copyright Clearance Center**. This is a company that caters specifically to businesses, allowing them to access millions of sources for use internally without risk of infringement. This may be a good option for corporations that need to draft documents, prepare presentations, etc. and don't want to worry about infringing copyrights.

Fair Use, next page

Donald Alan Garrity

Donald Alan Garrity, 81, died on Nov. 16, 2016.

Don was born in Helena on Aug. 18, 1935, the second child of Margaret and Harold Garrity. He attended local Catholic schools and graduated from Carroll College in 1957, with a degree in History and English.

Garrity

In August 1957, he married Ellen Henry and moved with her to South Bend, Ind., where he was a student at the University of Notre Dame School of Law. In June 1960, he and his family returned to Helena where he worked for Attorney General, Forrest Anderson. In 1969 he went into private practice and represented the Montana Board of Oil and Gas, among other clients, until he retired in 2008. He also represented many clients pro-bono, some of whom became great friends. Don was well known in the legal community and active in the Cathedral Parish. He served on the Second Story Cinema (the precursor to the Myrna Loy Center) Board of Directors and was an active member of the Montana Trial Lawyers Association.

Don will long be remembered for his poetic and artistic St. Patrick's Day cards and the St. Patrick's Day parties that he and Ellen hosted, which eventually got too big to be held in their home and moved to the East Helena Fire Hall.

A fourth-generation Montanan, Don loved his home state. For many years, he and a group of friends traveled the far regions of the Treasure State by car, stayed in small inns, and studied Montana's history. Some of their travels were memorialized in stories published in Montana, the Magazine of Western History.

His wife, Ellen, and eldest daughter Maureen preceded him in death. He is survived by Maureen's husband Kurt Anderson of Williston, ND; children Mike and wife Shannon McDonald of Helena; Sheila of Baltimore; Devin and wife Kim of Helena; John of Seattle; and Ann Tracey and husband Paul of Seattle. He is also survived by six grandchildren, Devin and Kate Anderson, Cole Garrity, Jack and Lucy McDonald-Garrity, and Fiona Tracey. He is also survived by his sisters Peggy Walsh and Judy Garrity, brothers and sisters-in-law, and a host of friends.

Francis McGee

Francis Parker McGee II, or "Frank" as he preferred to be called, passed away Saturday, Nov. 19, 2016, in Missoula, at St. Patrick Hospital. He was 67.

Born Jan. 9, 1949 in Los Angeles, Frank was the son of Francis Parker McGee I and Regina Kathleen (Hardeman) McGee. He attended school in California, and surrounding states, traveling with his family as his father worked for the government during the Cold War. He graduated from University of San Francisco with a degree in Political Science, then moved onto University of Utah and achieved his Law Degree.

McGee

Frank practiced law in California, Washington, D.C., and of course, Montana. He served in the U.S. Navy JAG Corps as a Lieutenant. On April 22, 1989, he married Mary Pat in San Marino, California. Their son, Matthew, was born May 22, 1991.

Frank possessed many abilities and participated in numerous hobbies, among which, he was an avid skier and a member of Professional Ski Instructors of America. He was also a member of American Institute of Building Design and had previously owned two contracting companies: McGee-Hardeman Associates and ABICAM Design and Const. He was an active participant in the community, which included, but was not limited to three term President of Kiwanis in California and two term President in Montana.

Beginning in 1996, Frank began practicing law in Butte, and worked very closely with the Montana Public Defenders Office, in addition to his private practice. He was very active in politics, and was a member of the Republican Party. He was a self-proclaimed "Kennedy-Reaganite". He ran for Montana Supreme Court in 2000.

Frank is survived by his spouse, Mary Patricia McGee and son, Matthew Thomas Patrick McGee.

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Trent Hooper is an attorney at the Jupiter Law Group and practices in intellectual property and general business law.
Rio Frame is a senior at Montana State University, Billings, and plans to attend law school beginning Fall 2017. She contributed by way of research and drafting, particularly in the four factor test and the Harry Potter case.

ENDNOTES

1 17 U.S.C. § 102.
2 17 U.S.C. § 102; Mazur v. Stein, 347 U.S. 201, 217 (1956).
3 17 U.S.C. § 411(a).
4 Triangle Publications v. Knight-Ridder, 626 F.2d 1171 (1980).
5 http://www.ipbrief.net/2011/08/04/even-weird-al-gets-permission/
6 17 U.S.C. § 107.

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